

Frequently Asked Questions

COVID-19 vaccination mandates

COVID-19 has been with us for more than 18 months and has taken a toll on workers in most sectors. While CUPE continues to encourage all workers who can become vaccinated to do so, we also recognize that this is a decision that each individual member will make for themselves.

On September 29, the Nova Scotia government announced that they would be mandating the vaccination of all workers in acute care, long term care, home support, and education. The following Monday, they added workers at correctional facilities and child care centres to the mandate. As of October 6, all direct employees of the province, including highway workers, are required to be fully vaccinated by November 30.

Time will be very tight for workers who need one or both of their doses, and unvaccinated members will have to make a decision that will have an impact on their jobs.

There is a lot of inaccurate information available about employee choices, relevant legislation, and how unions can represent members. CUPE strongly believes members have a right to receive accurate information, including a realistic assessment of the current situation and potential consequences that might flow from their choices.

To that end, CUPE has produced this list of “Frequently Asked Questions” and answers to help ensure that members have accurate information to make informed choices.

What is CUPE's approach to mandatory vaccination?

All workers who can be vaccinated should get vaccinated. Vaccination programs that are the most effective, according to the World Health Organization, are voluntary and not coercive.

Some workers cannot be vaccinated for medical or religious reasons. These workers are protected under the relevant human rights legislation and must be accommodated as the law provides.

For any other worker who chooses not to become vaccinated, their individual right to choose may come into conflict with the collective rights of their co-workers and their families. A worker who chooses not to become vaccinated may be required to wear a mask, social distance, or even take an unpaid leave of absence.

Discipline and harassment are not appropriate responses to a worker who chooses not to take a vaccine.

You can view CUPE's vaccine mandate guidelines online at cupe.ca/vaccine-mandate-guidelines.

What is the union doing about mandatory vaccination?

Every CUPE local is in a different situation, but all are working to ensure their members' voices are being heard. Depending on specific circumstances, some locals will be able to use the grievance process to challenge the overall policy, while others will be working to ensure the application of the policy meets the employer's obligations under the collective agreement and applicable legislation.

Regardless of the strategy, elected union officials have been working through the entire COVID-19 situation to support our members and will continue to do so. Members are encouraged to reach out to their local executives with their questions and concerns about any employer policy or practice.

Are employers allowed to make vaccination policies without the union or worker's agreement?

Employers can implement vaccination policies unilaterally, so long as those policies do not conflict with the collective agreement and are reasonable. Policies that conform to Nova Scotia Public Health directives will likely withstand arbitral review.

A “reasonable” vaccination policy is one that balances the employer’s interests in protecting workers and the public from the dangers of COVID-19 against workers’ interests in “bodily integrity” and privacy. COVID-19 policies must also comply with Nova Scotia’s *Human Rights Act*.

Can employers force workers to be vaccinated? What about “informed consent”?

An employer cannot physically force a worker to be vaccinated. Though it may not feel like it, there is a legal difference between forcing a worker to be vaccinated and imposing work-related consequences on a worker who chooses not to become vaccinated.

Just because a worker suffers negative consequences for not being vaccinated does not mean that their employer is forcing them to be vaccinated. So long as a worker has a choice whether to be vaccinated or not, even if they feel pressure from the employer, they are not being forced to be vaccinated.

What is relevant is whether the vaccination policy reasonably balances the employer interests in maintaining a healthy workforce and preserving public health, and worker interests in privacy and bodily integrity.

What consequences are employers allowed to impose on workers who make the choice not to become vaccinated?

There are no arbitration cases that have considered COVID-19 vaccine policies that we are aware of. There are many decisions over the last thirty years related to flu vaccination policies as well as a number of cases related to mandatory COVID-19 testing policies. These cases provide some guidance about the kinds of consequences that employers may impose on workers who choose not to be vaccinated.

Each policy must be assessed individually to determine if it is reasonable. However, in the health care sectors, arbitrators have upheld policies that have placed unvaccinated workers on modified job duties that reduce their interactions with patients or other workers, as well as policies that place unvaccinated workers on unpaid leaves of absence for the duration of outbreaks.

Modified duties or alternative work assignments within some sectors are more difficult to find and sometimes nonexistent.

It is important to recognize that the COVID-19 pandemic is not just another flu season. Arbitrators will view COVID-19 as being more serious and may be willing to accept even more significant consequences for workers as “reasonable”.

For example, in flu vaccine cases unpaid leaves of absence tended to last only for a relatively short period of time (i.e., until a flu outbreak in the workplace resolved). In the context of the COVID-19 pandemic, arbitrators may accept that, even if there is no outbreak in the workplace, workers may be placed on unpaid leaves of absence. These leaves of absence may be for long periods of time, as there is no clear end to the global COVID-19 pandemic.

Can an employer fire a worker who refuses to become vaccinated?

There is no legal basis to refuse to comply with an employer policy based solely on an “individual choice” argument. However, we are in uncharted territory. There are good arguments that a worker cannot be terminated, but the law in this area is uncertain.

