

Issue Brief: Return to In-Person Work During COVID-19 Pandemic

Background

The COVID-19 pandemic has altered how workplaces operate, with many shifting to remote work on a temporary basis. Now that Canadians are increasingly being vaccinated against COVID-19, the focus for many employers and HR professionals is moving towards how employees can eventually safely return to in-person work.

This issue brief provides some of the latest information pertaining to Ontario employers' legal duties and highlights some pressing topics, including vaccination workplace policies, workplace accommodations and work refusals, requiring medical tests or temperature taking, and resources to help ensure a safe workplace.

Ontario Employers' Legal Duties

Employers are responsible for keeping employees and workplaces safe under Ontario law and need to comply with the *Occupational Health and Safety Act (OHSA)* as well as the *Employment Standards Act*. This includes the requirement of having a workplace safety plan, policies, and procedures that all workers are aware of. These plans, policies and procedures should specifically reference the workplace response to the COVID-19 pandemic.

Regularly assessing whether the workplace can be operated safely in-person, including by conducting hazard assessments in conjunction with the joint health and safety committee(s), employees, and/or unions, to evaluate the workplace and where COVID-19 contamination can occur can help to inform ongoing workplace safety plans. The Ontario and Canadian governments have resources to help with hazard assessment and identification for workplaces, which can be located on [HRPA's COVID-19 resources webpage](#).

Other legal requirements relate to screening and personal protective equipment (PPE). Ontario legislation currently mandates that all workers complete a [mandatory pre-screening questionnaire](#) before entering the workplace each day. Additionally, Ontario's Ministry of Labour, Training and Skills Development states that PPE should be provided to workers if there are health or safety risks not appropriately controlled in alternative ways, in accordance with section 25 (2)(h) of the OHSA which states that employers have the duty to "take every precaution reasonable in the circumstances" to protect workers.

Proof of Vaccination

A contentious issue that has been discussed in the news, by employment lawyers, and Canadians in general is whether workplaces should require proof of COVID-19 vaccination in order for workers to work in-person. While this is subject to change based on further guidance from government officials and law, the Ontario Human Rights Commission (OHRC) [has released a document](#) related to COVID-19 and Ontario's Human Rights Code in response to this issue. The OHRC states: "Requiring proof of vaccination to ensure fitness to safely perform work, or protect people receiving services or living in congregate housing, **may be permissible under the Code if the requirement is made in good faith and is reasonably necessary for reasons related to safety.**" It is mentioned however, that the *Code* grounds of disability and/or creed may be engaged when proof of vaccination or mandatory testing is required and that those unable to receive the COVID-19 vaccine due to disability or creed must be accommodated unless it would cause undue hardship based on cost or health and safety.

Regardless, the OHRC recommends flexibility in accommodations if possible, including looking into alternative ways that an unvaccinated person can work safely. Explaining why proof of vaccination is needed and receiving informed consent before receiving the proof is important, as is ensuring minimal intrusion as possible on a person's privacy and not going beyond what is needed to ensure workplace safety.

Canadian law firm [McCarthy and Tetrault](#) notes that without express public health guidance or legislation stating otherwise, the legal duty to protect the safety of workers in Ontario is not likely to allow general enforcement of employees to be vaccinated, especially when there is a human rights reason that would prevent vaccination. However, they note that imposing restrictions on non-vaccinated employees, including site access or contact with other people in the workplace could be viable on a case-by-case basis. If a vaccination policy is developed, McCarthy and Tetrault states it must account for accommodation and privacy considerations, and be clearly communicated, and enforced consistently.

Another Canadian law firm, [McInnes Cooper](#), in summarized terms, states that the answer to whether employers can require proof of COVID-19 vaccination in order to come to work in-person is a qualified yes, with two conditions. McInnes Cooper writes that this can occur only once vaccines are widely available to all Canadians and if the employer has a proper vaccination policy with a balanced approach and alternatives to workers who refuse to be vaccinated, with no disciplinary repercussions, including loss of job for the refusal. The full document of McInnes Cooper's response to this question and other related questions is located in the references.

