

To: Executive Board

From: Mr. Carmine Tiano

Date: February 26th, 2021

Re: Can employers require COVID-19 vaccinations

Further to our discussions in whether workplaces can mandate COVID-19 vaccinations for its employees. The following provides an overview of the current legal landscape. Currently, like so many issues raised with COVID-19 there is no clear answer.

➤ **Ontario Human Rights Commission COVID-19 Guidance**

The Ontario Human Rights Commission (OHRC) has published some guidelines under the title “Can my employer or any service or housing provider require proof of a COVID-19 Vaccine¹.” The relevant sections are provided below:

- Receiving a COVID-19 vaccine is voluntary.
- At the same time, the government of Ontario has said they plan to issue proof-of-vaccination cards to people who receive a COVID-19 vaccine who may be required to take part in some activities.
- Requiring proof of vaccination to ensure fitness to safely perform work, or protect people receiving services or living in congregate housing, may be permissible under the *Code* if the requirement is made in good faith and is reasonably necessary for reasons related to safety.
- The *Code* grounds of disability and / or creed may be engaged when employers, housing or other service providers impose medical testing or treatment requirements, including proof of vaccination.
- Under the *Code*, organizations have a duty to accommodate people who may be unable to receive a COVID-19 vaccine, for reasons related to disability or creed, unless it would amount to undue hardship based on cost or health and safety.
- **The right to be free from discrimination can be limited under the Code, where, for example, broader health and safety risks are serious, like in a pandemic, and would amount to undue hardship. The OHRC and relevant human rights laws like the Code recognize the importance of balancing people’s right to non-discrimination and civil liberties with public health and safety, including the need to address evidence-based risks and treatment associated with COVID-19.**
- Everyone involved should be flexible in exploring whether accommodation is possible, including alternative ways a person might continue to safely work, receive a service or live in congregate housing without being vaccinated.
- Organizations should make clear the reasons why proof of vaccination is needed in the circumstances, and ensure prior, informed consent.
- Organizations should only request and share medical information, including proof of vaccination, in a way that intrudes as little as possible on a person’s privacy, and does not go beyond what is necessary to ensure fitness to safely perform work, or protect people receiving services or living in congregate housing, and accommodate any individual needs.

¹ See Question 21 http://www.ohrc.on.ca/en/news_centre/covid-19-and-ontario%E2%80%99s-human-rights-code-%E2%80%93-questions-and-answers

- No one should experience harassment or other discriminatory treatment based on a *Code* ground because they are unable to receive a vaccine.
- In addition, workers have rights and employers have obligations for workers' health and safety under the *Occupational Health and Safety Act*. Visit the Ontario Ministry of Labour, Training and Skills Development [website](#) for more information, including how to contact the Ministry.

Essentially, the OHRC document confirms that employers cannot make the COVID-19 vaccine mandatory for workers, however they can encourage their workers to get it. Additionally, the requirement to wear a mask, get tested or even get vaccinated or prove vaccination may represent a reasonable and bona fide requirement for health and safety reasons depending on the circumstances.

It is important to note that when the broader health and safety risks are serious, like in a pandemic, and public health has mandated various protocols (masks, testing)- based on evidence based risks and treatments associated with COVID-19- workplaces have more latitude.

➤ **Current Laws on Mandatory Vaccination**

Currently, Ontario has legislation requiring vaccinations of employees in specific circumstances. For example, regulations under the *Long-Term Care Homes Act* require a “staff immunization program” in accordance with evidence-based practices or prevailing practice.

Likewise, under the regulations of the *Child Care and Early Years Act*, employees of a childcare centre must be immunized in accordance with their local public health guidelines (the list usually includes polio, measles, and other serious diseases). However, long-term care homes and childcare centres are workplaces centered on caring for the elderly or young children, both vulnerable populations that have historically been two of the most at-risk for communicable diseases.

➤ **Arbitrator Decisions**

Most of the case law on “masks or vaccinations” is related to influenza in the health care sector. However, there are no clear precedents.

Employers implemented policies mandating that workers either get the flu vaccine or wear a mask throughout their shift. Unions challenged these policies and a number of arbitral decisions addressed whether such policies were in violation of the collective agreement. Unfortunately, these decisions are divided.

