

COVID-19: Returning to Work During the 4th Wave in Ontario

Webinar

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Outline

- Update on health and safety requirements
- Vaccination policies for employers
- Vaccination requirements
- Alternate work arrangements
- Accommodating a returning workforce

Health and Safety

Public health measures and health & safety protocols

Primary applicable laws

- Reopening Ontario (A Flexible Response to COVID-19) Act (ROA)
 - Public health measures and restrictions
- Occupational Health and Safety Act (OHSA)
 - The health and safety rights and duties of everyone in the workplace

Reopening Ontario Act: New Key Regulations

- Reg. 577/21 – Establishing a COVID-19 vaccination policy
 - Any organization or business that is open must comply with directions of the Chief Medical Officer of Health regarding content and implementation of a COVID-19 vaccination policy.

Example: Toronto Public Health

- Requirements include:
 - To whom it will apply (employees or others on premises as well?)
 - Actions required, including the provision of proof of vaccination status or a medical exemption, and completing a vaccination education course if they choose not to get vaccinated.
 - Compliance deadline(s)
 - Provisions for unvaccinated workers
 - Consequences of non-compliance

Reopening Ontario Act: New Key Regulations

- Reg. 645/21 – Proof of Vaccination
 - Applies to restaurants, bars, convention spaces, sports facilities, etc.
 - Any such organization or business that is open must require of all patrons both proof of identity and of full vaccination
 - Full vaccination: Received, at least 14 days prior, the full vaccine series authorized by Health Canada, OR, if it was a vaccine not authorized by Health Canada, two doses of that vaccine plus an mRNA vaccine, or three doses of the unauthorized vaccine

Occupational Health and Safety Act (OHSA)

- Every employer has a duty to “take every precaution reasonable in the circumstances for the protection of a worker.”
- No published regulations under this Act that specifically relate to COVID-19.
- Must rely on Ministry of Labour Guidance and general best practices

OHSA: Every Reasonable Precaution

- Encourage symptomatic workers not presently at work to stay home;
- Send home both symptomatic workers and those who were exposed to them
- Active and ongoing disinfection and provision of hand sanitizer, etc.
- Supply PPE where warranted and ensure proper training on how to put on and take off PPE safely
- Daily screening
- Contact tracing

Every reasonable precaution will not always be enough

- If an employee tests positive and it's likely due to a workplace exposure, report it as it as a workplace accident to WSIB. (Employer premiums are not affected by such claims)
- It must also be reported to the Ministry of Labour, Training and Skills Development, the workplace's joint health and safety committee or health and safety representative and the worker's trade union (if applicable)

OHSA: Work Refusals

- There is a limited right to refuse to do work that the worker believes to be unsafe.
- Overwhelming majority of complaints to date were rejected as unwarranted.
 - Nonetheless a work refusal requires investigation
 - If not then resolved, a Ministry of Labour inspector must be notified

Vaccination

Vaccination policies for employers

Vaccination policies – 4 key points

- Expect a dynamic environment going forward
- Avoid information overload
- Prepare for increasing integration
- Implement a vaccination policy

Current legal landscape

- Ontario vaccination mandates / directives
 - Established by Ontario government / regulation
 - Chief Medical Officer of Health
 - Apply to an employer's employees, contractors, volunteers, etc.
 - Limited so far – long-term care homes, hospitals, and home and community care service providers
 - Minimum requirements (can be exceeded)
 - Full vaccination
 - OR medical reason for not being vaccinated
 - OR completion of COVID-19 vaccination educational session
 - Unvaccinated individuals required to undergo regular COVID-19 antigen testing

Current legal landscape (cont'd)

- Ontario vaccine passports
 - Legislated requirement
 - As of September 22, Ontarians required to provide “proof of vaccination” to access certain business, facilities and settings
 - Only applies to patrons of a business, facility or setting
 - Does not apply to employees, workers, volunteers, etc.
 - Medical exemptions in limited circumstances
 - Severe allergic reaction to components of COVID-19 vaccine
 - Certain heart conditions
 - Digital vaccine certificate being developed
 - Business / organization prohibited from retaining patron’s proof of vaccination

Current legal landscape (cont'd)

- Recommendations for vaccination policies
 - Toronto Medical Officer of Health statement from August 20
 - Strongly recommending that local employers institute a workplace vaccination policy to protect their employees and the public from COVID-19
 - At a minimum
 - Workers provide proof of their vaccination
 - Unvaccinated workers provide written proof of a medical reason
 - Unvaccinated workers complete vaccination education course on the risks of being unvaccinated in the workplace
 - Not quite the same as a legal obligation

