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COVID-19: VACCINATION IN THE WORKPLACE

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As vaccination endeavours ramp up in Manitoba, quickly changing rules and policies have left many employers feeling confused. What does life after COVID-19 protocols look like? Can we mandate vaccinations in the workplace? How do we balance a safe return-to-work plan while respecting our employees' individual rights and comfort levels? Ensuring practical and respectful policies in the workplace feels like trying to hit a moving target. After 16 months of social distancing, it seems the next challenge we face is how to come back together safely and complaisantly.



CME and Made Safe have compiled a list of frequently asked questions along with additional advice to help you navigate this quickly changing transitional period. By addressing our members' concerns - and with the help of industry professionals - we hope to provide a sense of clarity to help you return to work.

VACCINATIONS IN THE WORKPLACE

Is it possible to mandate vaccines for employees?

One of the most controversial topics among employers and employees alike is whether or not vaccines will become mandatory. Under occupational health and safety legislation, employers have a legal duty to take all reasonable precautions to protect the health and safety of their workers. However, absent express public health guidance or the implementation of legislation stating otherwise, the legal duty is generally unlikely to allow Canadian employers to force an employee to be vaccinated, particularly if the employee has a legitimate, bona fide human rights reason that would prevent vaccination. These may include allergies, religious reasons, or other protected characteristics.

What about visitors or contractors?

If you run a business that commonly welcome customers, contractors or other visitors, is it possible to permit entry only to those who have been vaccinated? In short, no. It is strongly recommended that you do not restrict access to non-vaccinated individuals as this can be seen as discriminatory, especially in cases with a legitimate medical, religious, or other protected characteristic driver. Rather, you may offer to remove COVID-19 controls (e.g., mask wearing) upon proof of vaccination. If a visitor does not wish to disclose this information, they must abide by existing health and safety protocols to ensure the safety of other visitors and staff.

BEST PRACTICE GUIDELINES

What is reasonable?

Many employers have serious (and oftentimes, common) questions about what they can mandate in the workplace. For example, why can they mandate mask-wearing but not vaccines? This is a theme that has caused frustration throughout the pandemic. When trying to think about where to draw the line, a key term to remember is reasonableness. What is considered "reasonable" in the eyes of a courtroom drives many important policies and creates the basis for what you can and cannot mandate in the workplace. "Fair, proper, moderate under the circumstances, rational, and appropriate" will be included in the test for reasonableness.

Mandatory vaccinations, in most cases, are described as unreasonable. Vaccines can be defined as invasive as they are required to enter the body as part of their process. In contrast, masks are external, can be removed easily, and most masks used in public settings are less impactful than the respiratory protection that is currently used in many workplaces. Because of this, it is much more reasonable to expect employees to wear a mask throughout the day than to receive a vaccine, which is largely invasive and cannot be undone.

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IMPORTANT NOTE: This information is intended as best practice guidance, not as medical or legal advice. Information about the Coronavirus changes rapidly. Always refer to a public health authority for medical advice, and consult legal counsel regarding legislative concerns.

Conversely, there are instances where being vaccinated may be a condition of employment. For example, employees in roles that are required to travel to jurisdictions that mandate vaccinations or have prohibitive isolation requirements in the absence of a vaccination. In a case like this, it may be reasonable to require those employees to become vaccinated. Be careful, though – many jurisdictions, including Manitoba, have exempted truck drivers from isolation requirements and so becoming vaccinated would not be necessary to fulfill their job responsibilities. This would indicate that this situation may not pass the reasonable test. For any specific cases, it is strongly recommended to seek legal counsel before proceeding.

Is it reasonable for my employees to refuse to return to work until a 100 per cent vaccination rate is achieved in the work environment?

This would be an unreasonable position for the employee to hold. It is not possible to mandate that all employees become vaccinated, nor even to require that all employees make the company aware of whether or not they have been vaccinated. In this instance, the layers of protection provided by COVID-19 health and safety protocols (e.g., physical distancing, individual daily health screening, mask use, etc..) will create a work environment that meets an accepted safety standard.

Each company does have an obligation to protect all employees, including high-risk personnel, however, vaccinations are not the only way to accomplish an accepted level of safety. Other less invasive controls can be utilized in layers to provide appropriate protection for high-risk workers.

MANAGING MEDICAL CONFIDENTIALITY

Is it possible to ask an employee or client their vaccination status?

Individual health status and personal medical information is deeply private and typically confidential, particularly as it relates to diagnostic information. Nonetheless, certain circumstances may justify employers asking about vaccination status where it is reasonably necessary for a legitimate reason. Be aware, though, that the employee or client is under no obligation to share that information with you and the answer must be treated as confidential medical information.

