**Key Questions and Recommendations for DS Agencies**

**Considering a**

**COVID-19 Vaccination Policy for Staff**

January 15, 2021

**Topic**

As safe and effective COVID-19 vaccines are approved for use and become available, agencies within the Developmental Services Sector will need to consider developing and/or expanding current immunization policies to include COVID-19 vaccination. This document was prepared by members of the Sector Pandemic Planning Initiative, including Jeanette MacLean, Senior Health & Safety Consultant, Pandemic Response Lead at Community Living Toronto, and Brendon and Cheryl Pooran of PooranLaw. The document makes reference to the [COVID-19 Vaccine Rollout](https://pooranlaw.com/covid-19-vaccine-roll-out/) document prepared by PooranLaw.

This document reviews **key questions** agencies may have concerning policy options to require or establish consequences for staff who choose not to be vaccinated:

1. Can an employer require all staff to be vaccinated against COVID-19?
2. In taking this position, is this an infringement on an employee’s human rights?
3. If an employer does create a vaccine policy, should staff who chose not to be immunized be able to continue to provide direct support in residential programs?
4. If a staff member, for medical or religious reasons is unable to be vaccinated, is the employer obligated to accommodate the staff?
5. Is it reasonable, given the current situation, for an employer to place the staff on an unpaid leave until such time as COVID-19 no longer presents a significant public health risk?

**Key Questions**

1. **Can an employer require all staff to be vaccinated against COVID-19?**

Occupational Health

The *Occupational Health and Safety Act* and Ontario Regulation 67/93 *Healthcare and Residential Facilities*, which applies to residential supports, establishes a general duty for employers to have an immunization policy and program that requires employees to be inoculated against infectious diseases that pose a significant health and safety risk to both workers and the residents supported (O. Reg. 67/93, s. 8. & s.9[[1]](#footnote-2)).

Legal Considerations and Recommendations

Legal considerations and recommendations have been prepared to advise DS agenciesby Pooran Law ([COVID-19 Vaccine Rollout](https://pooranlaw.com/covid-19-vaccine-roll-out/), published on December 18, 2020) and Hicks Morley *OASIS COVID-19 Vaccine Advice*, publishedon December 23, 2020).

Both briefs conclude that an employer has several options to consider in preparing a COVID-19 vaccination policy which include, but are not limited to:

* For new hires, offers of employment can be made conditional upon receiving a COVID-19 vaccine, subject to accommodation for substantiated medical and religious reasons
* A COVID-19 immunization policy that ***encourages*** immunization and imposes employment consequences for non-vaccination, as opposed to a mandatory protocol is less likely to be successfully challenged. Note however that unions may nevertheless challenge a policy that encourages vaccination where there are negative consequences (unpaid leave, transfers, reduced hours of work or work opportunities, enhanced masking obligations).
* Setting clear and unequivocal terms for the policy, for when it applies and when it would not. For example, vaccination being required for all staff actively working in congregate settings during an outbreak (unvaccinated staff being transferred or placed on an unpaid leave during the outbreak). (For more on this, see #5).
* A COVID-19 vaccine policy should follow general rules and principles consistent withcurrent collective agreements, is clear and unequivocal, communicated to all employees and is consistently applied.

1. **In taking this position, is this an infringement on an employee’s human rights?**

Both briefs conclude that:

* The employer has a legal obligation to accommodate for human rights grounds and shall consider accommodation for substantiated medical and religious reasons up to the point of undue hardship.

**3. If an employer does create a vaccine policy, should staff who chose not to be immunized be able to continue to provide direct support in residential programs?**

Both briefs conclude that:

* In situations where an employee chooses not to be vaccinated, the employer may impose employment consequences deemed reasonable in the circumstances. These would have already been outlined in the policy shared with staff. The consequencescould include placing the staff on an unpaid leave of absence for the duration of the pandemic or until such time that COVID-19 no longer poses a significant public health risk.
* We note that such a policy is likely to be challenged by employees who are placed on an unpaid leave. Whether such a policy is defensible will depend on the degree of risk, the alternatives to leaves of absence that might be available.

