

LEADERS' GUIDE



**MANDATORY
VACCINATION
POLICIES AND
THE LAW**

**PREPARED BY THE LAW FIRM OF GOLDBLATT PARTNERS &
THE ONTARIO COUNCIL OF HOSPITAL UNIONS-CUPE**

Mandatory vaccination policies

CUPE'S APPROACH TO MANDATORY VACCINATION

This is the vaccination policy of the Ontario Council of Hospital Unions-CUPE:

All health workers who can be vaccinated, should get vaccinated.

Vaccination programs that are the most effective, according to the World Health Organization, are voluntary and not coercive.

Some workers cannot be vaccinated, for medical or religious reasons and these workers are protected under the Ontario Human Rights Code and must be accommodated as the law provides.

Anyone who is not vaccinated must have an employer-provided opportunity to speak confidentially with a medical professional to discuss concerns and to ask questions about the safety of vaccines and the benefits of vaccination for their families, co-workers and those in their care.

If following that discussion, a worker who has no protected right to refuse vaccination still chooses not to do so, her individual right to choose may come into conflict with the collective rights to well-being of her co-workers and their families and the people in her care.

Rapid antigen testing and screening immediately before entering work could be utilized, particularly in facilities in outbreak or communities with high rates of community spread, particularly for someone who is partially vaccinated or unvaccinated.

Discipline and harassment are not appropriate for people who refuse vaccination.

These are the vaccination mandate guidelines of the Canadian Union of Public Employees:

Vaccine Mandate Guidelines

COVID-19 has been with us for more than 18 months now, and CUPE members across the country have been on the frontline of this pandemic from the beginning.

The pandemic has been exhausting for our members, but there is an end in sight – if enough people get vaccinated. Vaccinations against COVID-19 are safe and effective and readily available and uptake across the country has been strong. But with new and prevalent variants causing a fourth wave of infection across the country, we need to do better.

CUPE has always encouraged our members to get vaccinated at their earliest opportunity, for the protection of ourselves, our coworkers, and the members of the public accessing the services our member provide. Everyone who can, should get vaccinated against COVID-19.

CUPE welcomes efforts to ensure safer workplaces and increase vaccination rates. This includes increasing vaccine accessibility for workers, accommodating workers who are not yet fully vaccinated, and the small number of those who cannot be.

Governments and employers across the country are discussing vaccine mandates for our workplaces. The following principles should guide CUPE representatives and locals when dealing with workplace vaccine mandates:

- Everyone who can get vaccinated against COVID-19 should.
- Governments and employers need to consult with unions before finalizing and implementing vaccine policies. Locals should reach out to employers proactively and make it clear that the union expects to be consulted about any vaccine policy changes.
- Vaccination programs are most effective when they include strong elements of education and encouragement. Locals should work with employers and public health to provide [vaccine education materials](#) or presentations.

- Vaccines are an important part of ensuring our workplaces are safe for everyone, and CUPE has always placed a priority on our members' health and safety. Our members have the right to be safe at work, and people have the right to receive public services in a safe environment.
- Vaccine policies are not a replacement for personal protective equipment, proper ventilation, and thorough cleaning regimes.
- Unvaccinated workers need to be provided with an opportunity to speak confidentially with a medical professional so they can better understand the benefits of vaccination. Employers should accommodate these appointments.
- Vaccine policies must accommodate the small number of workers who cannot be vaccinated for medical or religious reasons protected under human rights legislation.
- As a union, we recognize our obligation to those members who are not vaccinated.
- Measures such as alternate work arrangements, screening and pro-active testing before entering the workplace can be effective.
- Harassment and shaming of workers who refuse vaccination are never appropriate.

COVID VACCINES FOR HOSPITAL WORKERS, UNDERSTANDING YOUR RIGHTS

On August 17, 2021 the Chief Medical Officer of Health issued “Directive 6”, which required them to develop and enforce COVID vaccination policies for their workforces by September 7, 2021.

Since then, members and local leaders have raised a range of questions and concerns about vaccine policies.

While CUPE and OCHU encourage all workers who can become vaccinated to do so, we also recognize that this is a decision that each individual member will make for themselves.

Members have a right to a realistic assessment of the consequences that might flow from their choice.