Vaccination policy alternatives

- Vaccination encouraged
 - Formal statement along with supports and incentives
- Choice of vaccination or alternative
 - Unvaccinated or undisclosed
 - Submit to other workplace risk mitigation measures (e.g. testing)
- Mandatory vaccination(-ish)
 - Consequences of failure to get vaccinated unclear
- True vaccination requirement
 - Get vaccinated or face being terminated
 - Exemptions only for human rights grounds

Content of policies

- Scope and purpose
 - COVID-19 variants / protecting workers
 - Workers, contractors, agency staff, customers
 - Health and safety requirements
- Action steps workers must take
 - Provide proof fully vaccinated
 - Bring forward request for exemptions (medical and others?)
 - Vaccination education course
- Deadline for action steps
 - Reasonable dates

Content of policies (cont'd)

- Available supports for vaccination
 - Paid leave to get vaccinated / paid days in case of side effects
 - Vaccination incentives
- Provisions for unvaccinated workers
 - Additional PPE / frequent COVID-19 testing / modified work / remote work
 - Different considerations in event of outbreak
 - Vacation / unpaid leave / termination?
- Accommodations / exemptions

Content of policies (cont'd)

- Consequences of non-compliance
- Privacy considerations
 - Comply with privacy legislation
 - Purposes / confidentiality / security
- Staff contact
 - Person to be contacted if employees have questions about policy and what is required of them
 - Accommodation requests

Vaccination and privacy

- Consider privacy legislation / privacy policies
- Vaccination status is sensitive personal information
 - But, according to an Ontario judge, it sits “toward the low end of the privacy spectrum”
- Collection, use and disclosure
 - What is reasonably required to fulfill a specific business purpose
 - What personal information will be collected
 - How the data will be used
 - To whom it will be disclosed
- Safeguards / security / “need to know”

Vaccination accommodations

- Requests for exemptions from vaccination requirements
 - Unable to get vaccinated due to a human rights ground
 - Request accommodation
 - Remote work, use of PPE / physical distancing, regular COVID-19 testing, unpaid leaves of absence
- What justifies an exemption?
 - Medical: Ministry of Health guidelines from September 14
 - Allergies / certain heart conditions
 - Creed / religion: OHRC statement from September 22
 - Personal preferences and singular beliefs do not amount to a creed

Vaccinations and contractors

- Standard approach is for organization's vaccination policy to apply to employees and contractors
 - Condition on being granted access to physical site
 - Rationale is that risk of infection is the same for a fellow employee as for a contractor
- Trickle-down effect
 - Contractor is required to meet vaccination requirements of strictest customer
 - At least for part of workforce
- Customer may require direct or indirect proof

Vaccinations

Supporting employees in navigating and enforcing vaccination requirements

Supporting Your Employees

- The unvaccinated employee
 - Share credible evidence-based information with employees
 - Supportively address fear / reluctance
 - Consider whether accommodations such as continued work from home are viable
 - Facilitate vaccination – paid time off, transportation to clinic, host an onsite clinic
 - Accommodate adverse reactions

Supporting Your Employees

- Outward facing employees
 - Should not be required or expected to answer customer or guest questions about their personal vaccination status
 - Post your vaccination policy or make it available to someone who asks
 - An indirect answer: “We have a vaccination policy that I need to comply with”
 - Consider, where all such employees are in fact fully vaccinated, having them wear pins or stickers that say so

Supporting Your Employees

■ The Gatekeepers

- Ensure employees know that refusers can be politely invited to an outdoor eating / drinking area
- Make it clear that you have your employees' backs. No patron being turned away will get you in trouble
- The refuser who wants your employee to let them in anyhow is asking the employee AND you to break the law
- Remember “every reasonable precaution”. In the event of escalation, employees are entitled to remove themselves from the situation, and management should not be overly reluctant to seek police assistance
- Back them up!

Return to work issues

Return to work issues

- Ending, modifying or maintaining alternate work arrangements (remote / hybrid)
- Ending
 - Clear communication is key
 - Avoid constructive dismissal claim
- Modifying / maintaining
 - Develop remote work / hybrid work policy
 - New employment contracts
- Common issues throughout pandemic
 - Disability / family status (childcare / eldercare)

Questions?