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Considering a Mandatory Vaccination Policy?

Here's What You Need to Know¹

Under occupational health and safety legislation, employers have a general duty to take all reasonable steps to protect the health and safety of their workers. Vaccinations are widely recognized as being the most effective tool available to keep us all safe from the spread of COVID-19. The recent surge of COVID-19 infection rates driven by the Delta variant, particularly among individuals who are not fully vaccinated, has led many governments and public and private sector employers across Canada to recently announce mandatory vaccination policies for their employees. We expect that such announcements will continue, if not accelerate, in the coming days and weeks.

Under a mandatory vaccination policy, an employee is required to provide their employer with proof that they are fully vaccinated with a COVID-19 vaccine approved by Health Canada or the World Health Organization as a condition of being permitted to enter the physical workplace or attend other employment-related events. Specifically, employees are required to either show their employer, or provide their employer with a copy of, the employee's government-issued COVID-19 vaccine dose receipts.

Before your organization implements a mandatory vaccination policy, you should consider the following:

- **Accommodation.** A mandatory vaccination policy must allow employees who cannot be fully vaccinated due to medical or religious grounds (or other grounds protected by human rights legislation) to request an exemption from the requirement to provide proof of vaccination. An employer can require an employee requesting an exemption to provide proof of their need for an exemption (e.g. from a physician or faith leader) and should otherwise treat a request for an exemption as it would any other request for accommodation on human rights grounds. Employees who are granted an exemption can be required, among other measures, to undergo regular rapid antigen screening as a condition of entering the physical workplace, or to continue working from home if they are able to do so (and the employer does not require them to return to work in the physical workplace). If the employer introduces a rapid antigen screening program for employees with an approved exemption, it must ensure that the program complies with any rapid antigen screening protocols implemented by the government and/or public health agency of the province in which the employee is employed.

¹ By Trevor Lawson and Marco Fimiani, McCarthy Tétrault LLP. This document is not human resources advice or legal advice. Please consult your human resources professionals and legal advisors as you set up your mandatory vaccination program.

- **Privacy.** All personal information disclosed by employees to their employer pursuant to a mandatory vaccination policy must be collected, used and retained by the employer in accordance with the employer's privacy policy and applicable privacy laws. Such information must be held in strict confidence, only accessed by individuals within the organization who require access in order to confirm that an employee is fully vaccinated (or to accommodate an employee's request for an exemption) and only retained as long as is necessary to fulfil the purpose(s) for which it is collected. Employers should consider a confidential app or other electronic means for employees to upload their vaccination dose receipts, and deleting those receipts once they are reviewed by an individual(s) designated to do so within the organization (most likely in human resources) and the employee's status as fully vaccinated is confirmed and recorded. If an employer does not collect, use and retain this information in a way that is minimally intrusive to employee privacy, there is a risk that an employee may file a complaint with the privacy commissioner in those provinces that have privacy legislation applicable to employee personal information.
- **Transparency.** A mandatory vaccination policy should be clearly drafted and communicated in advance to all impacted employees and workplace partners (i.e. unions, contractors, etc.). An employer should set a deadline for providing proof of full vaccination that is far enough in advance to permit those employees who are not fully vaccinated to become fully vaccinated (e.g. 6-8 weeks after the policy is announced). Employers should also continue to monitor for updates and be prepared to adapt its policies and practices to ensure continued compliance with legislative and public health requirements and guidelines. A mandatory vaccination policy should remain in effect only as long as it is necessary to protect the health and safety of employees. Employers must also continue to follow all other government and public health regulations, protocols and guidelines related to COVID-19 in the workplace.
- **Other Employment/Labour Considerations.** Employers should consider and clearly communicate what specific consequences will flow to an employee from a refusal to comply with a mandatory vaccination policy, which may include an unpaid leave of absence and/or disciplinary measures up to and including termination of employment. In relation to non-union employees, there is a risk that an employee may allege that the unilateral introduction of a vaccination policy constitutes a constructive dismissal, on the basis that the policy is not reasonably necessary. For unionized employees, the applicable collective agreement(s) should be reviewed to ensure that the policy is consistent (and not in breach of) with the terms of such collective agreement(s). There is a risk that a union may challenge a vaccination policy on the basis that it is not consistent with the collective agreement, or in the alternative, that the policy is not reasonably necessary.

For further information regarding vaccine policies, or if you require any assistance in preparing a vaccine policy, please feel free to reach out to:

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Please note that FHPC and McCarthy Tétrault LLP are in the process of organizing a webinar on vaccine policies and related return to work issues. Further information regarding this webinar will be circulated shortly.