The purpose of this document is to help local leaders answer questions about member’s rights.

What is Directive 6?

Directive 6 is an order of the Chief Medical Officer of Health that requires hospitals to enact vaccination policies for their workers. It imposes a number of minimum rules for what these policies need to contain.

Directive 6 gives hospitals significant flexibility in what to put into their policies. As a result, hospital policies may vary widely.

(You can find Directive 6 at the end of this Guide).

Are Hospitals Allowed to Make Vaccination Policies without Unions or Workers Agreement?

Yes, so long as those policies do not conflict with the collective agreement and are reasonable.

It is well established that employers have the right to unilaterally (i.e. without agreement of the union or workers) implement workplace policies as an exercise of their “management rights” so long as those policies do not conflict with the collective agreement and are reasonable.

This is not new, nor is it unique to vaccination policies.

A reasonable vaccination policy is one that balances the employer’s interests in protecting patients, workers and the public from the dangers of COVID-19 against workers’ interests in bodily integrity and privacy. COVID policies must also comply with the *Human Rights Code*.

Can a Hospital Force Workers to Become Vaccinated? What about “Informed Consent”?

A hospital cannot literally force a worker to be vaccinated. There is a difference between forcing a worker to be vaccinated, and imposing consequences on a worker who chooses not to become vaccinated.

Just because a worker suffers negative consequences for not being vaccinated does not mean that their employer is forcing them to be vaccinated.

So long as a worker has a choice whether or not to become vaccinated, even if they feel some pressure from the employer, they are not being forced to be vaccinated.

This is why the *Health Care Consent Act*, the “Nuremburg Code” and issues around practicing medicine without a license are not relevant to hospital vaccination policies.

What is relevant is whether the hospital vaccination policy reasonably balances the employer interests in maintain a healthy workforce, protecting patient safety, and preserving public health, and worker interests in privacy and bodily integrity.

What kinds of Consequences is the Employer Allowed to Impose on Workers who make the Choice not to Become Vaccinated?

There are no arbitration cases that have considered COVID vaccine policies that we are aware of.

However, there are many decisions over the last 30 years related to flu vaccination policies in healthcare settings, as well as a number of cases related to mandatory COVID testing policies.

These cases provide some guidance about the kinds of consequences that employers may impose on workers who choose not to be vaccinated.

Each policy has to be assessed individually to determine if it is reasonable.

However, **arbitrators have upheld policies that have placed unvaccinated workers on modified job duties that reduce their interactions with patients or other workers, as well as policies that place unvaccinated workers on unpaid leaves of absence for the duration of outbreaks.**

It is important to recognize that the COVID pandemic is not just another flu season. **Arbitrators will view COVID as being more serious and may be willing to accept even more significant consequences for workers as “reasonable”.**

For example, in flu vaccine cases, unpaid leaves of absence tended to last only for a relatively short period of time (i.e. until a flu outbreak in the workplace resolved).

In the context of the COVID pandemic, arbitrators may accept that even if there is no outbreak in the workplace, workers may be placed on unpaid leaves of absence.

Those leaves of absence may be for long periods of time, as there is no clear “end” to the COVID pandemic.

Can the Employer Fire a Worker who Refuses to Become Vaccinated?

We do not know. There are good arguments that they cannot, but the law in this area is uncertain.

Arbitrators might conclude that termination for vaccination is reasonable. They might also conclude that it is unreasonable.

Arbitrators in flu vaccination cases have repeatedly emphasized that the policies that they have upheld as reasonable did not result in discipline.

This suggests that it is important for a policy to be non-disciplinary in order to be reasonable.

A policy that terminates an employee for non-vaccination would be very different. **There is a good argument that this type of policy would not be reasonable because it does not adequately respect the workers’ right to choose what medical treatment to undertake.**

There are good arguments that a policy that threatens termination crosses the line and coerces workers into medical treatment against their will.

There are no cases that have considered a policy that involved the threat of termination as part of a vaccine policy, and so we do not know how an arbitrator would decide this kind of case.

There is a risk that they would view COVID as being so serious that it would justify this type of policy.

Members in workplaces with policies that threaten termination should understand that, if they refuse to become vaccinated, the employer might terminate them.

