



EMPLOYER GUIDE TO COVID-19 VACCINATIONS IN THE WORKPLACE – PART 2 OF 4

What if an Employee Refuses on the Basis of a Human Rights Ground?

**PART
2 OF 4**

With the continuation of the COVID-19 pandemic, employers face a constantly evolving landscape of lockdowns, re-openings, and health and safety requirements. This Employer Guide has been put together to help employers navigate issues around COVID-19 vaccinations in the workplace and what to do if an employee refuses to vaccinate on the basis of a Human Rights ground.

In Part 1 of this Guide, we discussed whether an employer can require an employee to be vaccinated.

This part of the Guide delves into protected human rights grounds, such as disability, age, creed (religion), sex, etc., that an employee can raise to refuse the vaccine – as contrasted with an employee's personal preference to refuse the vaccine, and who is liable if the employee becomes seriously ill or dies from the vaccine.

I. WHAT IF AN EMPLOYEE REFUSES ON THE BASIS OF A HUMAN RIGHTS GROUND?

If an employer can require an employee to vaccinate, some employees will likely object to getting vaccinated.

If an employee refuses to get vaccinated on the basis of an enumerated ground under the *Human Rights Code*, such as:

1. disability;
2. creed (religion);
3. age;
4. sex (pregnancy), etc.,

then an employer will likely be required to accommodate the employee up to undue hardship.



Undue hardship is the point where any further accommodation would interfere excessively with the employers' operation. Such things as financial costs that are so substantial they would alter the essential nature of the enterprise or so significant that they would substantially affect the business' viability, and health and safety risks to other employees and customers/clients are considered when assessing whether there is undue hardship. The Ontario Human Rights Commission has stated as follows:

"The duty to accommodate can be limited if it would significantly compromise health and safety amounting to undue hardship – such as during a pandemic."

Therefore, hardship *must* still be experienced, but *not* undue hardship.

Refusals Based on Disability

When an employee raises the need for accommodation based on disability, an employer should do their due diligence and request a doctor's note from the employee to support the employee's accommodation request. The employer may be able to request further information from the doctor.

On September 1, 2021, the College of Physicians and Surgeons provided specific information to doctors that there are:

"very few acceptable medical exemptions to the COVID-19 vaccination".

On September 14, 2021, the Ontario Ministry of Health released a list of acceptable medical conditions which would qualify as medical exemptions to the COVID-19 vaccination, such as:

1. Pre-existing conditions such as:
 - a. Severe allergic reaction or anaphylaxis to components of a COVID-19 vaccine; or
 - b. Myocarditis prior to initiating an mRNA COVID-19 vaccine series (individuals aged 12-17 years old).
2. Contraindications to Initiating an AstraZeneca/COVISHIELD COVID-19 Vaccine Series;
3. Adverse Events Following COVID-19 Immunization; and
4. Actively receiving monoclonal antibody therapy OR convalescent plasma therapy for the treatment or prevention of COVID-19.

Accordingly, given the limitations placed on doctors, and their duty to their patients, some doctors may choose to write letters of opinion with respect to the employee's disability. Employers will need to consider whether they should accept additional evidence, including non-medical evidence that may qualify as a "disability" under the *Human Rights Code*.

Refusals Based on Creed (Religion)

An employee may raise the need for accommodation based on creed (religion). The Ontario Human Rights Commission has defined "creed" (religion) as a belief system that may have the following characteristics:

1. Is sincerely, freely and deeply held;
2. Is integrally linked to a person's self-definition and spiritual fulfilment;
3. Is a particular, comprehensive and overarching system of belief that governs one's conduct and practices;
4. Addresses ultimate questions of human existence, including ideas about life, purpose, death, and the existence or non-existence of a creator and/or a higher or different order of existence; and
5. Has some "nexus" or connection to an organization or community that professes a shared system of belief.

If an employee raises the ground of creed to request accommodation, an employer will need to consider what information and documentary support they wish to request from the employee. It may be that employees who have held a long standing religious belief of not accepting certain medical treatments may be able to refuse the vaccination on a religious ground. We look forward to Human Rights decisions to provide clarification.

