

Member's Quarterly

Spring 2022 Edition

Ask the Expert

Mandatory Vaccinations: Employers' Pressing Questions

Proceed with caution when making the rules

Tom Ross
Q.C.
Partner,
McLennan Ross LLP

With the emergence of new COVID variants, the new restrictions that started September 16, 2021 in Alberta and the growing discussion of mandatory vaccination, employers and employees are struggling to figure out their respective rights, entitlements and obligations in protecting against the spread of COVID-19 in the workplace.

We have seen commentary suggesting that employers have an elevated duty with respect to COVID-19 over and above the general obligation to keep their workplace safe and free from hazardous substances. We believe some of these concerns are overstated. A distinction must be drawn between employers introducing a hazardous substance in the workplace and a hazardous substance being brought into the workplace through no fault of the employer.

Below is an overview of some of the questions being asked by employers. As all circumstances are fact specific, legal guidance should be obtained when implementing plans.

If government COVID-19 protocols are removed, do employers continue to have any obligation to their employees with respect to the possible spread of COVID-19?

Employers have a general obligation to provide employees with a safe workplace. This obligation does not mean employers guarantee an employee will not contract COVID-19 at work, or any other illness for that matter. If an employer did not cause the illness to be in the workplace, it is unlikely an employer would be liable for an employee bringing COVID-19 to work and infecting other employees. An employer does not have a positive obligation to prevent every possible risk of COVID-19 entering the workplace. Employers have an obligation to identify hazards in the workplace and take reasonable steps to manage and reduce them.

What are the risks to employers of mandatory vaccination programs?

There are different legal risks associated with mandatory vaccination. First, there are privacy law issues and the risk of a privacy complaint. Second, there are human rights risks, though these can be addressed by accommodating employees who have a protected basis for refusing vaccination, such as disability or religious belief. Third, for non-union employees, there is a risk of constructive dismissal claims. Fourth, for union employees, there is a risk of grievances alleging that the mandatory vaccination requirement is unreasonable or contrary to the collective agreement. There are also practical risks, including how such programs impact employee morale, recruitment and retention.

What can an employer do to keep the workplace free from COVID-19?

Again, each workplace is fact specific. Although an employer has no current obligation to do anything specific, it is probably in an employer's best interest to have protocols in place to assure its employees that they are working in a safe environment.

Employers may want to ask their employees if they have been vaccinated. There are clear privacy considerations in requesting such medical information and whether it is legitimately required for safe operation. If the request for vaccination status is in order to require the employee to get vaccinated, it is not clear whether that purpose is reasonable.

Truly voluntary disclosure can be tracked, but the personal information must still be safeguarded. Anonymous employee surveys of vaccination status are also acceptable.

Member's Quarterly

Spring 2022 Edition

Ask the Expert continued

If an employer believes it needs to implement individual protocols, it should address its mind to whether it needs to request vaccination status or whether it can appropriately mitigate the risk of spreading COVID-19 through other means, such as working from home, mandatory mask requirements or social distancing. A relevant consideration will be how the employer has managed such risks throughout the pandemic.

Employers should also consider whether there are greater risks of COVID-19 within their operations. The greater the risks, the more an employer may be entitled to do.

Can employees refuse to attend work if an employer does not require mandatory vaccination for all employees?

Employees are entitled to refuse work that is dangerous. Although fact specific, it is doubtful whether the failure to mandate vaccinations creates a dangerous workplace. As such, employers should be able to require employees to attend work, even if there is not a mandatory vaccination program in place. This issue, however, is fact specific. Relevant to this question would be the presence of any added risks and the ability to work safely in that workplace during the pandemic (without mandatory vaccinations).

Can employees refuse to come to work and choose to work from home if they were able to do so during the pandemic?

Though employers are generally entitled to determine the place of work, given the recent Alberta government announcement that mandatory work-from-home measures are in place unless the employer has determined a physical presence is required for operational effectiveness, working from home will be required for many workplaces regardless of an employer's preference. It is a reasonable option for many employees, especially if they have been working from home earlier in the pandemic.

Are employees entitled to WCB coverage if they experience an adverse reaction to a COVID-19 vaccine?

The Alberta Workers' Compensation Board has stated, "If a worker has an adverse reaction to a COVID-19 vaccination, they are entitled to compensation when the immunization is a mandatory condition of employment."

Conclusion

The topic of mandatory vaccination is sensitive and evolving. Employers should consider the issues in their operations, as well as the need, risks, philosophy and values associated with mandatory vaccination. Caution is required. Any program should be carefully tailored to follow all public health guidance and also reflect the individual circumstances in each place of employment.

Tom Ross is a partner with McLennan Ross LLP in Calgary and can be reached via email at tross@mross.com.