If this happens, **if the union were to grieve the termination, which it should do**, it could not guarantee a particular outcome. They might be reinstated to employment, or they might lose the case.

At this time, we do not know which outcome is more likely. Workers should understand the risks and uncertainty that they face when deciding whether or not to become vaccinated.

Can a Worker be Disciplined for Refusing to Comply with other Aspects of a Vaccination Policy?

There may be other aspects of COVID policies that, if not complied with, would be grounds for discipline. Possible examples include:

- A worker who forges a fake vaccination record as proof of vaccination and provides it to the employer where the policy requires workers to provide proof of vaccination;
- A worker who refuses to attend a vaccine education session that is held during work hours where the policy requires unvaccinated workers to attend such training; or
- A worker who attends the workplace without a negative COVID-19 test, if the policy requires unvaccinated workers to provide such test results;

What about the Human Rights Code?

The *Human Rights Code* applies to workplace vaccination policies.

Workers who are unable to become vaccinated because of a ground that is covered by the *Code* have the right to reasonable accommodation, up to the point of undue hardship.

A worker cannot be disciplined for not being vaccinated if the reason that they are not vaccinated is protected by the *Code*.

The *Code* protects against discrimination on a number of grounds.

The two grounds that are most likely to be relevant with respect to vaccination policies are “disability” and “creed”.

What is covered by “Disability”?

Workers who have a documented medical condition that makes them unable to become vaccinated with an available COVID-19 vaccine are protected by the *Code* on the ground of disability.

To be protected on the ground of disability, a worker must be able to provide objective medical evidence from a qualified health care practitioner (i.e. Doctor or Nurse Practitioner) that taking the available COVID-19 vaccines is contra-indicated.

Workers should be made aware that:

- Medical conditions related to vaccines other than the available COVID-19 vaccines would not be relevant unless a health care professional indicated that the condition also prevents the worker from taking available COVID-19 vaccines;
- Self-reported medical conditions or symptoms are not enough. Employers are entitled to receive objective medical evidence from an independent healthcare professional; and
- Concerns about the safety or efficacy of available COVID-19 vaccines (including concerns about long-term side effects, adverse reactions, or Health Canada’s approval process) do not constitute grounds for protection under the *Code*.

What is covered by “Creed”?

Creed is a concept that covers sincerely held religious beliefs, as well as certain non-religious beliefs that are similar to religious beliefs.

According to the Human Rights Commission, a non-religious belief system may constitute a creed if they are:

- Sincerely, freely and deeply held system of beliefs;
- Integrally linked to a person's identity, self-definition and fulfillment;
- A comprehensive and overarching system of belief that governs the person's conduct and practices;
- Address ultimate questions of human existence or non-existence of a creator and/or higher or different orders of existence; and
- Has some nexus or connection to an organization or community that professes a shared system of beliefs.

A singular belief against vaccination, or against the COVID vaccines is not a creed under the *Code*.

Similarly, beliefs that an individual should be allowed to decide what vaccines to take, or beliefs about the safety or efficacy of COVID vaccines or the dangers of COVID-19 are not creeds.

If a person's religion or creed prevents them from becoming vaccinated, they are entitled to reasonable accommodation.

There is no need for the individual to show that their belief is an essential or obligatory element of their creed, or that it is recognized by others of the same creed, including religious officials. The belief must, however, be sincerely held.

An individual may not use a claim of creed that does not reflect a sincerely held belief as an excuse not to become vaccinated.

What Accommodations are Available for Unvaccinated Workers who are Protected by the Code?

Reasonable accommodation is an individualized process, that depends on the specific circumstances of the individual, including the details of their disability/creed, the nature of their job duties and, in the context of the current pandemic, the prevailing public health situation and state of scientific knowledge.

What will be a reasonable accommodation for one worker may or may not be a reasonable accommodation for another worker.

Unions, workers and employers have a duty to cooperate and work together to identify reasonable accommodations.

Flu vaccine case law suggests that there are a number of accommodations that could be reasonable for unvaccinated workers, depending on the circumstances, including modified job duties and paid leaves of absence.

Unpaid leaves of absence are less likely to constitute a reasonable accommodation.