Moreover, the employer's efforts need to be *reasonable enough* to allow employees to carry out their work duties. It *does not mean* that accommodation has to be *perfect or ideal*. In fact, the employee has a *corresponding* duty to cooperate with reasonable accommodation.



If the accommodation offered is reasonable but the employee turns it down, then the employer may not have any further duty to make additional efforts to accommodate the employee, and the employee may be considered to have resigned or abandoned their employment.

If the employee is *still* unable to perform their essential work duties *even after* reasonable accommodation has been made short of undue hardship, the employer may not be restricted from terminating the employee, but they still *must* provide proper notice of termination to the employee.

*Check out our **Employers Guide on Termination of Employment** for more information on the proper amount of notice to provide an employee who is terminated.*

A failure to accommodate by the employer will be found to be a breach of the *Human Rights Code* and will result in the employer being liable for damages.

II. WHAT IF AN EMPLOYEE REFUSES ON THE BASIS OF A PERSONAL REASON?

There are a few different ways an employer can approach the refusal to comply with the vaccination policy. The first is to ensure that the employee is refusing based on their *actual personal reasons* and not on the basis of a protected Human Rights ground, such as age, disability, creed (religion), sex (pregnancy), etc.



Some examples of personal reasons are: *“I don’t believe in vaccinations”* or *“vaccinations will not provide any protection against COVID-19”* or, as was stated by a Human Rights Applicant at the Human Rights Tribunal of Ontario: *“it is my civic duty to be critical of government and their decisions”*.

If an employer determines that the basis for refusing to comply with the vaccination policy on the basis of a personal reasons is a protected Human Rights ground, then an employer *must* accommodate the refusal up to undue hardship, as outlined above.

However, if the refusal is not on the basis of a protected ground, but rather, on the basis of a personal reason or preference, then the employer does not have a duty to accommodate the refusal. The Ontario Human Rights Commission has stated as follows:

“At the same time, the OHRC’s position is that a person who chooses not to be vaccinated based on personal preference does not have the right to accommodation under the Code. The OHRC is not aware of any tribunal or court decision that found a singular belief against vaccinations or masks amounted to a creed within the meaning of the Code.”

There are a number of steps that an employer can take if an employee raises a personal preference as a basis for refusal:

1. **Educate the employee** on the efficacy of the vaccine, the scientific evidence to support the vaccine, the risks and benefits of getting vaccinated, whether the benefits of doing so outweigh the risks, and the protection that the vaccination may offer against the many variants currently going around. Any information provided to an employee for the purposes of educating them on the COVID-19 vaccinations should be based on scientific data and credible sources. Be prepared for the employee to respond.

2. **Provide alternatives to vaccinations**, such as providing personal protective equipment (i.e., masks), social distancing and screening questionnaire (which are all mandatory), face shields, gloves, adjusting the workplace such as assigning individual offices, rearranging the workspace to ensure physical distancing, installing workstation dividers, providing more room between workstations, installing plexiglass in areas of high contact with other workers or the general public, avoiding in-person interaction if alternatives are available (e.g. video conferencing, email, installing a document or letter tray outside the office or workstation), offering hybrid - work from home and the office arrangements, reassigning tasks, requiring regular antigen testing, etc. Remember, requiring vaccinations is the most instructive safeguard that an employer can require. An employer can only insist on vaccinations in their workplace if

there is a serious risk of contracting COVID-19 in the workplace and if all other safeguards do not work. It is an objective determination. The employer's management's personal views as to whether to vaccinate or not, do not matter.

3. Take disciplinary action for the refusal, such as a paid leave of absence, a warning, and finally, termination without cause. Great care should be taken when determining whether or not to discipline an employee for a refusal to comply with a vaccination policy, because if the ground for refusing to vaccinate turns out to be a Human Rights ground, then the employer could open themselves up to a Human Rights complaint, in addition to a constructive dismissal claim. An employer who chooses to discipline an employee for refusing to vaccinate should have a policy in place, which should contain a term regarding potential discipline for refusals.