It may be preferable to implement a policy that states that in the absence of proof of vaccination, all COVID-19 protections will stay in place.

Am I able to differentiate between employees who are vaccinated or unvaccinated order to enforce mask-wearing? (e.g., by using different coloured hard hats, or a mark on their ID badge)?

It is strongly recommended that you do not differentiate between vaccinated and unvaccinated workers. A policy that states that workers who demonstrate proof of vaccination can be exempted from some of the COVID-19 protection controls, and workers who choose not to provide proof for whatever reason will continue to abide by the COVID-19 protections as detailed in the company policy accomplishes the same goal.

If we choose to implement a “vaccination or mask” policy once public health lifts indoor mandatory mask, how can we validate individuals’ vaccination status?

It is recommended that clear policies be developed and communicated indicating, “workers who choose to provide proof of vaccination will (receive some exemptions to the COVID-19 protection requirements). It is not mandatory that workers get vaccinated and workers are not required to share their vaccine status. Workers who do not provide proof of vaccination will continue to abide by the COVID-19 protection measures described in the COVID-19 protection policy.”

Further, if a risk assessment of your facility and operation determines that it is reasonable and required for your operation and/or the safety of your staff to wear masks, then it may be acceptable to maintain a similar policy after Public Health Orders are lifted.

INCENTIVISING VACCINATIONS

Incentives for employees who pursue vaccination:

In the interest of increasing the number of vaccinated employees in their workplaces, many employers are considering offering incentives to employees who pursue vaccination, including vaccination bonuses, paid time off for vaccination appointments, employee recognition programs and the opportunity to return to in-office work environments before other cohorts. While well-intentioned, employers must be mindful of possible pitfalls, like if an incentive program results in differential treatment of groups of employees on the basis of a protected

human rights ground and so on. This means, those who are unable to receive a vaccine due to legitimate protected characteristics, such as medical or religious reasons, must still be considered for the same incentives.

In the case of a monetary incentive, is it possible to ask for proof of vaccination?

Yes, monetary incentives can be tied to demonstrating proof of vaccination. This would likely be considered a reasonable request. However, as mentioned above, it could be considered discriminatory if persons who are unvaccinated due to medical, religious, or other protected characteristics are excluded from access to the incentive.

Similar rules apply in the case of a raffle or lottery incentive structure. Additionally, though, if you wish to announce the winner of the raffle/lottery, you must get consent from the winner(s) beforehand.

MAINTAINING CONTINUED MASK-WEARING

In a private business (that does not receive public visitors) is it mandatory for employees to wear masks as per public health orders? Or is this a recommendation?

In short, no, but they ARE being required by workplace safety enforcement folks as part of your regular workplace safety program. The current public health order references indoor public place as defined in The Smoking and Vapour Products Control Act. Manufacturing Workplaces typically do not fall under this definition. However, the Workplace Safety and Health Branch inspectors have been focused on COVID-19 protections under Part 36 of the regulations and have issued numerous improvement orders related to mask use and enforcement over the last 12 months.

Can masks be mandatory in the workplace during flu season or through seasonal changes which causes spikes in hospitalizations (this would be looking forward past Covid)?

If a risk assessment of your facility and operation determines that it is reasonable and required for your operation and / or the safety of your staff to wear masks, then it would be acceptable.

OTHER CONCERNS

Public Health officials in Manitoba have said on several occasions that public health concerns override human rights. Is this a legal interpretation for government or does it extend to employers?

The short answer is “no,” this does not extend to employers. “Public Health” is defined by the World Health Organization as, “the art and science of preventing disease, prolonging life and promoting health through the organized efforts of society.” While manufacturing in Manitoba is critical to the success of the province and provides a key pillar of the economy, the issues and concerns of individual employers are often not taken into consideration by government when looking at issues of public health concerns.

This is one of the many reasons that being a part of an organization like CME is so important. CME helps give voice to manufacturers at the various levels of government and amplifies the individual’s concerns to ensure that the needs of manufacturers both large and small are considered.

Are COVID-19 infections WCB compensable?

If on the balance of probability, the COVID-19 infection was contracted in connection to the work or workplace then yes, it would be a compensable injury. [Over 2000 claims for COVID](#) have been accepted by the WCB as of May 21, 2021.

ACCESS TO EXPERTS

CME AND MADE SAFE ARE HERE TO HELP

Contact our team of health and safety experts for manufacturing-specific insights and supports:

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