

The vaccination debate at work

COVID-19 vaccines will roll out across Canada in 2021, but can employers require employees to get vaccinated?

BACKGROUND

The COVID-19 pandemic wreaked havoc on the economy and society in 2020. In 2021, the focus will shift to the vaccines being developed and distributed with the hope that they will bring the pandemic to an end. However, not everyone is keen on getting vaccinated. Employment lawyer Rishi Bandhu looks at the legal considerations of requiring employees to get immunized through the lens of past legal battles between workplace safety and employee rights.

BY RISHI BANDHU

THERE IS undoubtedly no better tool to help prevent the spread of COVID-19 than a vaccine. The Pfizer and Moderna vaccines authorized for use in Canada claim to be more than 90 per cent effective in preventing or minimizing COVID-19 symptoms.

However, no one can force another to undergo medical treatment without consent or statutory authorization. Our governments do not appear willing to pass legislation mandating vaccination. The preference, at least for now, seems to be encouraging vaccination on a voluntary basis.

Subject to human rights considerations — more on this below — there is no reason employers can't ask new employees to provide proof of vaccination status as a condition of employment. In a pre-pandemic world, though, employers did not think to include a term or condition of employment based on vaccination status. Existing employees, therefore, present a more complicated situation.

Non-unionized employers who unilaterally change terms and conditions of employment risk facing actions for constructive dismissal. The test is, briefly stated, whether the unilateral change is substantial in the eyes of a reasonable third person. The assessment is contextual and looks at all of the relevant circumstances.

Right to bodily autonomy

The common law jealously guards an individual's right to make decisions about matters involving medical treatment and bodily integrity. Historically, a forced medical examination has been considered an assault or battery. Hence, a condition of employment imposed by an employer to vaccinate against COVID-19 would undoubtedly represent a significant change to the employment relationship.

In the 1963 case of *Thompson v. Oakville (Town)*, an Ontario court held that, in the absence of contractual or statutory authority, the employer had no right to require an employee to submit to an examination by a doctor of the employer's choosing.

The Supreme Court of Canada has recognized in *R. v. Stillman* and *R. v. Morgentaler* that every individual has the fundamental right to determine what may be done — or not done — to one's body. That right forms part of an individual's protection to "life, liberty and security of the person" under s. 7 of the Canadian Charter of Rights and Freedoms. In *Fleming v. Reid*, the Ontario Court of Appeal held that: "With very limited exceptions, every person's body is considered inviolate, and accordingly, every competent adult has the right to be free from unwanted medical treatment." The court went on to say that it didn't matter if there were serious risks or consequences that could stem from a refusal of medical treatment, as the "doctrine of informed consent ensures the freedom of individuals to make choices about their medical care." The right of medical self-determination dictates that "it is the patient, not the doctor, who ultimately must decide if treatment — any treatment — is to be administered," said the court.

While the privacy and security interests of employees are central to the analysis, the employer's safety obligations are also critical.

Labour arbitrators in the unionized setting have invalidated employer policies that would require an employee to take a flu vaccine or remain out of the workplace without pay during a period of flu outbreak. In the 2002 decision of *St. Peter's Health System v. C.U.P.E., Local 778*, an arbitrator found that suspending employees for refusing a flu vaccination was a violation of the employees' Charter rights.

In the 2018 decision of *St. Michael's Hospital v. ONA*, the arbitrator held that the hospital's policy of "vaccinate or mask" was unreasonable, in part because of the lack of evidence with respect to the efficacy of masks to contain the flu virus. In light of

the current broad acceptance of masks to contain the spread of COVID-19, the *St. Michael's Hospital* decision may no longer be viewed in the same light. Moreover, other arbitrators — such as in the Alberta decision of *Chinook Health Region v. U.N.A. Local 120*, for example — have found hospital employer policies requiring employees to choose between vaccination or a non-disciplinary leave of absence to be reasonable.

