

# LIDSTONE & COMPANY

## BARRISTERS AND SOLICITORS

### BULLETIN

**TO:** Clients  
**FROM:** Andrew Carricato  
**DATE:** December 18, 2020  
**RE:** Mandatory Vaccinations  
**FILE:** 99999 - 044

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Several local governments have asked if they can refuse service or access to members of the public who are not vaccinated for COVID-19. As employers, local government administrators have also asked whether they can require employees to be vaccinated or implement a mandatory vaccination policy. As always, the answer is “its complicated” and “it depends”. As a local government employer, the answer may be even more complicated given that governments are subject to the *Canadian Charter of Rights and Freedoms*.

#### **Legal Context**

In Canada, policies requiring vaccination as a condition of service or employment must comply with employment and labour law, human rights codes and the *Charter*.

#### **Labour and Employment Law**

In the labour context, workplace policies must be consistent with the collective agreement and must be a reasonable exercise of management rights (which, among other things, requires the policy to be connected to the employer’s legitimate business interest.) In the unionized healthcare sector, there is case law relating to mandatory vaccine and mask policies for healthcare workers. However, the case law is inconsistent and depends on where one lives.

For example, in 2012, BC introduced a “vaccinate-or-mask” policy requiring healthcare workers to choose between receiving the influenza vaccine or wearing a mask during flu season. The policy purpose was to increase vaccination rates among health care workers against influenza to improve patient outcomes. The policy was upheld as reasonable and found to be the least in intrusive way to increase patient safety [*Health Employers Assn. of British Columbia and HSA BC (Influenza Control Program Policy)*, (2013) 237 L.A.C. (4th) 1 (Diebolt)].

However, In 2015, an [Arbitrator in Ontario struck down a “vaccinate-or-mask” policy for nurses as an unreasonable exercise of management rights](#). That decision followed previous decisions which tended to land in favour of the union and employee rights against the imposition of forced medical treatment [*St. Peter's Health System v. CUPE, Local 778 (Flu Vaccination Grievance)*, [2002] O.L.A.A. No. 164, Feb. 7, 2002].

## **Human Rights Legislation**

In BC, Alberta and Yukon, local governments must not discriminate against individuals in the provision of goods, services or facilities customarily available to the public on any prohibited grounds. As employers, local governments are also prohibited from discriminating in employment based on prohibited grounds. In this case, the most likely grounds would be based on any actual or perceived physical or mental disability, religious association, belief, or activity, or political belief or political activity to being vaccinated. Members of the public or employees who choose not to be vaccinated on these or other prohibited ground ought to be accommodated to the point of undue hardship.

Therefore, a *bona fide reasonable justification* is required to deny members of the public access to goods, services or facilities (such as recreational services and facilities like pools, gyms, classes, courses etc.).

Likewise, a *bona fide occupational requirement* is required to refuse employees continued employment if they choose not to be vaccinated. Terminating employees for refusing to get a COVID-19 vaccine will in some cases amount to a human rights violation.

Mandatory vaccination policies that fail to exercise reasonableness and a balancing of interests may also infringe an individual's rights under the *Charter* and be declared unconstitutional. To date, cases have held that Section 7 (the right to liberty and security of the person) and Section 2b (the right to freedom of expression) may be violated by a mandatory vaccination policy. However, we think a government may infringe both rights where it can be shown that the breach is a reasonable and justified limit on rights in accordance with section 1 of the *Charter*.

## **Health and Safety Legislation**

Employers are generally obligated under occupational health and safety legislation to protect employees from work related injuries and illnesses by preventing and reducing the risk of harm and hazards in their workplaces. To do so, employers take precautions to meet reasonable health and safety standards which may include the use of policies and guidelines to limit the spread of infectious disease in the workplace.

The health and safety goals of mandatory vaccination policies can and do, therefore, collide with individual rights and freedoms of employees.