However, given the uncertainty of how long such a leave would last, employers may try to demonstrate that the requirement to pay during a leave of absence would constitute undue hardship.

Regular COVID-19 testing before accessing the workplace would likely be another option for reasonable accommodation for

unvaccinated workers, unless the worker is unable to be tested for a reason protected by the *Code*.

Workers who are not vaccinated because of a *Code*-protected ground cannot be disciplined as a result of not being vaccinated.

Can Employers Require Workers to Disclose their Vaccine Status, or Provide Proof of Vaccination?

Yes, so long as this information is kept confidential, is protected from unauthorized access, and is used only for the purpose of administering a COVID vaccination policy.

Workers have privacy rights in the workplace. There are also limits to an employee's right to privacy.

Employers have the right to information that is necessary for them to run their workplace. This includes information that is necessary for them to implement a reasonable COVID vaccination policy.

At a minimum, this would include whether or not each employee is or is not vaccinated, as well as proof of vaccination for those workers who are vaccinated.

Employers must still protect worker's privacy when they collect this type of personal medical information. Employers are required to ensure that only those people who need to have access to this information do have access to it.

Other workers, or members of the public, or management that does not have a need to access this information should not have access.

Steps should be taken to make sure that this information is stored securely, such as using locked cabinets or password protection on computers.

Employers may also only use an individual's vaccine status information for the purpose of implementing and enforcing a COVID policy.

The employer should not use a worker's vaccine status for some other purpose. If they did so, they would likely be violating the worker's privacy rights.

What about the Personal Health Information Protection Act? Don't Worker's Have a Right not to Disclose their Personal Health Information?

Not in this context. Operators of public hospitals are "health information custodians" under the *PHIPA (Personal Health Information Protection Act, 2004)*.

However, the vaccine status information of their employees does not constitute "personal health information" if the hospital has that information for a reason other than providing healthcare to the employee.

Maintaining a record of vaccine status for implementing a COVID vaccination policy in the workplace would fall within this exception.

What about the Charter and the Canadian Bill of Rights?

The *Charter of Rights and Freedoms* likely does not apply to the hospital's relationship with its workforce.

Even if the *Charter* did apply, it would likely not go any further than the *Human Rights Code* and the general requirement for employer policies to be reasonable.

The *Bill of Rights* only applies to the Federal Government. It does not apply to hospitals in any way.

This doesn't Seem Fair

Workers have the right to understand the law as it currently stands.

Workers also have the right to view the law as fair or unfair.

Even if they believe the law is unfair, it is important that they understand what the law is.

Workers have the right to understand what the consequences of their choices may be, whether or not those consequences are fair.

Workers should make decisions in light of the most accurate information that you are able to provide them.

COVID-19

Directive #6 for Public Hospitals within the meaning of the *Public Hospitals Act*, Service Providers in accordance with the *Home Care and Community Services Act, 1994*, Local Health Integration Networks within the meaning of the *Local Health System Integration Act, 2006*, and Ambulance Services within the meaning of the *Ambulance Act, R.S.O. 1990, c. A.19*.

Issued under Section 77.7 of the Health Protection and Promotion Act (HPPA), R.S.O. 1990, c. H.7

WHEREAS under section 77.7(1) of the HPPA, if the Chief Medical Officer of Health (CMOH) is of the opinion that there exists or there may exist an immediate risk to the health of persons anywhere in Ontario, he or she may issue a directive to any health care provider or health care entity respecting precautions and procedures to be followed to protect the health of persons anywhere in Ontario;

AND WHEREAS, many health care workers (HCW) in higher risk settings remain unvaccinated, posing risks to patients and health care system capacity due to the potential (re) introduction of COVID-19 in those settings, placing both HCW and patients at risk due to COVID-19 infection;

AND HAVING REGARD TO the prevalence of the Delta variant of concern globally and within Ontario, which has increased transmissibility and disease severity than previous COVID-19 virus strains, in addition to the declaration by the World Health Organization (WHO) on March 11, 2020 that COVID-19 is a pandemic virus and the spread of COVID-19 in Ontario

AND HAVING REGARD TO the immediate risk to patients within hospitals and home and community care settings who are more vulnerable and medically complex than the general population, and therefore more susceptible to infection and severe outcomes from COVID-19

I AM THEREFORE OF THE OPINION that there exists or may exist an immediate risk to the health of persons anywhere in Ontario from COVID-19;

AND DIRECT pursuant to the provisions of section 77.7 of the HPPA that:

Directive #6 for Public Hospitals within the meaning of the *Public Hospitals Act*, Service Providers within the meaning of the *Home Care and Community Services Act, 1994*, Local Health Integration Networks within the meaning of the *Local Health System Integration Act, 2006*, and Ambulance Services within the meaning of the *Ambulance Act, R.S.O. 1990 c. A19*.

