

Return to the Workplace Toolkit #2

(a.k.a “Haven’t we been
down this road before?”)



Can I require my employees to return to the workplace?

Yes.

If the employees worked in the office pre-pandemic and were directed to work remotely on a temporary basis during the pandemic, then the employer will be able to direct that the employees return to the office. There may be some situations where this general concept does not apply to unionized workplaces, due to the nature of their collective agreements, but it generally holds true otherwise. That said, employers must continue to follow public health guidelines and relevant laws related to the pandemic and health and safety. For example, until July 15, 2021, section 2.1(1) of Ontario Regulation 263/20 stated that “Each person responsible for a business or organization that is open shall ensure that any person who performs work for the business or organization conducts their work remotely, unless the nature of their work requires them to be on-site at the workplace.” While this specific remote work requirement has now been removed from the Regulation, the law still requires that each person operating a business must comply with public health guidance including any instructions on physical distancing. On that basis, many public health units are still directing employers to operate remotely (where possible).

Lastly, if an employer has promised or indicated to employees that they would work remotely on a permanent basis, it may be a constructive dismissal to require employees to return to the office, unless the employer provides reasonable notice.

Is a return to the workplace necessary?

The answer to this question sets the stage for the discussions below about vaccination policies. Some employers have not been negatively impacted with the move to remote workplaces, due to the nature of their business. Examples which come to mind are workplaces where employees perform their jobs at the other end of a screen or telephone. On the other hand, businesses where employees need to work in person (i.e. construction, caregivers, restaurant and retail) have had no choice but to keep employees working in the workplace throughout the pandemic.

For those workplaces where remote work is possible and has been the norm for the past year-and-a-half, consideration should be given as to whether forcing a return to the workplace is necessary or desired. It may be that a partial return to the workplace will suffice (i.e. 2-3 days per week). Alternatively, it may be that the return to the workplace of just select individuals will suffice. And why does the company want to have people back in the workplace? There are many reasons, and not all of them may be necessary. For example, a return may be desired because the company is paying for expensive real estate. A return may be desired because some employees perform better under supervision. In-person meetings with clients, the mentoring of employees, and a host of other reasons for in-workplace work may make sense. All of those reasons should be balanced with the employer’s continuing obligations to keep employees healthy and safe under the *Occupational Health and Safety Act* (Ontario) (OHSA), as well as the potential for further waves of the pandemic. Ultimately this will be a business decision for most employers that have the ability to have employees work remotely. For employers that require employees in the workplace however, the next question will usually be whether or not vaccines can be mandated.

Can employers require employees to be vaccinated?

In Ontario, strictly speaking there is no law prohibiting non-union employers from requiring current or new employees to be vaccinated as a condition of employment. The real issue is the consequences of same (i.e. what are an employer’s rights and liabilities if it imposes a mandatory-vaccination policy and an employee refuses to be vaccinated?). Employers that impose a mandatory vaccination policy should be aware of two potential risk factors. First, for those employees who cannot or choose not to be vaccinated for medical or religious reasons, the employer may need to accommodate the employees. Accommodation will be discussed further below. Second, for those employees who choose not to be vaccinated because they simply don’t want to, there will be a risk of constructive dismissal claims if the employer makes vaccination mandatory. That is because making vaccinations mandatory during the course of employment may be a fundamental change

to an employee's terms of employment. Similarly, if the employer makes vaccination mandatory and an employee refuses, and the employer dismisses the employee, the employer will likely not have just cause for dismissal (except, perhaps, in some high-risk health care or communal living environments), and will be required to pay out the employee's full termination entitlements. Some employers may be comfortable with paying out employees who claim constructive dismissal, and having them leave, while others may not.

