



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

Can an Employee be Required to Undergo COVID-19 Testing?

PART
4 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 whether an employee can be required to undergo COVID-19 antigen testing.

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

vaccinated. In Part 2 of this Guide, we discussed the various Human Rights grounds that an employee could raise to be exempt from the vaccination policy, whether an employee can refuse to comply with the vaccination policy on the basis of a personal preference and who would be liable if an employee gets sick or dies from the vaccination. In Part 3 of this Guide, we discussed employee's privacy rights, the proof of vaccination required, if any, and what steps to take to ask for disclosure.

This part of the Guide addresses whether COVID-19 antigen testing is lawful, the risks of implementing such a policy at the workplace and some of the steps that an employer can take to implement the policy.

I. CAN AN EMPLOYEE BE REQUIRED TO UNDERGO COVID-19 TESTING?

Employers have a duty pursuant to section 25(2)(h) of the *Occupational Health and Safety Act* to protect their workers' health and safety while they are at work. This duty requires employers to:

"take every precaution reasonable in the circumstances for the protection of a worker"

COVID-19 testing policies have been found to be enforceable in certain health and safety sensitive environments, such as airports, hospitals and long-term care homes. In these situations, Courts and Arbitrators have held that such policies are reasonable and enforceable given the implications of an undetected case or outbreak in the workplace.

However, it is unlikely that COVID-19 testing policies will be enforceable in all workplaces.

Determining whether a COVID-19 testing policy will be enforceable in a workplace will depend on:

1. the purpose for which the employer is requiring such a policy;
2. whether the risk of the spread of COVID-19 at the workplace (due to an inability to enforce social distancing practices and previous outbreaks at the workplace) outweighs the intrusiveness to the employee's privacy and health; and
3. whether alternative measures have been implemented but have failed to decrease the risk.

So if an employer can:

1. establish that there is a legitimate risk of

COVID-19 transmission in the workplace; and

2. that it cannot be addressed by other safety measures (which have already failed in preventing the transmission), and
3. there are safeguards to ensure compliance with:
 - a. public health directives,
 - b. privacy laws,
 - c. Human Rights and
 - d. Occupational Health and Safety requirements,

then requiring COVID-19 testing *may* be seen as a reasonable precaution to protect their workers. In such a situation, a COVID-19 testing policy would likely be enforceable.

Absent the above requirements, implementing a COVID-19 policy may expose an employer to liability and a lawsuit from their employees.



WHAT ARE THE RISKS OF IMPLEMENTING A COVID-19 TESTING POLICY?

If an employer mandates COVID-19 testing in a workplace where there is little risk for the spread of COVID-19, such as where it is possible for all employees to maintain social distance and wear masks, and/or to work from home, there is a risk that an employer may face a constructive dismissal or Human Rights claim from their employees.

Constructive Dismissal

Requiring an employee to undergo COVID-19 testing may be considered constructive dismissal. An employee may claim that they never agreed to undergo COVID-19 testing when they commenced employment and that this requirement is a fundamental change in the terms of employment being constructive dismissal.

If an employee establishes a constructive dismissal claim, the employer will be liable for wrongful dismissal damages, such that they will have to pay the employee reasonable notice, which could be up to 24 months' notice or greater, in addition to other damages.

WHAT ARE SOME OF THE STEPS AN EMPLOYER SHOULD TAKE TO IMPLEMENT THE COVID-19 TESTING POLICY?

If an employer chooses to implement a mandatory COVID-19 testing policy, then they should keep the following things in mind:

- 1. Define important terms:** What COVID-19 test will be used? Is proof of a negative test required? Will employees be required to get tested on their own time?
- 2. Set deadlines for compliance:** By what date does an employee have to provide proof of a negative COVID-19 test? How frequently does an employee have to undergo COVID-19 testing?
- 3. Include any public health guidelines:** For example, employees who are required to undergo regular rapid antigen testing will need to be trained on how to administer the test on themselves or there will need to be a designated person on site to conduct the test.
- 4. Provide alternatives to testing:** Are employees able to work from home if they do not wish to undergo testing? Are there non-invasive test options available such as temperature checks and screening forms? Other alternatives may include wearing PPE (i.e., masks), social distancing, alternate duties to keep employees away from the general public or risk exposure to other employees, and/or working from home.
- 5. Accommodate any refusals based on Human Rights:** The Human Rights Tribunal of Ontario states that the ground of disability is engaged when employers impose medical testing. Accordingly, any refusal based on a Human Rights ground, such as religion, disability, age, sex (pregnancy), etc., *must* be accommodated by the employer, up to undue hardship. A failure to accommodate up to undue hardship would likely be a breach of the *Human Rights Code*, and the employer may be liable for damages.



Human Rights

Requiring only unvaccinated employees to undergo COVID-19 testing may expose an employer to a Human Rights claim as the unvaccinated employees would be differentiated from vaccinated employees, perhaps on the basis of disability, age, creed (religion), etc. To prevent this risk, an employer should consider having *both vaccinated and unvaccinated* employees undergo COVID-19 testing.

A Human Rights claim would expose the employer to damages for injury to dignity, feelings and self-respect, and also loss of wages which could be greater than reasonable common law notice.

6. Clearly communicate and educate employees: Employees should be given a copy of the *written* COVID-19 policy, and should be educated on what the policy requires and how it will be implemented and enforced.

7. Privacy concerns should be addressed: The policy should outline how, if at all, private medical information (such as a negative or positive test result) will be stored, kept confidential and used.

8. Pay for testing and time off work: If the employer is requiring that the employee undergo COVID-19 testing, the policy should say that the *employer will pay the cost, including any time lost as a result of taking the test.*

9. Enforcement: The policy should reference the consequences for failing to comply with the policy, such as discipline or termination *without cause*. Employers should not terminate an employee *for cause* for failing to comply with the COVID-19 testing policy. Any disciplinary action taken against an employee for failing to comply should be done under the guidance of an Employment Lawyer.

10. Seek Legal Advice: A policy of this nature should always be reviewed by an Employment Lawyer before putting it into place.

11. Include a clause in the Employment Agreement: If an employer is hiring a new employee, then an employer should include a clause in the Employment Agreement that states that the employee *must* comply with any and all policies, including a COVID-19 testing policy, as a condition of their employment and specifically include a requirement for COVID-19 testing. For current employees, provide fresh consideration (i.e. a bonus or additional benefit) in exchange for their signing a new Employment Agreement, otherwise they may claim constructive dismissal as the policy may be a fundamental change in the terms of employment. Employers should

not rely on existing Employment Agreements with respect to adherence to policies. If it is constructive dismissal, an employer would be liable for damages for breach of the *Employment Standards Act, 2000* and common law which could be up to 24 months' notice or possibly greater.

CONTACT US TODAY FOR PARTS 1 –3 OF THE EMPLOYER GUIDE!

- **Part 1** – Can an Employee be Required to be Vaccinated?
- **Part 2** – What if an Employee refuses on the basis of a Human Rights Ground?
- **Part 3** – Can an Employee be Required to Disclose Whether They Are Vaccinated?

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

WE ARE HERE TO HELP!

Vaccinations in the workplace, the transition back to the office 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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