

Practical Considerations for Returning Employees to Work

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By Alex Kagan

Since the Government of Canada approved several COVID-19 vaccines in December 2020, businesses have been tentatively planning a return to normal operations. Initially, the slow distribution of vaccines among the working age population stalled return to work plans. Then, even as vaccines became more readily available, schools and daycares remained closed or open on a tenuous basis.

But since the spring, vaccines have been readily available and vaccination rates among Canadians are very encouraging. Nevertheless, the pandemic has stubbornly held on and the Delta variant is surging. These ongoing obstacles, and our collective experience in 2020, have heightened the awareness of employers who recognize their obligation to ensure the workplace is safe for a return to work.

As employers either prepare, or have started, to return employees to work, often by relying on vaccination policies of one type or another, there are a number of practical issues to consider. We have addressed some of these issues below to provide your organization with guidance in navigating these difficult waters:

- To what extent is your workforce already vaccinated?
- Is the return of the entire workforce necessary?
- How will you address privacy concerns in your vaccination policy?
- How will you enforce your vaccination policy?

To what extent is your workforce already vaccinated?

To properly assess the risk of a return to work strategy, businesses need to understand their exposure to potential liability, especially strategies that hinge on implementing vaccination policies. Therefore, conducting an *anonymous* survey regarding vaccination status among your workforce can be very helpful. It should be made clear, however, that the survey is part of the organization's desire and obligation to maintain adequate health and safety protocols in the workplace, which requires accurate and complete information. As explained in more detail below, employers should explain the privacy protections that will be implemented to keep sensitive information strictly confidential.

Is the return of the entire workforce necessary?

For many businesses, remote work is not a viable option. Either employees return to work, or the business cannot function. But in many cases, remote work for at least some positions is a practical, albeit a problematic, alternative. To be clear, employers are entitled to instruct employees to return to work, even if an employee's strong preference is to work remotely. The challenge is how the business will respond to employees who resist or refuse to return. Claims related to human rights are especially challenging. Various enforcement alternatives are outlined below, but one of the simplest ways to avoid the legal issues associated with compelling a return to work is to permit remote working when it is practical to do so, at least for a period of time while the business assesses the vaccination status of its workforce.

How will you address privacy concerns in your vaccination policy?

While maintaining health and safety in the workplace arguably supersedes the privacy concerns of employees, the jury is still out regarding how requiring employees to disclose personal medical

information, such as vaccination status, will be treated from a privacy perspective. Employers cannot be careless in requesting vaccination status. Therefore, any organization contemplating a vaccination policy must consider the privacy legislation in their province of operation as well as best practices in general. The following are simple measures that can facilitate a smooth rollout of a vaccination policy:

1. Establish a password protected email account that is solely used for employees to submit their vaccination status. That way, employees are not expected to divulge their vaccination status to their supervisor.
2. Advise employees that only a senior member of management, identified by name and title, will be permitted access to this designated email account.
3. Advise employees that after their vaccination status is confirmed, all supporting documentation provided will be permanently deleted. Only status will remain documented, but this information will be kept strictly confidential.
4. In short, provide a clear explanation to employees regarding who will collect their data, why it is being collected, how it is being used or disclosed, how it is being protected, and when it is being deleted.

How will you enforce your vaccination policy?

In both the United States and across Canada, vaccination policies are being implemented by governments and private businesses. Written policies that clarify expectations regarding vaccination requirements for employees, contractors and customers makes sense. But the real issue may be the enforcement policies for those who refuse. As we outlined in our previous article - To Vaccinate or Not To Vaccinate: The Employer's Dilemma- employers should carefully consider the legal risks of implementing mandatory vaccination policies.

We have all seen the news reports of the "mandatory" vaccination policies that have been recently rolled out. Upon closer review, many such policies are effectively recommendations because they lack enforcement or consequences for non-compliance. For example, Toronto's Medical Officer of Health published a strong recommendation that workplaces in the City implement a vaccination policy in which employees, at a minimum, either (a) provide proof of vaccination, (b) submit written proof of a medical exemption or (c) complete a vaccination education course. Therefore, while such a policy may encourage vaccination, it certainly does not make it compulsory.

We anticipate that medical officers in other regions will implement similar directives, which should be monitored closely. Under Ontario's *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020*, businesses must comply with any "advice, recommendations and instructions" issued by a Chief Medical Officer, including directives to "***establish, implement and ensure compliance with a COVID-19 vaccination policy.***"

To be clear, there is currently no legislation which requires *mandatory* COVID-19 vaccination. We think it very unlikely this kind of legislation will be enacted. And despite government directives to implement vaccination policies, the *Human Rights Code* has not been amended. Therefore, if employees object to a vaccine mandate on the basis of religious or medical grounds, employers are obligated to provide accommodation to the point of undue hardship.

In the absence of a legitimate human rights objection, employers are entitled to dismiss employees who refuse vaccination. But case law during the pandemic is very limited and there is currently no precedent to support a just cause termination for an employee's refusal to be vaccinated. Unless there are compelling circumstances, such a finding is doubtful. In most circumstances, a termination arising from an employee's vaccination refusal will likely result in a without cause dismissal, thus entitling the worker to their full severance entitlements at common law, subject to an enforceable termination clause or any notice of the requirement to vaccinate.

To avoid the liabilities associated with termination, many employers have leveraged Ontario's Infectious Disease Emergency Leave ("IDEL"), which in practical terms extended the length of time an employee could be temporarily laid off without triggering an automatic termination under the *Employment Standards Act, 2000* (the "ESA"). Note that IDEL is scheduled to expire on **September 25, 2021**, though the

government has extended the leave several times in the past. Case law is currently mixed as to whether IDEL, which only expressly modified the ESA, results in a constructive dismissal under the *common law*, which would entitle affected employees to full compensation as though they had been dismissed without cause. We anticipate that the Court of Appeal will provide clarity on this issue but until then, leveraging IDEL exposes a business to potential liability, subject to relying on a contractual term - written or implied - which permits a temporary layoff.

In other words, terminating or laying off an employee for a refusal to vaccinate still carries with it a real risk of future liability from a common law perspective.

Conclusion

Throughout the pandemic, the only constant has been change. But due to widely available and highly effective vaccines, employers seem more willing to move toward normalized operations. While some employers may prefer to avoid the vaccination debate entirely, government directives will make that impossible. Throughout the pandemic, every employer's general duty under the *Occupational Health and Safety Act* has remained unchanged: take every reasonable precaution necessary to ensure a safe workplace. Given that vaccines may be the single best tool available to combat the pandemic at large and in the workplace, employers cannot simply ignore their utility.

The path to a return to normal is fraught with complex legal, privacy, operational and morale issues. Please join Aird & Berlis LLP's Workplace Law Group on September 21, 2021, as we present Post-Pandemic Planning for Employers: Next Steps for Reopening.

Please do not hesitate to contact a member of the Aird & Berlis Workplace Law Group should you have any questions. We look forward to your questions at the upcoming webinar.

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