Medical Tests and/or Temperature-Taking

Similar to the issue of requiring proof of vaccination, the question of whether an employer can require a medical test related to COVID-19, such as taking employees temperature or having them

take a COVID-19 test, is also contentious. The OHRC's position is that this may be permissible under the *Code* if the testing is shown to be effective and necessary under the circumstances, including during a pandemic. However, the ground of disability is engaged with testing and the information gathered from testing can have a detrimental impact on a person's disability. Consequently, medical testing must be reasonably necessary in ensuring the health and safety of workers but without obtaining unnecessary information that could identify a person's pre-existing disability. Additionally, the results of testing cannot result in automatic negative repercussions, such as discipline or termination.

If an organization is enforcing medical testing or temperature-taking related to COVID-19, the reasons for doing so should be clearly explained, including how employee's health information will be used and disposed of to protect privacy. Similarly, while asking employees whether they have tested positive for COVID-19 may be allowed to determine if the workplace is safe, protecting confidentiality and privacy must be done, and this request should only be made if necessary for the health and safety of the workplace. Employers should never disclose personal details of who tested positive for COVID-19 in the workplace unless there is an urgent health and safety justification to do so.

Rapid antigen testing, a type of test that can be done at [eligible workplace](#) sites for asymptomatic employees, should only be used as a second screening step after workers have passed the health screening questionnaire. This type of testing should never be used to diagnose COVID-19 for workers experiencing symptoms or who may have been exposed to someone else with COVID-19. Anyone who receives a positive result from a rapid test should immediately seek laboratory-based testing within 24 hours and isolate while waiting for those test results. Rapid testing is not a replacement for other public health measures, like physical distancing and mask use.

Accommodations and Work Refusals

The pandemic has created several different challenges for workers, which may result in some being unwilling or unable to return to in-person work. As a result, employers should develop policies to address these types of situations, clearly outlining how they will be handled. As a general principle, employers must accommodate employees under the Ontario Human Rights Code in relation to COVID-19, with the exception of when it causes undue hardship based on cost or health and safety. This includes accommodating employees, up to the point of undue hardship, who:

- Need to stay home for care-giving responsibilities of family members (including if a family member is ill, in self-isolation, if a child's school or day care is closed as a result of COVID-19, or if a child cannot go to school or day care due to higher risk of infection, etc.),

- Are under medical investigation, supervision, treatment, isolation, or quarantine (note: Ontario Bill 186, *Employment Standards Amendment Act (Infection Disease Emergencies), 2020* grants job-protected leave without pay to employees under the circumstances listed above, in addition to those who need to be away from work for caregiving purposes due to school or day care closures, care for other relatives, or those impacted by travel restrictions due to COVID-19).
- Are concerned about workplace safety, if there are reasonable grounds that the workplace poses a danger to the workers health and safety.

Possible accommodations for the situations listed above may include allowing workers to work from home, work alternate hours, or take leaves. The OHRC suggests that employers should take all requests for accommodation in good faith and should not overburden the healthcare system by requiring medical notes. Additionally, Bill 186 in Ontario states that medical notes are not required for employees that need to take a leave due to COVID-19.

Workplace Outbreaks and Important Resources

For workplace COVID-19 outbreaks or exposures, the general protocol is to immediately notify your public health unit if two or more people in your workplace have tested positive for COVID-19 within a 14-day interval. Additionally, employers will need to notify the Ontario Ministry of Labour, Training and Skills Development. A risk assessment should be developed in advance so if there is a potential outbreak, the employer is able to identify both part of the worksite that may be affected as well as which other employees have been in contact with the infected worker(s) and may have been exposed to COVID-19. Employees that have potentially been exposed should be asked to self-isolate, monitor and report any COVID-19-like symptoms or diagnoses to their employer. Additionally, the job area where infection likely occurred should be shut down until the area and equipment are fully disinfected, and in some cases, until approval is given from your local public health unit or other authorities. It is important to review the policies of your local public health unit if an outbreak or exposure occurs in your workplace, as guidance can vary depending on your location.

There are numerous resources on considerations to help keep workplaces safe and minimize risks during the pandemic, including from the provincial and federal governments. Additionally, there are resources available for how to handle symptomatic employees, workplace exposures of COVID-19, mental health and psychological considerations during the pandemic, and printable posters from the Ontario government in many different languages providing information on cleaning, equipment use, and workplace safety during the pandemic. All of these resources and more can be accessed at [HRPA's COVID-19 resources webpage](#), which is maintained and updated regularly.

Note: This document is not intended to provide legal advice and does not contain all legal requirements and obligations of workplaces. The information is subject to change overtime.

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