Mandatory vaccine policy in the workplace: An overview for Canadian employers

August 20, 2021

Considerations from the legal perspective

As the COVID-19 vaccine becomes more widely available, many employers worldwide have been exploring the idea of mandatory vaccination for employees as a condition of access to the workplace (and a variety of questions related to it). Although employers are eager to move forward with this solution, mandatory vaccine policy may carry important legal implications, depending on where employees live.

Employers may first want to ask themselves a few more questions before taking action, including:

Why do employers want their employees to be vaccinated?

The answer may seem obvious, since governments and the media alike have promoted the vaccine as the ticket back to “normal” life (including the workplace).

Employers may indeed wish to protect the health and safety of their employees by restricting access to the workplace to only fully vaccinated individuals, as it is their statutory duty in all Canadian provinces. However, Canadian employers face a complex issue; they must determine whether the obligation to protect an employee’s health and safety justifies the encroachment upon employees’ privacy and human rights protections under Canadian law. Unfortunately, the answer to this question is not obvious. Our neighbours to the South have clearly taken the approach of requiring vaccination as a condition for accessing the workplace in many instances. It may be time to question whether the rise of virus variants and the growing number of cases worldwide will drive our governments in Canada to take a similar approach. We have already seen one province implement a vaccination passport system in anticipation of a fourth wave. As such, people will be required to present their proof of vaccination via the passport system to access certain public spaces and non-essential businesses (not for work purposes). These actions are far-reaching and probably would not even have been even contemplated some three months ago. While this specific government measure does not currently require employers to impose such conditions on their employees, ultimately, there may be more significant support for this kind of proposition in the

future. Employers may have to adopt similar measures to uphold and justify their obligation to provide a safe and healthy workplace.

However, this is the question that employers may want to be asking themselves today:

Is mandating vaccination the most efficient way for employers to meet their duties, while mitigating legal risks?

Although mandatory vaccination poses potential legal risks, such as human rights and privacy claims, some employers are willing to move forward with implementing these measures. They would require employees to be fully vaccinated should they want to return to the workplace and engage in specific tasks involving physical contact with the public, clients or business travel. While mandatory vaccination involves risks, other preventive measures can help curb quite effectively the transmission of the COVID-19 virus in workplaces (*e.g.* offices, retail, etc.) and thus expose employers to fewer risks of a legal challenge. Still, to demonstrate the commitment of certain employers, let us look at some recent developments in the U.S.A. Several major law firms have recently stated that only fully vaccinated employees will have access to their offices. At least one firm declared that employees who are not fully vaccinated would have their access cards to enter the building, and their specific offices, deactivated.

Further, many Fortune 100 and 500 companies have taken the public position that their employees must be vaccinated to work and travel for the company. These actions may again show that employers are taking a bolder approach to their obligation to protect their employees' health and safety. In the context of the Delta variant and the approach of a 4th wave, the health and national security argument seems to have taken precedence over privacy and human rights protections.

Can this type of approach be adopted in Canada, and if so, when? As this is a quick-moving issue, it is very possible that companies in Canada may take a more aggressive approach if the situation in the fall deteriorates. Businesses will most likely be forced into rolling back their return to office plans due to the Delta variant and its effect on the number of cases. However, companies cannot ignore the realities of the Canadian legal landscape at this time.

Overview of applicable considerations

First, employers with operations outside of Canada may be surprised to discover that imposing vaccinations on employees in Canada is not a widespread practice in our jurisdiction as it may be, for instance, south of the border. This can be explained by the specific legal considerations to contend with when contemplating mandatory vaccination in Canada, such as human rights and privacy laws. The thresholds to meet in Canada are particularly high, and so are the possible legal risks related thereto.

What are the main legal considerations Canadian employers must keep in mind when contemplating requiring vaccination as a condition to access the workplace?

Privacy

In most Canadian provinces, an employer may collect, use or disclose personal employee information only with their consent and for reasonable purposes.