Changing expectations

A recent arbitration decision may signal a greater willingness to accept encroachments into an individual's bodily autonomy in the name of containing COVID-19. In December 2020, an Ontario arbitrator found in *Caressant Care Nursing & Retirement Homes v. Christian Labour Association of Canada* that a mandatory bi-weekly COVID-19 testing regimen was reasonable, despite the highly invasive nature of the test, which caused persistent nose bleeds for at least one employee.

The decision in *Caressant* reflects the severity of the COVID-19 pandemic and the exceptional measures that have been undertaken to minimize spread of the virus. The same factors are likely to be persuasive in assessing whether a mandatory vaccination requirement gives rise to a valid constructive dismissal claim in the non-unionized context.

While the privacy and security interests of employees are undoubtedly central to the analysis, the employer's safety obligations are also critical. Employers have an obligation under health and safety legislation in each jurisdiction to take every reasonable precaution for the protection of workers. Since March, employers have significantly modified their workplaces to meet that duty and mitigate the spread of COVID-19. Employees attending the workplace are expected to comply with masking and physical distancing rules.

What is reasonable in the circumstances, considered against an individual's privacy and autonomy rights, will depend on several factors, including the following:

- **The status of the pandemic.** As of this writing, infection rates continue to



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escalate despite government-mandated restrictions, including lockdowns.

- **The nature of the employer's operation.** Long-term-care homes, for example, are likely to be afforded more leeway in the measures they choose to protect against the virus. A policy of mandatory immunization in a workplace where physical distancing is possible and interaction with members of the public can be kept to a minimum is less likely to pass scrutiny.
- **The consequences for failing to vaccinate.** Employers who impose termination of employment as a penalty for failing to vaccinate are more likely to face and be liable for constructive dismissal.

Human rights considerations

An employee's reasons for refusing to immunize will also be scrutinized. While employees are likely to be afforded deference over personal decisions involving vaccines, human rights considerations may represent the proverbial trump card for both existing and new employees.

Possible human rights objections to vaccination could include religious- or disability-related concerns, including allergic or other adverse reactions to a vaccine. In those circumstances, an employer would be expected to accommodate, unless it can be demonstrated that the vaccination is a bona fide occupational requirement and accommoda-

tion of the employee's refusal to vaccinate would be impossible.

No unequivocal answers

Like most legal issues, there are no unequivocal answers to the question of whether or not an employer can require vaccinations as a condition of work. What is relatively clear, though, is that the answer will depend on the employer's imposed consequence for refusing to vaccinate. COVID-19 has changed expectations in ways that could never have been anticipated. Employers will continue to be given leeway to introduce policies that protect the workplace, but they will unlikely be able to coerce vaccination on the threat of termination.

Ultimately, to mitigate the risk of liability, the safest course of action for employers electing to require vaccination throughout a workforce is to avoid mandating termination of employment for non-compliance. A temporary, non-disciplinary leave of absence is more likely to be considered reasonable. A remote working assignment, if feasible, presents the least risk. COVID-19 will disappear as a pandemic in time, so temporary solu-

tions are less likely to be assailed.

The employer's existing policies, communication practices and foundation of trust with employees are critical to avoiding issues. Employers who maintain flexibility, together with open and respectful communication that occurs well in advance of any implementation deadlines, are more likely to avoid legal issues.

For more information, see:

- *Thompson v. Oakville (Town)*, [1964], 1 O.R. 122 (Ont. H.C.).
- *R. v. Stillman*, [1997] 1 S.C.R. 607 (S.C.C.).
- *R v. Morgentaler*, [1988] 1 S.C.R. 30 (S.C.C.).
- *Fleming v. Reid*, 1991 CanLII 2728 (Ont. C.A.).
- *St. Peter's Health System v. C.U.P.E., Local 778*, 2002 CarswellOnt 4709 (Ont. Arb.).
- *St. Michael's Hospital v. ONA*, 2018 CanLII 82519 (Ont. Arb.).
- *Chinook Health Region v. U.N.A., Local 120*, 2002 CarswellAlta 1847 (Alta. Arb.).
- *Caressant Care Nursing & Retirement Homes v. Christian Labour Association of Canada*, 2020 CanLII 100531 (Ont. Arb.).

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