4. Terminating an employee comes with risk. If an employer wishes to terminate the employee without cause – with termination notice being provided - legal advice should be sought at that time as there may be court decisions that provide clarification with respect to whether the employee is entitled to an additional award of damages. Employers should not terminate employees for cause – without termination notice being provided – even if there is an Employment Agreement that says that the employee will be required to comply with all policies, as the requirement to vaccinate would certainly not be in the contemplation of the employer and employee at the time of entering into the agreement.

An employer should always seek the assistance of an Employment Lawyer before taking any steps.

*Check out our **Employers Guide on Termination of Employment** for more information on the proper amount of notice to provide an employee who is terminated.*

III. WHAT IF AN EMPLOYEE GETS SICK OR DIES FROM THE MANDATORY VACCINE?

Typically, if an employer is insured under the *Workplace Safety and Insurance Act*, then the employer can rely on the Workplace Safety and Insurance Board (“WSIB”) to pay for any injuries sustained by the vaccinated employee. The WSIB provides coverage for “no-fault” injuries – meaning injuries sustained that were not the fault of the employee, as long as they occurred at the workplace.



If an employer made it a requirement for the employee to get vaccinated, they may be able to rely on the WSIB to pay for any injuries sustained by the vaccinated employee, since the injury would be considered a “no-fault” injury.

If an employer is not insured under the WSIB, then this would mean that the employer may be liable for civil damages – for example, damages for negligence. It is possible that in the highly unlikely event that an employee dies from the vaccination, that an employee's estate may bring a law suit against the employer.

However, in the industries and regions where the law requires employers to establish a vaccination policy, *under today's law*, employers would likely not be liable if an employee becomes sick or dies from the vaccine.

The Federal Government has set up a Vaccine Support Injury Program to compensate Canadians who experience a “serious and permanent injury” after receiving any Health Canada authorized vaccine, including an authorized COVID-19 vaccine. Financial support will also be available to the dependents of those who have died after receiving a vaccination. That support may include income replacement, payment for injuries, death benefits including funeral expenses, and other eligible costs, such as uncovered medical expenses. The amount of financial support provided will be determined on a case-by-case basis, and compensation will be retroactive from the date of the injury or death.



In terms of what constitutes a “severe” or “permanent injury”, an employee would have had to suffer from “life-threatening or life-altering injuries that may require in-person hospitalization, or a prolongation of existing hospitalization, and results in persistent or significant disability or incapacity, or where the outcome is a congenital malformation or death.”

As the eligibility threshold is a “serious and permanent injury” this may limit the compensation, if any, to be received. As a result, the employer may be the easiest target for a lawsuit by the employee, or in the event of their death, the

employee’s estate. This is something employers should keep in mind if they are considering making it a requirement for their employees to be vaccinated.

CONTACT US TODAY FOR PARTS 1, 3 - 4 OF THE EMPLOYER GUIDE!

- **Part 1** – Can an Employee be Required to Vaccinate?
- **Part 3** – Can an Employee be Required to Disclose Whether They Are Vaccinated?
- **Part 4** – Can an Employee be Required to Undergo COVID-19 Testing?

Contact us at contact@minken.com or call us at 905-477-7011 to receive the previous and remaining parts of the Employer Guide.

WE ARE HERE TO HELP!

Vaccinations in the workplace, the transitioning workplace and the COVID-19 pandemic will be an ongoing process and discussion, and starting the conversation with your employees is essential. Reach out to your employees now, whether they have continued to work or are transitioning back to work, to ask for their concerns and questions, and contact Minken Employment Lawyers today for assistance with vaccinations and any COVID-19 related questions at contact@minken.com or call us at 905-477-7011. Go to our website and sign up for our newsletter to receive up-to-date information, including new legislation and Court decisions impacting your workplace.

The content of this booklet is intended to provide a general guide to the subject matter. **The content of the booklet is not, and should not be construed as, offering any form of legal advice.** Every case is different so we strongly recommend speaking to an Employment Lawyer about your specific circumstances.

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