Case law from flu vaccination disputes have shown that employer policies deemed reasonable did not result in discipline. Arbitrators in flu vaccination cases have repeatedly emphasized that the policies that they have upheld as reasonable did not result in discipline. This suggests that it is important for a policy to be non-disciplinary in order to be considered reasonable.

A policy that terminates an employee for non-vaccination would be different. There is a good legal argument that this type of policy would not be reasonable because it does not adequately respect the workers’ right to choose what medical treatment to undertake.

Two of the first cases in Ontario to challenge an employer’s vaccination policy generated opposite outcomes highlighting the impact of different circumstances and workplaces. While one arbitration resulted in the employer’s policy being upheld, the other resulted in the arbitrator finding some elements of the policy unreasonable including imposing termination or an unpaid leave of absence on non-compliant employees.

The success of any grievance will depend on the specific factors involved and in this case the arbitrator identified that some of the factors influencing their decision included the fact that there was not a government mandate for vaccination and that the employees did not work with vulnerable populations. The arbitrator added the following context to the decision *“this award should not be taken as a vindication for those who choose, without a legal exemption, not to get vaccinated. Those individuals are in my view misguided and acting against their own and society’s best interests”*.¹

Members in workplaces with policies that threaten termination should understand that, if they refuse to become vaccinated, the employer might terminate their employment. If this happens and the union were to grieve the termination, it could not guarantee a particular outcome.

A local will consult about a grievance and take the grievors interests into account in its decision making, along with the interest of other members of the bargaining unit. The grievance rests with the local and they will ultimately decide how to proceed. The individual might be reinstated to employment, or they might lose the case.

At this time, it is uncertain how arbitrators will handle terminations arising from breaches of mandatory vaccination policies. Even if a grievance goes to arbitration and the arbitrator reinstates the worker, they may not receive any damages and may not be allowed to return to work immediately.

Regardless of the outcome, members need to know that this type of litigation often takes a long time. Workers should understand the risks and uncertainty that they face when deciding whether to become vaccinated or not.

1. John Stout, Electrical Safety Authority v. Power Workers’ Union, Grievance ESA-P-24, COVID-19 Vaccination Policy, November 11, 2021

Can an employer require a worker to disclose their vaccine status or to provide proof of vaccination?

Yes, so long as this information is kept confidential, is protected from unauthorized access, and is used only for the purpose of administering a COVID-19 vaccination policy or complying with applicable laws.

Workers have privacy rights in the workplace. There are also limits to an employee's right to privacy.

Employers have the right to information that is necessary for them to run their workplace. This includes information that is necessary for them to implement a reasonable COVID-19 vaccination policy. This would likely include whether each employee is vaccinated or not, as well as proof of vaccination for those workers who are vaccinated. In short, your employer can request your vaccination status as part of a vaccination policy and the expectation is that you provide it.

Employers must still protect worker's privacy when they collect this type of personal medical information. Employers are required to ensure that only those people who need to have access to this information do have access to it.

Other workers, or members of the public, or management that does not have a need to access this information, should not have access. Steps should be taken to make sure that this information is stored securely, such as using locked cabinets or password protection on computers.

Can employers require me to be tested for COVID-19?

Regular COVID-19 testing before entering the workplace would likely be another option for reasonable accommodation for unvaccinated workers, unless the worker is unable to be tested for a reason protected by human rights legislation. This will only be a viable alternative if it is allowed by legislation or Public Health orders.

Under occupational health and safety legislation, employers must make every reasonable effort in the circumstances to protect the health and safety of workers. This includes reducing the risk of exposure to the COVID-19 virus.

Though each policy will be judged on its own merits, it is highly unlikely that an arbitrator would rule in favor of workers that do not wish to be vaccinated or tested.

There have already been cases considering mandatory rapid COVID-19 testing. Arbitrators have upheld mandatory COVID-19 testing policies, concluding that they fairly balance employee privacy and bodily autonomy interests with the objectives of workers and public safety. It is increasingly unlikely that an arbitrator would overturn a requirement for regular COVID-19 testing.

What about the *Human Rights Act*?

The *Human Rights Act* applies to workplace vaccination policies. Workers who are unable to become vaccinated for reasons that are covered by the Act have the right to reasonable accommodation, up to the point of undue hardship on the employer.

A worker cannot be disciplined for not being vaccinated if the reason that they are not vaccinated is protected by the Act. The Act protects against discrimination on several grounds. The two grounds that are most likely to be relevant with respect to vaccination policies are disability and religion.

What is covered by “religion”?

A singular belief against vaccination, or against the COVID-19 vaccines, would not warrant a religious exemption under the Act. Similarly, beliefs that an individual should be allowed to decide what vaccines to take, or beliefs about the safety or efficacy of COVID-19 vaccines or the dangers of COVID-19, are not sincerely held religious beliefs as understood under the Act.

If a person’s religion prevents them from becoming vaccinated, they are entitled to “reasonable” accommodation. An individual may not use a claim of religion that does not reflect a sincerely held belief as an excuse not to become vaccinated.

