

**Key Questions and Recommendations for DS Agencies
Considering a
COVID-19 Vaccination Policy for Staff**

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Topic

As safe and effective COVID-19 vaccines are approved for use and available, agencies within the Developmental Services Sector need to consider developing and/or expanding current immunization policies to include COVID-19 vaccination. This document was prepared by members of the Sector Pandemic Planning Initiative, including Jeanette MacLean, Senior Health & Safety Consultant, Pandemic Response Lead at Community Living Toronto, and Brendon and Cheryl Pooran of PooranLaw. The document is based on information shared by PooranLaw in its information bulletins for the Developmental Services Sector ([COVID-19 Vaccine Rollout](#) and [COVID-10 Mandatory Vaccination Policy](#)).

Summary of Recent Developments

On August 18, 2021, the government announced that it will be mandating employers in the Developmental Services (DS) Sector operating both residential and day services programs to have vaccination policies and that vaccinated employees will be subject to exemptions from Emergency Order restrictions on secondary employment. While MCCSS has not provided further direction for DS agencies as yet, the Ministry of Health has released helpful guidance which is likely to be replicated by MCCSS when it releases its own [guidance](#).

Mandatory Policies: As summarized by PooranLaw in its recent [bulletin](#), the government has indicated that covered employers (including developmental services and intervenor services providers) will need to have policies in place by **September 7, 2021** that:

1. Require employees to provide information and documentary proof as follows:
 - a) Proof that they are fully vaccinated; or
 - b) Written medical documentation from a physician or nurse practitioner affirming that the employee is medically unable to receive COVID-19 vaccination; or
 - c) For employees declining vaccination for other reasons, proof that they have completed an employer approved COVID-19 vaccination education session prior to making their choice to decline vaccination.

2. Employees who are unvaccinated for any reason must undergo rapid testing at least once per week.

Single Employer Restrictions: In addition, on August 24, 2019, the government introduced [amended regulations](#) that provide that unvaccinated employees will continue to be prohibited from engaging in secondary employment in residential settings for more than one employer in the same congregate care sector (i.e. DS, Intervenor Services, Shelters). This restriction will be lifted for fully vaccinated employees on September 23, 2021.

Prevalence of Mandatory Vaccination: In addition, there is mounting support for vaccination policies that do not provide the option for unvaccinated employees to continue working in person except as an approved human rights related accommodation. In fact, the Ministry of Health (MOH) Guidance Document for MOH regulated employers affirms that employers have the discretion to decide (based on their legal risk tolerance)

whether they will allow unvaccinated employees to continue active duty where they do not have a medical restriction from preventing them from doing so. This isn't to say that the MOH or MCCSS will provide any legal protection to employers who choose to place unvaccinated employees on a leave, but it does suggest that the government isn't standing in the way of employers who choose to do so.

In the past few weeks, we have seen the federal government, the City of Toronto and multiple broader public sector and private sector employers both in Ontario and abroad announce mandatory vaccination policies that require employees who are medically able to be vaccinated to present proof of vaccination as a condition of continued active in-person employment. These announcements typically do not speak to the consequences that unvaccinated employees who cannot work remotely will face for refusing to vaccinate, but the presumption is they will face unpaid leaves of absence and/or termination of employment for ongoing refusal. The jury is still out on whether employers will face liability for imposing such consequences on their employees.

Key Questions

This document reviews **key questions** agencies may have concerning policy options to require or establish consequences for staff who choose not to be vaccinated:

1. Can an employer require all staff to be vaccinated against COVID-19?
2. In taking this position, is this an infringement on an employee's human rights?
3. If an employer does create a vaccine policy, should staff who chose not to be immunized be able to continue to provide direct support in residential programs?
4. If a staff member, for medical or religious reasons is unable to be vaccinated, is the employer obligated to accommodate the staff?
5. Is it reasonable, given the current situation, for an employer to place the staff on an unpaid leave until such time as COVID-19 no longer presents a significant public health risk?
6. What best practices should be adopted for an employer wishing to implement a more aggressive vaccination policy for its employees?

1. Can an employer require all staff to be vaccinated against COVID-19?

Occupational Health

The *Occupational Health and Safety Act* and Ontario Regulation 67/93 *Healthcare and Residential Facilities*, which applies to residential supports, establishes a general duty for employers to have an immunization policy and program that requires employees to be inoculated against infectious diseases that pose a significant health and safety risk to both workers and the residents supported (O. Reg. 67/93, s. 8. & s.9¹).

Legal Considerations and Recommendations

Legal considerations and recommendations have been prepared to advise DS agencies by Pooran Law ([COVID-19 Vaccine Rollout](#), published on December 18, 2020 and [COVID-10 Mandatory Vaccination Policy](#) published August 19, 2021) and Hicks Morley *OASIS COVID-19 Vaccine Advice*, published on December 23, 2020).