Some arbitrators found the employer’s policy compliant, citing provisions of the collective agreement that specifically addressed vaccinations during an outbreak, directions from the Ministry of Health to employers to implement an influenza protocol, expert evidence supporting vaccination rates amongst health care workers and transmission of influenza to the patients, and the existence of the alternative of masking ^{2 3}.

² See *Health Employers Assn. of British Columbia v. the Health Sciences Assn* (2013) 237 L.A.C. (4th) 1, [2013] B.C.C.A.A.A. No. 138

³ See *North Bay General Hospital v ONA* 2008 CarswellOnt 9040 (Ont Arb)

At the same time there are several Ontario cases involving hospital policies requiring employees to receive the flu vaccine or wear a mask if not vaccinated^{4 5} where the policies have been found to be unreasonable. In those cases, the employer's policy was determined to be unreasonable, based on the following:

- a) no scientific evidence in favour of masks preventing transmission of the flu;
- b) there was little evidence of asymptomatic transmission of the flu; and
- c) the vaccine was not even close to 100% effective when administered.

Please note to date, there has been no similar discussion of mandatory vaccination policies in non-unionized workplaces.)

➤ Conclusion

As mentioned most of the case law has been developed in the context of seasonal influenza, where efficacy can vary between 20 to 60%.⁶ The evidence suggests that COVID-19 vaccines are over 90% effective⁷. Additionally, COVID-19 is estimated to be roughly ten (10) times more deadly than the seasonal flu⁸. There is also significant evidence that mask policies significantly lower the spread of disease⁹.

Only one arbitral decision has been released to date dealing with mandatory COVID testing in a retirement home. *Christian Labour Association of Canada v Caressant Care Nursing & Retirement Homes*¹⁰ dealt with an employer's policy that staff be tested every 2 weeks for COVID. An employee refused to be tested and was placed on unpaid leave. In this case, the Arbitrator upheld the policy, finding that the testing requirement, even though it was intrusive to the individual, was reasonable in light of all of the circumstances.

In my opinion the Sault Area Hospital & St. Michael Hospital decisions would be decided differently today in the context of COVID-19 pandemic, given the current public health mask mandate and the asymptomatic transmission of COVID-19. The health care setting is clearly a high risk setting.

I expect that mandatory vaccination programs will be upheld in workplaces providing direct care, particularly of a vulnerable population in a congregate living situation, subject to human rights exemptions.

What does this mean for Construction sites?

The prior case law- vaccinations in the health care sector- is helpful but not determinative and or clear on whether close physical workspaces like construction settings will be subject to enforceable mandatory vaccination programs and or terminations for cause. An employer may make the argument that when the broader health and safety risks are serious, like in a pandemic, and public health has mandated various

⁴ See, e.g., *Sault Area Hospital and Ontario Nurses' Association*, 2015 CanLII 55643 (ON LA); *St. Michael's Hospital v Ontario Nurses' Association*, 2018 CanLII 82519 (ON LA).

⁵ *St. Michael's Hospital v Ontario Nurses' Association* 2002 Carswell 4709 (On Arb)

⁶ CDC Seasonal Flu Vaccine Effectiveness Studies <https://www.cdc.gov/flu/vaccines-work/effectiveness-studies.htm>

⁷ Pfizer-BioNTech COVID-19 vaccine: What you should know and Moderna COVID-19 vaccine: What you should know.

⁸ John Hopkins Medicine, Coronavirus Disease 2019 vs. the Flu (<https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-disease-2019-vs-the-flu>)

⁹ Nina Bai, *Still Confused About Masks? Here's the Science Behind How Face Masks Prevent Coronavirus*, June 26, 2020

<https://www.ucsf.edu/news/2020/06/417906/still-confused-about-masks-heres-science-behind-how-face-masks-prevent>

¹⁰ See *Christian Labour Association of Canada v Caressant Care Nursing & Retirement Homes* 2020 CanLII 100531 (ON LA) (Randall).

protocols (masks, testing)- on evidence-based risks- vaccinations may be deemed mandatory or they may require proof of vaccinations.

It goes without saying that like everything so far with COVID-19, we will need to wait and see if the government enacts any mandatory vaccine legislation-which to date they have said they would not. Moreover, we may need to be guided by the release of arbitrator or court decisions before employers and unions will have any certainty about whether workplace can mandate workers to submit to vaccinations in sectors outside health care.