In order to impose vaccination as a condition to access the workplace, an employer would necessarily need to ask its employees: “Are you vaccinated?”, which would qualify as the collection of personal information. Hence, to do so, not only would employees need to consent to the collection of such information, but employers would need to be able to demonstrate that they are requesting this information for a reasonable purpose. The following are examples of circumstances that, in the event of a legal challenge, our tribunals may potentially consider as a reasonable purpose for the collection of such data in connection with a mandatory vaccination requirement:

- A very high risk of COVID-19 transmission in the specific workplace of the employer (compared to society at large), due to intrinsic characteristics present at the time the mandatory vaccination policy is in place;
- The impossibility (or high impracticality) of implementing other less intrusive measures; and
- The demonstrable inefficacy of other less intrusive measures due to the nature of the work/the workplace.

Even where such circumstances are not present, one may argue that this question is being asked to protect the health and safety of ALL employees and this is not an interference with anyone’s privacy rights. At the present time, the majority view seems to be that this need to protect the employee’s health and safety would not in itself constitute a reasonable purpose. However, this has not been tested and the argument is not only attractive but it is also a very real and plausible one.

Human rights

Vaccination is an invasive medical treatment, a personal decision for which individuals should have the option to consent to or not.

Further, pursuant to federal and provincial human rights legislation, employees may refuse to receive the vaccine based on prohibited grounds of discrimination (which may include, depending on applicable legislation, disability (interpreted to include “medical conditions”), and religion). A mandatory vaccination policy would need to be reasonably justified and necessary, along with other, less invasive measures being insufficient to protect employee health and safety. In addition, it would also need to account for an employers’ obligation to provide reasonable accommodation to employees who refuse to be vaccinated based on such protected grounds, up to the point of undue hardship. Namely, in the province of Québec, this question becomes even more complex as human rights legislation limits employers in even asking job candidates about protected grounds of discrimination, making mandatory vaccination all the more difficult to contemplate and implement. While these are very real concerns, employers may still have arguments to consider.

For example, employers may be able to contest the true continued feasibility of remote work. Are companies really getting the work they require from the employees working from home? Would employers be justified in concluding and arguing that these considerations have now become an instance of undue hardship? While this type of argument may not work in all circumstances, there may be situations where it would

prevail. Employers must be consider these types of decisions on a case-by-case basis, a “one size fits all" approach does not apply in these circumstances.

Conclusion

While many employers perceive the vaccine as a great tool for medical protection, it is clear that it can also pose a legal threat.

Other options are available which, in the absence of clear science on the vaccine’s efficacy, may well protect the workplace just as efficiently, or even more so. Employers should certainly not rely on the fact that their employees are vaccinated to let sanitary and distancing measures fall to the wayside, especially for employees in areas where these procedures are is still mandatory or recommended.

Ultimately, employers imposing any measure that potentially affects their employees’ rights should be prepared to defend their decisions in case of a legal challenge. To assist them in doing so, they should notably ask themselves the following questions throughout the process:

- Are the measures imposed necessary and justifiable, given the specific circumstances of **our workplace**, in light of our business context and reality?
- Are we using the least intrusive measure possible to reach our goal (in other words, is imposing the vaccine on our employees the most efficient way to avoid the risk of contagion)?
- Are we complying with all other applicable legislation and up-to-date government/labour board/health authorities’ guidelines?
- Are we protecting employee privacy at all times?
- Are we complying with human rights legislation and accommodating employees where necessary (*e.g*. religious and medical reasons)?

As employees start to return to work in great numbers and employers prepare for the fall, employees will inevitably have questions regarding the future of their workplace. We believe that all employers should seriously consider having a telecommuting or remote work policy to help manage the return to the office, especially with the reduced health measures planned by the various governments. In addition, this approach considers the most effective method to curb the transmission of the virus in your work environment. Despite the legal risks of imposing the vaccine onto employees, some will decide to proceed in this way. We believe that some employers may be justified in doing so, keeping in mind that they are not immune to legal challenges. A well-thought-out plan in preparation for return to work could help employers demonstrate to the court or tribunal that the decision was considered and weighed appropriately before taking action.

If you have any questions regarding mandatory vaccination policy issues, please contact your BLG lawyer or one of the contacts listed below.

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