Accommodations for religious reasons might be difficult to substantiate. The Nova Scotia Human Rights Commission has said, “Only religious beliefs that are sincerely held and connected to a faith must be accommodated.”

What is covered by “disability”?

Workers who have a documented medical condition that makes them unable to become vaccinated with an available COVID-19 vaccine are protected by the Act on the ground of disability. To be protected on the ground of disability, a worker must be able to provide objective medical evidence from a qualified health care practitioner (i.e., doctor or nurse practitioner) that taking the available COVID-19 vaccines is contraindicated. Workers should be made aware that:

- Medical conditions related to vaccines other than the available COVID-19 vaccines would not be relevant unless a health care professional provided evidence that the condition also prevents the worker from taking available COVID-19 vaccines.
- Self-reported medical conditions or symptoms are not enough. Employers are entitled to receive objective medical evidence from an independent healthcare professional.
- Concerns about the safety or efficacy of available COVID-19 vaccines (including concerns about long-term side effects, adverse reactions, or Health Canada’s approval process) do not constitute grounds for protection under the Act.

Can a worker be disciplined for refusing to comply with other aspects of a vaccination policy?

There may be other aspects of COVID-19 policies that, if not complied with, would be grounds for discipline. Possible examples include:

- A worker who forges a fake vaccination record as proof of vaccination and provides it to the employer, where the policy requires workers to provide proof of vaccination.
- A worker who refuses to attend a vaccine education session that is held during work hours, where the policy requires unvaccinated workers to attend such training.
- A worker who attends the workplace without a negative COVID-19 test, if the policy requires unvaccinated workers to provide such test results.
- A worker who refuses to disclose vaccination status, where the policy requires employees to disclose vaccination status.
- A worker who refuses to wear a mask and social distance, where the policy requires unvaccinated workers to wear masks and social distance.

What accommodations are available for unvaccinated workers who are protected by the *Human Rights Act*?

Reasonable accommodation is an individualized process that depends on the specific circumstances of the individual, including the details of their disability or religion, the nature of their job duties and, in the context of the current pandemic, the prevailing public health situation and state of scientific knowledge.

What will be a “reasonable” accommodation for one worker may or may not be a reasonable accommodation for another worker.

Unions, workers and employers have a duty to cooperate and work together to identify reasonable accommodations.

Flu vaccine case law suggests that there are a number of accommodations that could be reasonable for unvaccinated workers, depending on the circumstances, including modified job duties and paid leaves of absence.

While extended unpaid leaves of absence are less likely to constitute a reasonable accommodation, employers will likely try to demonstrate that the requirement to pay during a leave of absence would constitute undue hardship.

Regular COVID-19 testing before accessing the workplace would likely be another option for reasonable accommodation for unvaccinated workers, unless the worker is unable to be tested for a reason protected by the Act.

While an employer is not permitted to discipline a worker who is unable to become vaccinated due to disability or religious belief, it is not “discipline” for an employer to place a worker on an unpaid leave because no suitable accommodation is available.

What about the Charter of Rights and Freedoms?

The Charter only applies to the actions of governments, and not to private employers. A Charter challenge could only be brought against the government's vaccine mandate and not to the rules or policies implemented by employers.

It is unlikely that a Charter challenge will succeed. First, the applicant would need to establish that a vaccine mandate deprives them of life, liberty or security of person. This is unlikely, because mandatory vaccination policies do not contemplate holding a person down and physically forcing them to be vaccinated. Instead, the policies impose consequences – either an unpaid leave of absence or termination.

The consequences of not adhering to a workplace vaccination policy are economic (in the form of losing earnings or employment), and there is case law indicating section 7 of the Charter does not apply to purely economic (i.e., monetary) interests.

Even if a violation of section 7 of the Charter were established, the measure could be saved under section 1 which says that Charter rights are guaranteed: “Subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” The government could rely on the exceptional circumstances of the COVID-19 pandemic as providing it a wider berth to implement measures designed to stop the spread of the virus.

If I have an adverse reaction to the vaccine, who is responsible for any lost wages?

A small portion of people may have adverse reactions to a vaccination and other may feel unwell for a period of time. While it is not yet clear how the Workers Compensation Board would adjudicate such a claim, we would recommend members file a report with WCB. Workers may also be able to access short-term illness or other sick leave benefits under their particular collective agreement.

In all other cases, members should follow workplace protocols related to the symptoms they are experiencing and utilize sick leave, if available and appropriate.

COVID-19 COVID-19 vaccine safety and side effects: bit.ly/3BWwm5p

How to file a WCB claim: bit.ly/3n3mzEI

Is the vaccination mandate “unjust”?

The impacts of COVID-19 have been disproportionately unfair, especially to workers in acute and long-term care. However, we believe that workers have the right to understand the law as it currently stands.

Even if workers believe the law is unfair, it is important that they understand what the law is, so they may understand the consequences of their choices.