
ONTARIO COVID-19 VACCINATION POLICIES: IMPORTANT LEGAL ISSUES FOR EMPLOYERS

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A. INTRODUCTION

WE ARE IN THE MIDST of an unprecedented situation for employment law in Ontario as the COVID-19 pandemic continues, and public health guidance recommends vaccination policies for workplaces. Charities and not-for-profits in the province must consider the legal responsibilities for employers to manage the workplace, the rights of employees and the risks involved when implementing vaccination policies for COVID-19. From the outset, we must remind readers that this Carters' *Bulletin* is not a legal opinion and involves a discussion that is largely untested in courts and tribunals, with laws that are still to be interpreted and are likely to change in the near future. We cannot be certain where things are headed, but there are "signposts" that indicate a likely direction. As mandatory COVID-19 "vaccine passports" are implemented province-wide and employers institute vaccine policies in the workplace, it is important to be aware of the interacting issues to be able to make informed decisions. This *Bulletin* offers a high-level overview of the legal areas that are engaged by COVID-19 vaccination policies and discusses the broad implications for charities and not-for-profits to consider in the employment context.

B. LEGISLATED REQUIREMENTS

IN ONTARIO, employers must comply with legislated requirements for implementing a COVID-19 vaccination policy (a "C-19 VP"), which includes government regulations and public health directives. In some "high-risk" settings and specialized occupations in healthcare, there is express legislation requiring

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employees to provide proof of full vaccination, written proof of a medical reason for non-vaccination, or attendance at educational sessions about vaccinations, together with weekly verification of an up-to-date negative COVID-19 antigen test.¹ This includes paramedics in the *Ambulance Act's General Regulation*,² child care centre employees in the *General Regulation of the Child Care and Early Years Act, 2014*,³ and long-term care home employees in the *Long-Term Care Homes Act's General Regulation*.⁴

Ontario's *Health Protection and Promotion Act*⁵ also gives broad discretion to public health authorities in the province to make orders, which may include mandatory vaccination or other directives to control an infectious disease outbreak. The provincial government has filed frequent amendments to regulations under the *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020* throughout the pandemic. Ontario Regulation 364/20: *Rules for Areas at Step 3 and at the Roadmap Exit Step* currently includes the following provisions:

(2.1) The person responsible for a business or organization that is open shall operate the business or organization in compliance with any advice, recommendations and instructions issued by the Office of the Chief Medical Officer of Health, or by a medical officer of health after consultation with the Office of the Chief Medical Officer of Health,

(a) requiring the business or organization to establish, implement and ensure compliance with a COVID-19 vaccination policy; or

(b) setting out the precautions and procedures that the business or organization must include in its COVID-19 vaccination policy.

(2.2) In subsection (2.1),

“medical officer of health” means a medical officer of health as defined in subsection 1 (1) of the *Health Protection and Promotion Act*.⁶

¹ See O Reg 364/20, Sched 1, s 2(2.1), together with Chief Medical Officer of Health, *Directive #6 for COVID-19 Vaccination Policy in Health Setting* (August 17, 2021), online: Ontario Ministry of Health <https://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/directives/vaccination_policy_in_health_settings.pdf>, which requires “Covered Organizations” to establish, implement, and ensure compliance with a COVID-19 vaccination policy.

² RSO 1990, c A.19; O Reg 257/00, s 6(1)(h).

³ O Reg 137/15, s 57; SO 2014, c 11, Sched 1.

⁴ SO 2007, c 8; O Reg 79/10, s 229(10).

⁵ RSO 1990, c H.7.

⁶ SO 2020, c 17; O Reg 364/20, Sched 1, ss 2(2.1)–(2.2).

