

Vaccination is one major way we are going to fight our way out of the pandemic. It is one way we collectively work to keep each other safe, and starve the COVID-19 virus of places to spread. As workers, we have a vested interest in safe and healthy workplaces. CUPE encourages everyone who is able to get vaccinated.

WHAT KINDS OF VACCINE POLICIES EXIST?

In general, there are two types of vaccination policies. The first is mandatory vaccination. Mandatory vaccination requires you to be fully vaccinated in order to attend work, except where you are exempt due to a protected human rights ground, such as a medical condition or religion. We have seen these announced by some municipalities, universities, hospitals, long-term care operators, airlines, and school boards.

The second common type of policy is “vax or test,” which requires workers to be fully vaccinated or to submit to frequent testing – typically at least once per week, but more often under some policies. We have seen vax or test policies implemented in school boards, childcare, healthcare, social services, and other sectors.

WHO IS CREATING VACCINE POLICIES?

In some sectors, the provincial government is requiring employers to create vaccination policies. For example, in the health and education sectors, the Chief Medical Officer of Health has issued instructions requiring school boards and many health facilities to implement a “vax or test” policy for employees at a minimum. The federal government is requiring mandatory vaccination for some federally-regulated workplaces such as airlines.

Some employers are implementing vaccination policies unilaterally by relying on management rights. Such policies must be reasonable.

CAN MY EMPLOYER MAKE VACCINATION MANDATORY?

Given the contagiousness and serious health and safety risks of COVID-19, it is likely arbitrators will uphold requirements to be vaccinated in order to attend work in person. That said, mandatory vaccination policies must be reasonable, and they must be applied reasonably.

Policies need to consider how to accommodate workers who cannot get the vaccine based on a protected human rights ground, like a medical condition preventing vaccination, or a religious objection. They should set out clear expectations and provide reasonable timelines and notice at each step.

WHAT ABOUT MY PRIVACY RIGHTS?

Vaccination policies will require employers to gather personal health information in the form of employees’ vaccination status. Employers are permitted to gather personal health information for a legitimate employment purpose, provided they gather no more information than is necessary to achieve that purpose. They must also use the information gathered only for the purpose of implementing the policy. And, any personal health information gathered (including vaccination status) must be kept confidential.

COVID-19 testing information, including the results of tests, is also personal health information. Gathering COVID-19 test results is reasonable in the context of a COVID-19 workplace testing program. Again, confidentiality must be respected.

Employers should already have mechanisms in place to safeguard confidential medical information, as they are required to gather it in circumstances like medical accommodations.

DO I HAVE A RIGHT TO REFUSE VACCINATION WHERE MY EMPLOYER HAS A MANDATORY VACCINATION POLICY IN PLACE?

An employee can always refuse to be vaccinated. However, there may be consequences if you refuse. COVID-19 is a new disease. We do not know of any CUPE collective agreement that has language outlining what happens where an employee refuses to be vaccinated against COVID-19, if there is a policy requiring it.

Human rights legislation provides protections only for those who fall within its limited scope (see more below).

Locals will need to continue discussions with employers around vaccination policies and implementation issues.

In some cases, locals may be able to negotiate alternate work arrangements (like remote work), that allow unvaccinated employees to continue working, while not endangering the health and safety of others.

Where alternate work arrangements are not possible, locals should try to negotiate the ability to draw down vacation and other banks while workers remain out of the workplace. Where members run out of banked time, locals should try to negotiate unpaid administrative leave as an alternative to termination.

HOW DOES THE HUMAN RIGHTS ACCOMMODATION PROCESS WORK UNDER A MANDATORY VACCINATION POLICY?

An employee seeking a human rights accommodation must first demonstrate that they are unable to be vaccinated for a reason protected by legislation, such as disability or religion/creed.

There are a limited number of reasons someone would be medically unable to receive any COVID-19 vaccine. One reason might be an allergy to an ingredient in all available COVID-19 vaccines. The vast majority of people can safely get any approved COVID-19 vaccine. An exemption based on religion/creed requires an employee to link their refusal to get a COVID-19 vaccine to a sincerely held religious or similar belief system. Skepticism about the safety or effectiveness of vaccines, or political opposition to vaccination, is not enough.

Keep in mind that judicial decision makers have not accepted that any individual personal belief constitutes a creed. Some employees who oppose COVID-19 vaccines may try to claim a personal belief that vaccines are ineffective or harmful amounts to a creed. But without a clear connection between such views on COVID-19 vaccines and a broader religious or analogous belief system (rather than a political ideology), such claims are unlikely to be successful.

Accommodations that would exempt an employee from masking or testing are extremely rare.

Even if you have grounds for an accommodation, an employer is only required to accommodate up to the point of undue hardship. However, an employer can take into account the health and safety of others in the workplace in deciding whether to grant a particular requested accommodation.

CAN I LOSE MY JOB IF I DON'T GET VACCINATED OR COMPLY WITH TESTING REQUIREMENTS?

Some employer policies do say employees who refuse to be vaccinated will be fired (except those with a proven human rights accommodation). Termination should always be the last step in discipline. There are alternatives an employer should explore prior to termination. For example, an employer should consider whether it is possible for an unvaccinated employee to work from home.

If you are terminated, talk to a steward and file a grievance. Explain your particular situation to your local. Your local will decide what to do with your grievance, including whether to refer it to arbitration. There is a strong chance arbitrators could uphold the terminations of employees who refuse to be vaccinated.

Where a vax or test policy is in place, the odds of an arbitrator overturning such a termination are low.

WILL I GET PAID IF I'M ON LEAVE OR TERMINATED?

Locals can encourage employers to allow employees to draw on leave banks in the collective agreement, such as vacation. Whether or not an employee has a right to do this will depend on the particular collective agreement language. Once an employee runs out of banked time, any leave will very likely be without pay. Whether an employer must continue benefits during a leave will be determined by the collective agreement.

If you are terminated, your employer will almost always say you were fired "with cause" and not pay you any severance.

Service Canada often denies employees fired "with cause" EI benefits. If it does, it is up to the employee to challenge Service Canada's decision and say why they should get EI benefits.

WHY DON'T VACCINATED PEOPLE HAVE TO GET TESTED?

While vaccinated people can become infected, infection is much less likely as compared with unvaccinated people.

Vaccination status is not a protected human rights ground. It is therefore not a form of prohibited discrimination for an employer to treat vaccinated and unvaccinated employees differently for the purpose of determining whether they need to be regularly tested or not.

Workplace Health & Safety

Workers have a right to a healthy and safe workplace. Vaccination is one part of ensuring that right, as it significantly reduces the chance of a workplace outbreak and helps protect anyone who is infected from serious harm.

But it is not a solution on its own. Vaccination must be part of a workplace COVID-19 plan that should involve your union health and safety representatives and include other measures, such as improved ventilation, distancing, screening, and PPE.