¹ Queens Park Ontario: *Occupational Health and Safety Act*, R.S.O. 1990, C.O.1. s. 25, <https://www.ontario.ca/laws/statute/90o01>; O. Reg. 67/93: *HEALTH CARE AND RESIDENTIAL FACILITIES*, s. 8 & s. 9.

Legal consequences an employer has several options to consider in preparing a COVID-19 vaccination policy which include, but are not limited to:

- **For new hires**, offers of employment can be made conditional upon receiving a COVID- 19 vaccine, subject to accommodation for substantiated medical and religious reasons. Ideally, disclosure of vaccination status would not be made until a conditional offer of hire has been extended to the candidate.
- **For existing staff**, a COVID-19 immunization policy that *encourages* immunization and imposes employment consequences for non-vaccination, as opposed to a mandatory protocol is less likely to be successfully challenged. Note however that unions may nevertheless challenge a policy that encourages vaccination where there are negative consequences (unpaid leave, transfers, reduced hours of work or work opportunities, enhanced masking obligations).
- **Clear Consequences** and unequivocal terms for the policy, for when it applies and when it would not. For example, vaccination being required for all staff actively working in congregate settings during an outbreak (unvaccinated staff being subject to **mandatory rapid antigen testing**, continuing **restrictions on secondary employment, transferred** or placed on an **unpaid leave during the outbreak**). (For more on this, see #5).
- **Consistency with Collective Agreements**, a COVID-19 vaccine policy should follow general rules and principles consistent with current collective agreements, is clear and unequivocal, communicated to all employees and is consistently applied.
- **Human Rights Accommodation**, should be referenced as being available up to the point of undue hardship for bona fide human rights related restrictions.

2. In taking this position, is this an infringement on an employee’s human rights?

- The employer has a legal obligation to accommodate for human rights grounds and must consider accommodation for substantiated medical and religious reasons up to the point of undue hardship.
- Rapid antigen testing as an alternative to vaccinating would likely be viewed as a valid form of accommodation for employees who are unable to vaccinate for valid human rights related reasons.
- It is possible that an unvaccinated employee could claim an inability to undergo rapid testing for medical reasons based on contraindications as indicated by the test manufacturer. This would be subject to medical proof of restrictions and it may be that accommodation is not possible without undue hardship.
- Failure to meet the procedural and substantive duties to accommodate up to the point of undue hardship would be an infringement on the rights of an employee who has a bona fide restriction preventing them from vaccinating.

3. If an employer does create a vaccine policy, should staff who chose not to be immunized be able to continue to provide direct support in residential programs?

- In situations where an employee chooses not to be vaccinated, the employer may impose employment consequences deemed reasonable in the circumstances.
- Now by government mandate these consequences must include:
 1. Providing proof of a) a medical restriction; or b) having completed an education session; and
 2. Rapid antigen testing at least once every 7 days; and
 3. Effective September 23, 2021, only unvaccinated staff will continue to be restricted by law from working for secondary employers in the same congregate care sector.

Additional consequences may include, leaves of absence during periods of outbreak in the employees work location, transfers to residential locations where people supported are a lower risk community; restrictions on hours of work or duties; loss of shifts (particularly when working

in the private home or on a fee for service basis).

- We note that a policy that places any employee who is unvaccinated on an unpaid leave of absence is likely to be challenged by employees as:
 - A constructive dismissal where the employee is **non-union**. Non-union employers may be able to offset this risk by providing advance working notice consistent with the employee's contractual rights. This would make the risk of constructive dismissal claims by short service staff, or staff who are subject to binding contracts limiting notice entitlements to the statutory minimum, relatively low.
 - A breach of collective agreement rights for **unionized employees** (with potential claims to back pay for the period of unpaid leave). Whether an employer will be able to successfully defend against such an allegations will depend on the circumstances of each employer. At present, no case law supporting a policy imposing leaves outside of outbreak situations has been upheld. Recommendations for increasing the potential for successfully defending such a policy are discussed in question 6 below.

4. If a staff member, for medical or religious reasons is unable to be vaccinated, is the employer obligated to accommodate the staff?

- The employer has a legal obligation to accommodate, provided that the medical or religious reason is legitimate. For example, a person declining to be vaccinated for ethical reasons or due to a disbelief in vaccines or unfounded beliefs that vaccines cause certain types of disability, would not be protected as a human rights issue. Typically, requests for accommodation should be investigated and usually its best to seek legal advice before denying a request for accommodation, particularly during these unprecedented times.
- Possible forms of accommodation for employees declining vaccination for bona fide human rights protected reasons may include location transfers, changes in job requirements, enhanced PPE requirements, rapid testing and, where no other less intrusive form of accommodation would be available without undue hardship, an unpaid leave of absence as a last resort. What is possible without undue hardship will depend significantly on the stage of re-opening applicable to the region in which the agency is located, as well as the saturation of vaccination within the agency, among other things.
- The greater the degree of risk in the community (and the higher the threat to safety posed by unvaccinated workers), the easier it will be to prove that accommodating an unvaccinated employee without some fetters on their employment constitutes undue hardship.