## **Immunization Legislation**

Vaccination policies in Canada are diverse. Just three provinces have legislated vaccination policies, which apply only to children in school. Ontario and New Brunswick require immunization for diphtheria, tetanus, polio, measles, mumps and rubella. Manitoba requires a measles vaccination. Exemptions exist based on religious or medical grounds. Were an outbreak to occur in those provinces, children who are not immunized could be excluded from attending at school or work or may be subject to other public health orders. In the provinces without similar

legislation, government retains the authority to impose similar restrictions on those who are not vaccinated.

In British Columbia, the provincial government enacted [mandatory vaccination reporting legislation](#) applying only to children attending schools (K to 12) on July 1, 2019. Only the requirement to report a child's vaccination history, or lack thereof, is mandatory. That act does not require mandatory vaccination. Other than the "vaccinate or mask" policies as described above, there is no other similar requirement to our knowledge in the workplace context requiring non-healthcare workers to do the same.

In Alberta, the *Public Health Act* currently contains a section that allows the Lieutenant Governor in Council to order Albertans to be immunized or re-immunized against communicable disease in certain circumstances like an epidemic. However, [that province's Health Minister and chief medical officer of health say they would not use the power and that they would repeal it.](#)

In the Yukon, there is no mandatory immunization legislation to our knowledge.

### **What is an employer to do?**

Hypothetically, provincial medical officers of health could impose a mandatory vaccination mandate, similar to what they have done regarding the wearing of masks in public. A direction of such an intrusive action from a Provincial or Territorial government would remove the guessing and potential responsibility from individual employers having to fight it out with their employees. However, it is very unlikely any provincial or territorial government is going to take such action. This leaves employers in the unenviable situation they are in. As local government employers, the situation is even more unenviable for all the possible legal pitfalls described above, not to mention the public relations and political consequences that a mandatory vaccination policy might trigger.

### **Consider Offering Incentives to Employees and Patrons of Services and Facilities**

We do not recommend a mandatory vaccination policy for employees or the public.

Rather than threatening employees with loss of employment if they do not get vaccinated, local governments may consider pitching the importance and benefit of vaccination as a health and safety issue. Encourage employees to get the vaccine for their safety and the safety of their colleagues and the public they serve. Especially where employees are working closely in person with other employees or the public, including more vulnerable populations such as those of advanced age or who are immuno-compromised. Local governments can reinforce federal and provincial/territorial messaging regarding the benefits of vaccination.

In British Columbia, Alberta and Yukon employers may legitimately be able to implement a "vaccinate-or-mask" policy with success, with *bona fide* reasonable justification. The basis of such a policy would consist of requiring confirmation of vaccination. For those who choose not to, or object to being, vaccinated on medical or religious grounds, an employer may require those employees to continue to follow current public health measures such as wearing a mask,

maintaining 2 to 3 meter distance from others, require virtual attendance at meetings and gatherings and/or to work behind protective physical barriers. They may even contemplate requiring those employees to continue working from home for the foreseeable future until herd immunity is achieved.

In the unionized context, great care will need to be taken not to offend any collective agreement provisions including abuse of the management rights clause. A careful balancing of interests will also need to be exercised. It would be advisable for any unionized employer looking to implement a “vaccinate-or-mask” policy to work collaboratively and in good faith with their union counterpart in the development and roll-out of a policy.

With respect to mandating a “vaccinate-or-mask” policy for members of the public in order to receive services, goods or have access to public facilities, a careful balancing of human rights and health and safety will need to be done as well along with *bona fide* reasonable justification. Once the population achieves herd immunity as recommended by infection disease experts and provincial public health, it would be advisable to repeal the policy.

There is no “one-size fits all” with respect to these issues. Any plans or policies to restrict service or employment by distinguishing between those vaccinated and not vaccinated should be reviewed by legal counsel.

*Note: This memo is of a general and summary nature only and is not exhaustive of all possible legal obligations. In addition, laws may change over time and should be interpreted only in the context of particular circumstances such that these materials are not intended to be relied upon or taken as legal advice or opinion. Readers should consult a legal professional for specific advice in any particular situation.*