Medical officers of public health units in Ontario have made strong recommendations for implementing C-19 VPs, including the [City of Toronto](#).⁷ Ontario's Chief Medical Officer of Health issued its COVID-19 Directive #6 under the *Health Protection and Promotion Act* for Public Hospitals, Local Health Integration Networks and Ambulance Services requiring vaccination.⁸ Charities and not-for-profits may not be included in the requirements for Directive #6. However, they are included in the general public health recommendations for implementing C-19 VPs. This may fall short of an actual mandate for requiring proof of vaccination from employees, but it may be prudent for all employers to consider having some sort of C-19 VP in place that promotes the use of Health Canada approved vaccines for workers.

C. WORKPLACE HEALTH & SAFETY

EMPLOYERS IN ONTARIO, including charities and not-for-profits, have a legal responsibility under the *Occupational Health and Safety Act*⁹ (“OHS”) to take reasonable precautions to ensure a safe workplace.¹⁰ An employee has a legal right under the OHS to refuse unsafe work. COVID-19, a deadly infectious disease, causes a risk to public health that could make a workplace unsafe if there are not reasonable precautions taken to control the risk of spread. If an employee refuses to work because they believe the workplace is unsafe, the employer must conduct an investigation, which may eventually require a further investigation by the Ministry of Labour, Training and Skills Development.

Charities and not-for-profits should already have infection control policies in place, such as requiring personal protective equipment, masks, disinfection and sanitizing procedures, and these must continue to be followed whether or not an employee has been fully vaccinated. Employees who are not fully vaccinated may be required to follow further infection control measures as part of a C-19 VP, such as providing negative COVID-19 tests at regular intervals, or working remotely, if the nature of the job permits.

⁷ “COVID-19: Vaccine Information for Employers”, *City of Toronto* (20 September 2021), online: <<https://www.toronto.ca/home/covid-19/covid-19-reopening-recovery-rebuild/covid-19-reopening-guidelines-for-businesses-organizations/covid-19-guidance-employers-workplaces-businesses/covid-19-vaccine-information-for-employers>>

⁸ Directive #6 includes exemptions for documented medical reasons or the option of completing an educational session “about the benefits of COVID-19”, online: *Ministry of Health* and *Ministry of Long-Term Care* <https://www.health.gov.on.ca/en/pro/programs/publichealth/coronavirus/docs/directives/vaccination_policy_in_health_settings.pdf>; see also heading D, *below*.

⁹ RSO 1990, c O.1.

¹⁰ *Ibid*, s 25(1)–(2).

D. HUMAN RIGHTS

ALTHOUGH A C-19 VP might require staff of a charity or not-for-profit to receive vaccines for the health and safety of the workplace, a C-19 VP must allow for certain exemptions for employees under the Ontario *Human Rights Code* (the “Code”).¹¹ Section 1 of the *Code* lists the enumerated grounds on which discrimination is prohibited. Under the provisions of the *Code*, employers must accommodate *bona fide* requests for exemptions based on enumerated grounds to the point of undue hardship for the employer. Determining what “undue hardship” entails includes “considering the cost, outside sources of funding, if any and health and safety requirements.”¹²

For a C-19 VP, the most relevant grounds under section 1 of the *Code* are “disability”, which could require accommodating a medical exemption, and “creed”, which could require accommodating a religious or other belief-based exemption.¹³ A C-19 VP would need to allow for employees to claim these exemptions and acknowledge the employer’s responsibility to accommodate them. The Ontario Human Rights Commission (“OHRC”) published “OHRC policy statement on COVID-19 vaccine mandates and proof of vaccine certificates” on September 22, 2021 (the “OHRC policy”).¹⁴ The OHRC policy states that organizations “might also put COVID testing in place as an alternative to mandatory vaccinations or as an option for accommodating people who are unable to receive a vaccine for medical reasons.” Organizations should also cover the costs of those COVID tests for those who are unable to be vaccinated, according to the OHRC. A “creed” under the *Code* is not a personal preference or “singular belief”, the OHRC policy states.¹⁵ Even creed-based beliefs against vaccinations may not necessarily be sufficient as an exemption “if it would significantly compromise health and safety amounting to undue hardship — such as during a pandemic.”¹⁶

¹¹ RSO 1990, c H.19.