5. Is it reasonable, given the current situation, for an employer to place the staff on an unpaid leave until such time as COVID-19 no longer presents a significant public health risk?

In the PooranLaw brief, the concept of “balance of interest” is explained as that which “involves balancing the employee’s interest in bodily integrity and privacy with the employer’s legitimate interests in invoking the vaccination policy.” PooranLaw suggested that “the balance of interest weighs in favour of vaccination, at least while COVID-19 is circulating widely in the community.”

PooranLaw’s brief summarized a case where a vaccination policy that placed unvaccinated staff on leave during periods of flu outbreak in a health care facility were upheld. PooranLaw has also summarized cases in which universal biweekly rapid testing for COVID-19 as a requirement for active duty (on threat of leave of absence) was also found to be legitimate despite incursions into privacy and bodily integrity of affected employees. PooranLaw cites these decisions as good indication that policies requiring unpaid leaves of absence as an alternative to vaccination may be upheld.

PooranLaw noted that at this point there remain no legal decisions in which an employer policy requiring vaccination on threat of a termination or leave of absence for work locations not in outbreak have been upheld. Moreover, unions have made clear that they intend to challenge policies that would see employees placed on leaves of absence due to a refusal to vaccinate on the basis that rapid antigen testing and education sessions should adequately address the risk posed by unvaccinated workers.

At the same time, PooranLaw also noted that the magnitude of the risk from COVID-19, the fact that outbreaks continue to arise and deaths continue to occur despite all measures short of mandatory vaccination and the powers and obligations that agencies have been imbued with during the pandemic under O. Reg. 121/20 could potentially justify a policy that imposes leaves of absence, at least during periods of lockdown or heightened community risk.

For agencies planning to implement a vaccination policy, it will be very important to assess your risk tolerance for litigation/arbitration and ensure your policies provide you with the best possible legal defence.

6. What best practices should be adopted for an employer wishing to implement a more aggressive vaccination policy (such as a policy imposing leaves of absence on all unvaccinated employees)?

- Ensure the policy was developed in consultation with the Joint Health and Safety Committee/Health and Safety Representative and legal advice.
- Ensure the policy is consistent with the principles and language in any applicable collective agreement
- Ensure the policy and employment consequences for failing to adhere to the policy are reasonable given the current circumstances of the pandemic and public health risks COVID-19 poses:
 - Consider whether any other measures (such as rapid testing) would be sufficient to address the risks
 - Consider whether outbreaks continue to arise despite all other measures adopted (including rapid antigen testing etc.)
 - Make regular updates based on the degree of risk in the community at the time that any negative consequences are imposed on an employee
 - Consideration the degree of risk within your organization and within the worker's work location
- Ensure the policy terms are clear and unequivocal
 - The agency in this example clearly outlined that the employee could choose between receiving a vaccine or else going off work without pay if they work in a congregate setting
- Ensure that the policy is clearly communicated to all employees.
- Ensure the policy clearly articulates the employment consequences which will apply if the employees choose not to vaccinate e.g., placing the staff on unpaid leave
- Consistently applying the policy to all employees who refuse to be vaccinated
- Ensure that employees identifying a human rights related need for accommodation are given the opportunity to prove they have a bona fide basis for accommodation. For example, the staff has an autoimmune deficiency and their doctor has advised they should not have the vaccine. Or the staff may be heeding the guidance of their religious leaders that vaccines are unacceptable. (note, employees declining vaccination for religious reasons would be required to take part in vaccination education sessions and rapid testing under current government directives).
- Where there are bona fide human rights related restrictions are at play, investigate

options in consultation with the employee and the union (if any). Alternatives that may apply in addition to the mandatory rapid antigen testing may include enhanced PPE, re-deployment to a work location where the people support and staff in the worksite are at lower risk of infection (either because they have all been vaccinated, are younger, healthier and/or better able to observe Covid-19 precautionary measures), restrictions on working in more than one work location internally or externally, leaves of absence during outbreaks etc. Where these accommodations aren't possible or would not sufficiently address the risk then an unpaid leave may be the only option.

Disclaimer

Legal input and feedback included in this policy were provided by [PooranLaw](#) lawyers as members/consultants of the Sector Pandemic Plan Initiative's Governance working group. However, the legal input and feedback included in this policy should not be construed as legal advice. Each agency's circumstances and legal rights may vary and there will also be nuances within each agency. The goal of the legal input and feedback included in this document is to help present options and highlight risks and other considerations. Agencies may wish to seek legal advice specific to their agency's circumstances, the types of support they provide, their regional risks etc., once they have selected the options that meet the needs of their organization.