Date of Issuance: August 17, 2021

Effective Date of Implementation: September 7, 2021

Issued To: Public hospitals within the meaning of the *Public Hospitals Act*, service providers within the meaning of the *Home and Community Care Act, 1994* with respect to their provision of community services to which that Act applies, Local Health Integration Networks within the meaning of the *Local Health System Integration Act, 2006* operating as Home and Community Care Support Services with respect to the provision of community services and long-term care home placement services, and Ambulance Services within the meaning of the *Ambulance Act*, with respect to paramedics (collectively the “**Covered Organizations**”).

Required Precautions and Procedures

1. Every Covered Organization must establish, implement and ensure compliance with a COVID-19 vaccination policy requiring its employees, staff, contractors, volunteers and students to provide:
 - a) proof of full vaccination^[1] against COVID-19; or
 - b) written proof of a medical reason, provided by a physician or registered nurse in the extended class that sets out: (i) a documented medical reason for not being fully vaccinated against COVID-19, and (ii) the effective time-period for the medical reason; or
 - c) proof of completing an educational session approved by the Covered Organization about the benefits of COVID-19 vaccination prior to declining vaccination for any reason other than a medical reason. The approved

^[1] For the purposes of this document, “fully vaccinated” means having received the full series of a COVID-19 vaccine or combination of COVID-19 vaccines approved by WHO (e.g., two doses of a two-dose vaccine series, or one dose of a single-dose vaccine series); and having received the final dose of the COVID-19 vaccine at least 14 days ago.

session must, at minimum address:

- i. how COVID-19 vaccines work;
 - ii. vaccine safety related to the development of the COVID-19 vaccines;
 - iii. the benefits of vaccination against COVID-19;
 - iv. risks of not being vaccinated against COVID-19; and
 - v. possible side effects of COVID-19 vaccination.
2. Despite paragraph 1, a Covered Organization may decide to remove the option set out in paragraph 1(c) and require all employees, staff, contractors, volunteers and students to either provide the proof required in paragraph 1 (a) or (b).
3. Where a Covered Organization decides to remove the option set out in paragraph 1(c) as contemplated in paragraph 2, the Covered Organization shall make available to employees, staff, contractors, volunteers and students an educational session that satisfies the requirements of paragraph 1(c).
4. Every Covered Organization's vaccination policy shall require that where an employee, staff, contractor volunteer, or student does not provide proof of being fully vaccinated against COVID-19 in accordance with paragraph 1(a), but instead relies upon the medical reason described at paragraph 1(b) or the educational session at 1(c) or if applicable, the employee, staff, contractor volunteer or student shall
 - a) submit to regular antigen point of care testing for COVID-19 and demonstrate a negative result, at intervals to be determined by the Covered Organization, which must be at minimum once every seven days.
 - b) provide verification of the negative test result in a manner determined by the Covered Organization that enables the Covered Organization to confirm the result at its discretion.
5. Where the Covered Organization is a public hospital, the Covered Organization's vaccination policy applies to any businesses or entities operating on the hospital site.
6. Every Covered Organization must collect, maintain and disclose, statistical (non-identifiable) information as follows:
 - a) Documentation that includes (collectively, "the statistical information"):
 - i. the number of employees, staff, contractors, volunteers and students that provided proof of being fully vaccinated

If local leaders have questions concerning the mandatory vaccination policy in your workplace:

Please contact Louis Rodrigues (at louisr@ochu.on.ca), First Vice-president, Ontario Council of Hospital Unions-CUPE, who can set up a teleconference for you & your national staff representative and the law firm of Goldblatt Partners.