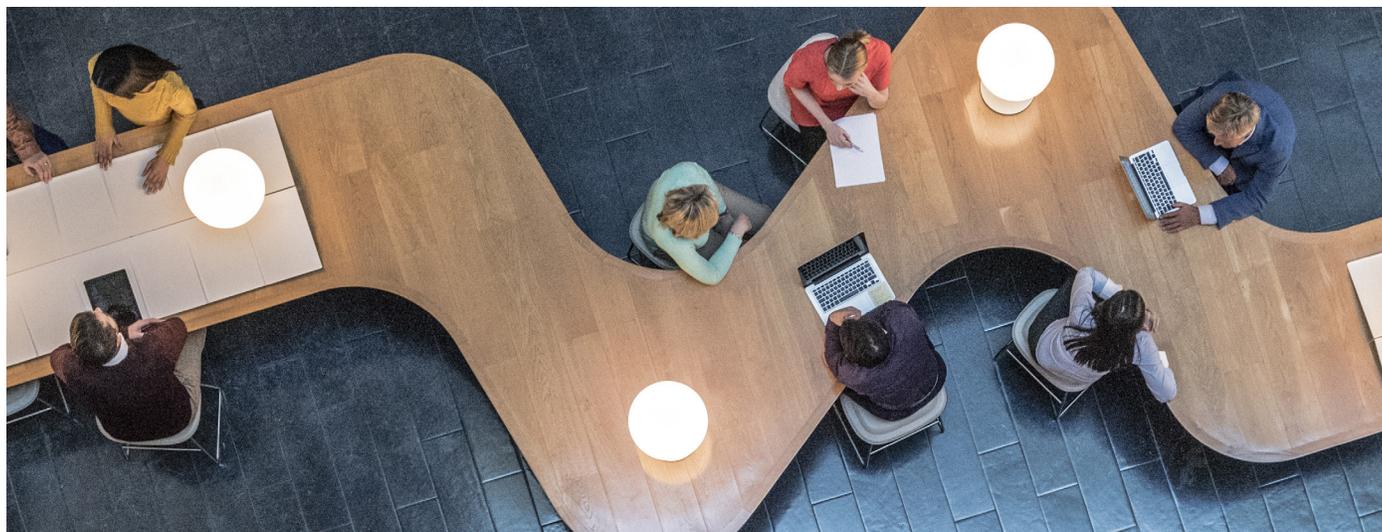
Vaccination-related accommodation

If employees cannot or choose to not be vaccinated due to a protected ground – such as disability or religion - under the *Human Rights Code* (Ontario) (the Code), then they will need to be accommodated to the point of undue hardship. To do otherwise will leave the employer open to a potential claim of discrimination. Keep in mind that for employees who claim protection in relation to religion, the legal test is whether or not they have a sincerely-held religious (not ideological) belief that they should not be vaccinated.

It is anticipated that most requests for accommodation will relate to medical reasons. While there is not yet any clear guidance on this point in relation to COVID-19, it is anticipated that employers will be able to ask for a medical note or questionnaire from the employee's medical provider, to substantiate the request for accommodation. The anticipation that employers will be able to ask for medical notes in such a case is due to

the fact that the Ontario Human Rights Tribunal already permits similar requests for medical documentation when employers look to accommodate employees in relation to other sorts of disability matters. However, just as is the case whenever any other employee medical documentation is collected by employers, consideration should be given to ensuring that the medical documentation is used only for the purposes for which it was collected, that it is not disclosed except to the extent consented to by the employee, that it is kept secure, and that it is not retained for any longer than necessary for the purpose for which it was collected. A general rule of thumb is that once the employer has satisfied itself with medical documentation that accommodation is necessary, it is best that a note to that effect be made on the employee's file, the accommodation be put into place, and the medical documentation be destroyed or deleted.

Employees who are required to be accommodated due to an inability or refusal to be vaccinated for medical or religious reasons, should be given the option to work remotely if that option is available for their position. If not, consideration should be given to moving the employee to a different position which can be worked remotely. A further option is to keep the employee in the workplace if they are comfortable with it, but to work with the employee to create as safe a space in the workplace as is possible (including in closed area separated from other employees). Yet another option is to impose regular mandatory testing on employees who are not vaccinated. While there is not yet any law



in relation to targeted testing of just unvaccinated employees in the workplace, there is law in relation to the testing of all employees in the workplace, and arbitrators have generally permitted testing where it strikes a reasonable balance considering the nature of the interests at stake and the impact on employees, as well as where there are no less intrusive means available to achieve the objective. In other words, if the other options are not possible, then regular mandatory testing of unvaccinated employees may be acceptable from a legal point of view. If none of those options are possible, then an unpaid leave of absence may need to be considered. Employees who require accommodation should not have their employment terminated just because they cannot or choose not to be vaccinated due to a protected ground under the Code.

What about employees who choose not to be vaccinated for a non-Code reason?

As indicated above, employees who choose for personal or ideological reasons (other than religious or medical reasons) not to be vaccinated can be terminated in a non-unionized workplace but will likely be entitled to their full termination entitlements, although that may not be a recommended approach from a human resources point of view. The better approaches would be to: (i) allow the employee to

work remotely if their position permits; (ii) return the employee to the workplace in a manner which allows for them to be safeguarded from their colleagues (i.e. through masking, distancing and other public health measures); or (iii) provide the employee with an unpaid leave, during which time they can apply for Employment Insurance benefits. That last option also has the risk of a constructive dismissal claim, but it is still a better approach than a termination of employment.

What about new employees?

New employees are obviously in a different position than existing employees by virtue of the fact that the employment relationship has not yet started. For companies that will continue hiring after putting a vaccination policy into place, the requirement to be vaccinated can be enforced on new hires as a condition of their employment, subject however to the duty to accommodate discussed above. There is no risk of a constructive dismissal claim in these cases, as the employee is a new hire and is agreeing to be hired on the condition of being vaccinated. But new hires who cannot or chose not to be vaccinated for medical or religious reasons, will need to be accommodated. Keep in mind that a decision to not hire someone simply because the employer doesn't wish to accommodate them, is also a matter of discrimination.





Can I ask for proof of vaccination?

Subject to all of the discussion above, the answer to this question is probably yes. However, requesting proof of vaccination may engage potential privacy duties. In Ontario, the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) does not apply to personal employee information held by provincially-regulated employers, which is the vast majority of employers in Ontario. However, there is always the potential for privacy related tort claims, however remote those may be.

To that end, proof of vaccination information and documentation should be treated similarly to medical information and documentation obtained by employers who wish to confirm whether an employee requires accommodation, as set out above. In particular, consideration should be given to ensuring that documentary proof of vaccination is used only for the purposes for which it was collected, that it is not disclosed except to the extent consented to by the employee, that it is kept secure, and that it is not retained for any longer than necessary for the purpose for which it was collected. Furthermore, it is recommended that employers not retain a copy of the vaccination record. It should be enough for someone in the company to indicate on a checklist that they have seen proof of vaccination for an employee.

Template vaccination policy

For those companies that either want to implement a mandatory vaccination plan or want to only permit vaccinated employees into the workplace (with all other employees working remotely), a vaccination policy is highly recommended. In addition to some of the points raised above, thought should be given in a vaccination policy to also addressing how visits to the workplace by customers and other guests will be handled. Dentons Canada's Ontario employment law team would be pleased to assist employers with their vaccination policies.

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