¹² *Ibid.*, s 11(2).

¹³ According to the OHRC, “The *Code* does not define creed, but courts and tribunals have often referred to religious beliefs and practices. Creed may also include non-religious belief systems that, like religion, substantially influence a person’s identity, worldview and way of life”; Online: *Ontario Human Rights Commission* <http://www.ohrc.on.ca/en/code_grounds/creed>.

¹⁴ Online: http://www.ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-vaccine-mandates-and-proof-vaccine-certificates.

¹⁵ *Ibid.*

¹⁶ *Ibid.*

E. PRIVACY

WHETHER A C-19 VP requires documented proof of vaccination, or requires only an honour-based reporting procedure, employees may reasonably expect their privacy to be respected regarding disclosure of personal information, and employers are responsible for protecting the personal information they receive. Even though not all charities and not-for-profits are involved in “commercial activities” that are governed by the federal *Personal Information Protection and Electronic Documents Act* (“*PIPEDA*”), it is best practice to comply with the security and privacy requirements of *PIPEDA*, including the principles set out in Schedule 1 of *PIPEDA*.¹⁷ Depending on the nature of the organization and how documented medical information is provided, charities and not-for-profits may also be governed by the privacy requirements under Ontario’s *Personal Health Information Protection Act*. Charities and not-for-profits should have a privacy policy in place for protection of personal information (and, in particular where a C-19 VP is contemplated, including personal health information), and any further information collected as part of a C-19 VP must be in accordance with an existing privacy policy. A C-19 VP should be an interim policy and not permanent; it should communicate clearly that any personal information collected for its purposes will be kept only for as long as needed for the purposes of the C-19 VP.

F. EMPLOYMENT CONTRACTS

IT IS NOT YET CLEAR how employment-related issues will be litigated with regard to C-19 VPs or how the courts will interpret and apply — and further develop — the law. Depending on what judges decide, some actions by employers that unilaterally alter the employment contract, such as reducing or eliminating an employee’s hours because they refuse to receive a COVID-19 vaccine, may be grounds for a constructive dismissal lawsuit, leaving employers liable for expensive payouts to comply with common-law reasonable notice requirements. As has been the case with temporary lay-offs and deemed Infectious Disease Emergency Leave arising as a result of the pandemic,¹⁸ there will likely be future litigation brought by employees who were terminated from their positions as a result of failing to abide by any C-19 VP. In unionized environments, there may be grievance arbitrations in relation to employees who claim to be negatively affected by their employer’s C-19 VP.

¹⁷ Principles Set Out in the National Standard of Canada Entitled Model Code for the Protection of Personal Information, CAN/CSA-Q830-96, online: <<https://laws-lois.justice.gc.ca/ENG/ACTS/P-8.6/page-11.html>>.

¹⁸ Barry W. Kwasniewski, “Ontario Superior Court Addresses COVID-19 Temporary Layoff Provisions, But Uncertainty Remains”, *Charity & NFP Law Bulletin No. 497* (24 June 2021), online: *Carters* <https://www.carters.ca/pub/bulletin/charity/2021/chylb497.pdf>.

G. CONCLUSION

C-19 VPS ARE SOMETHING ENTIRELY NEW that charities and not-for-profits are having to deal with in the face of the continuing pandemic, and the persistent “fourth wave”. Whether any policy is “reasonable” is ultimately a fact-driven exercise that is up to judges and courts to decide. In the meantime, it is diligent and prudent for charities and not-for-profits to implement a C-19 VP that is in accordance with laws, regulations and public health guidance currently in place in Ontario, or any province or jurisdiction where the charity or not-for-profit carries on its activities. As noted above, this *Bulletin* is for discussion purposes only and is not intended to do anything more than to identify some of the legal issues at play and their potential implications for employment law. As the legal landscape in this area is changing quickly, it will be essential to carefully monitor ongoing developments as they occur.



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