

Memorandum 21:41

Date: July 26, 2021

To: Presidents and Administrative Officers
Local and Federated Associations

From: David Robinson, Executive Director

Re: **Legal Considerations for Mandatory Vaccine Policies**

As institutions announce reopening plans for the Fall semester, questions have arisen about whether universities and colleges can legally mandate COVID-19 vaccinations for staff and students.

Everyone should be strongly encouraged to vaccinate for personal and community protection. However, in the absence of public health regulations or orders mandating vaccines, the lawfulness of a mandatory vaccination policy will be highly dependent on the specific context.

Basic Legal Considerations

Mandatory vaccination requires a balancing of health and safety legislation requirements (that employers take every reasonable precaution to protect employees) with privacy and human rights.

The law demands that any mandating of COVID-19 vaccination in an employment context must:

- weigh individual employee privacy rights and personal autonomy against the safety of others;
- be premised on strong evidence of the effectiveness of the vaccine in the specific environment in question, not only for the individual recipient but also in ensuring individuals cannot pass on the virus even if vaccinated;¹
- account for the effectiveness of possible, reasonable alternative options (such as masking and social distancing or working from home);
- ensure the policy/rule reasonably applies to all those in the workplace unit (e.g., all workers, academic staff, students and administration), and will be enforced fairly;
- provide accommodation for those whose health or religious beliefs do not permit vaccination (however, those who are not vaccinated may be excluded from environments where the risk they pose to others would be unacceptable); and
- provide for confidentiality and protection of personal privacy.

According to the [Office of the Chief Science Advisor of Canada](#), there is strong scientific evidence that “fully vaccinated individuals have a significantly decreased risk of SARS-CoV-2 infection and likely have a decreased risk of spreading the infection to others”. When it comes to other potential benefits of vaccination, including limiting transmission to others, research is continuing:

¹: “Scientific Considerations for Using Covid-19 Vaccination Certificates: Report of the Chief Science Advisor of Canada” (March 31, 2021).

Given the short time since the COVID-19 vaccines have become available, it is not surprising that many scientific uncertainties persist and are the subject of intense ongoing studies. They include 1) the ability of vaccines to reduce/eliminate SARS-CoV-2 transmission, 2) duration of immunity, 3) correlates (indicators) of protection, 4) vaccine efficacy/effectiveness in specific populations and in individuals with prior infection, and 5) protection against infection/reinfection by different virus variants.

To date, there has been no legal decision concerning an employer or institution's right to mandate COVID-19 vaccination. The caselaw on other mandatory vaccination policies² suggests that in workplaces with high levels of close social interaction, and especially in health care settings, an employer could require an employee to vaccinate or be forced to stay home (without pay unless the collective agreement provides otherwise) if no alternative safety measures could be implemented. This is particularly so where there is no clear collective agreement language on the issue.

Associations should be aware that adopting calls for mandatory vaccine on campus may limit their ability to represent individual members who cannot be vaccinated and face penalty.

Academic staff associations and Joint Health and Safety Committees should work closely with their administration in developing any policies related to COVID-19 vaccination to ensure the safest re-opening of campuses for all, bearing in mind the importance of individual privacy. At minimum, the Employer must ensure that provincial guidelines and regulations regarding COVID-19 safety precautions are respected for students and staff.

If an association is involved in the development, adoption, or approval of a mandatory vaccine policy, they should advise the Employer in writing that the Association reserves the right to challenge the policy or its application through the grievance procedure.

Vaccination Tracking/Vaccine Passports

Any request or requirement that an employee or student provide proof of vaccination is subject to privacy law. Vaccination information constitutes personal health information and is subject to strict legal protection.

In a [May 19, 2021 joint statement](#) regarding the possible implementation of vaccine passports, the Federal, Provincial and Territorial privacy commissioners noted:

[I]n light of the significant privacy risks involved, the necessity, effectiveness and proportionality of vaccine passports must be established for each specific context in which they will be used.

- **Necessity:** *vaccine passports must be necessary to achieve each intended public health purpose. Their necessity must be evidence-based and there must be no other less privacy-intrusive measures available and equally effective in achieving the specified purposes.*
- **Effectiveness:** *vaccine passports must be likely to be effective at achieving each of their defined purposes at the outset and must continue to be effective throughout their lifecycle.*
- **Proportionality:** *the privacy risks associated with vaccine passports must be proportionate to each of the public health purposes they are intended to address. Data minimization should be applied so that the least amount of personal health information is collected, used or disclosed.*

² See e.g., [St. Michael's Hospital v Ontario Nurses' Association](#), 2018 CanLII 82519 (ON LA) and [Sault Area Hospital and Ontario Nurses' Association](#), 2015 CanLII 55643 (ON LA)

The necessity, effectiveness and proportionality of vaccine passports must be continually monitored to ensure that they continue to be justified. Vaccine passports must be decommissioned if, at any time, it is determined that they are not a necessary, effective or proportionate response to address their public health purposes.³

If an institution meets the above conditions for requiring proof of vaccination, it must have a policy in place which sets out:

- the purpose for the policy;
- the requirements for employees (e.g., whether they must provide proof of vaccination);
- the requirements for students, including requirements for international students who have not received a Health Canada approved vaccine;
- repercussions on employees and students for not providing the necessary information;
- confirmation as to where the information will be stored; and
- how the information will be shared and when it will be destroyed.

Academic staff associations should be consulted on such policies.

At this time, the provinces do not have interoperable vaccine registries which may make it more difficult to accurately verify the vaccination status of staff and students from different provinces.⁴ International students must either have taken Canadian-approved vaccines or quarantine for 14 days upon entry into the country.⁵ They may then take Canadian-approved vaccines.

Staff may not legally ask students or others about their vaccination status. Vaccination status is connected to health and (possibly) religious status. Both aspects are deeply personal and protected by human rights and privacy laws.

Duty to Accommodate

If a mandatory vaccination policy is implemented, institutions are legally required to accommodate students and staff who have disabilities/medical conditions and/or religious reasons which affect their ability to be vaccinated. Scepticism of the efficacy of vaccines is not grounds for accommodation.⁶

Conclusion

The science is clear that vaccination against COVID-19 is crucial for personal and community safety. However, absent public health orders mandating vaccination, whether institutions can legally implement mandatory vaccination policies requires weighing health and safety requirements and the risk of COVID-19 within the campus community, against collective agreement rights as well as privacy legislation, the right to bodily integrity, and human rights.

³ Office of the Privacy Commissioner of Canada, "Privacy and COVID-19 Vaccine Passports: Joint Statement by Federal, Provincial and Territorial Privacy Commissioners" (May 19, 2021)

⁴ Government of Canada, "Coronavirus disease (COVID-19): International students"

⁵ Ontario Ministry of Health, "[COVID-19 Guidance for Individuals Vaccinated outside of Ontario/Canada V. 1.0](#)" (June 4, 2021)

⁶ See e.g., [The Customer v. The Store](#), 2021 BCHRT 39. This case concerns mandatory masking, but the principles articulated regarding the grounds for accommodation apply equally to vaccination.