**4. If a staff member, for medical or religious reasons is unable to be vaccinated, is the employer obligated to accommodate the staff?**

Both briefs conclude that:

* The employer has a legal obligation to accommodate, provided that the medical or religious reason is legitimate. For example, a person declining to be vaccinated for ethical reasons would not be protected as a human rights issue. But, as recommended by PooranLaw, “these factors should be assessed with legal advice.”
* Possible forms of accommodation for employees declining vaccination for bona fide human rights protected reasons may include location transfers, changes in job requirements, enhanced PPE requirements, and, where no other less intrusive form of accommodation would be available without undue hardship, an unpaid leave of absence as a last resort. What is possible without undue hardship will depend significantly on the stage of re-opening applicable to the region in which the agency is located, as well as the saturation of vaccination within the agency, among other things.
* During the current state of emergency for instance, the imposition of a leave of absence may be more justifiable than when a region is in Stage 3 of re-opening.

**5. Is it reasonable, given the current situation, for an employer to place the staff on an unpaid leave until such time as COVID-19 no longer presents a significant public health risk?**

In the PooranLaw brief, the concept of “balance of interest” is explained as that which “involves balancing the employee’s interest in bodily integrity and privacy with the employer’s legitimate interests in invoking the vaccination policy.” PooranLaw suggested that “the balance of interest weighs in favour of vaccination, at least while COVID-19 is circulating widely in the community.” With the emergency order declared on January 12, the employer’s interest for safety would bear further weight compared to the employee’s individual interests.

PooranLaw’s brief summarized a case where avaccination policy that placed unvaccinated staff on leave during periods of flu outbreak in a health care facility were upheld.

PooranLaw noted that in this case, leaves were only implemented where there was an active outbreak in the unvaccinated employee’s work location, as opposed to the outbreak in the community at large. There is currently no legal precedent for staff being put on leave of absence based purely on the risk of contagion in the community. At the same time, PooranLaw outlined that the more limited a policy is (e.g., only staff during an outbreak situation vs. all staff), the less risk there will be from a legal perspective.

At the same time, PooranLaw noted that the magnitude of the risk from COVID-10 eclipses that of your average flu season and the powers and obligations that agencies have been imbued with during the pandemic under O. Reg. 121/20 could potentially justify a policy that imposes leaves of absence during periods of lockdown or heightened community risk. PooranLaw cautioned that this is untested territoryand could present risk of back wages being awarded in grievance arbitration for unionized staff held out of work due to refusal to vaccinate if a policy is held to be unreasonably intrusive.

For agencies planning to implement a vaccination policy, it will be very important to **outline clear and unequivocal terms when the vaccine is required, as well as possible implications of refusal to vaccinate** that are based on transmission risk factors outlined by Public Health. Examples:

* a vaccine requirement for all staff working in congregate settings throughout the pandemic
* a vaccine requirement for all staff working in a congregate setting in outbreak
* a vaccine requirement for all staff not working from home during an Emergency Order

**Example: Scenario of a Unionized Staff**

***Scenario:***

The employer advised all employees of the COVID-19 Vaccination Policy that included the following elements:

1. encouraged all staff working in congregate care settings to be vaccinated
2. notified them that if they failed to do so they would be placed on a leave of absence without pay during periods when:
   1. the risk of covid-19 contagion in the community reached XXX threshold,
   2. where there were any outbreaks amongst agency staff of the agency, or
   3. as otherwise recommended by Public Health.

A unionized employee who provides direct support in one of the agency’s group homeschose not to be vaccinated as he/she does not feel the vaccine is safe.

***Considerations:***

What considerations/actions should the employer take – or have previously taken –toaddress this situation?

* ensure the policy was developed in consultation with the Joint Health and Safety Committee/Health and Safety Representative and legal advice, and is consistent with the principles and language in the current collective agreement
* ensure the policy and employment consequences for failing to adhere to the policy are reasonable given the current circumstances of the pandemic and public health risks COVID-19 poses:
  + this may require regular updates based on the degree of risk in the community at the time that any negative consequences are imposed on an employee
  + it will also require a consideration of the degree of risk within your organization and within the worker’s work location
  + consideration of alternative measures (changes in work location, changes in duties, remote work, enhanced PPE)
* the policy terms are clear and unequivocal
  + The agency in this example clearly outlined that the employee could choose between receiving a vaccine or else going off work without pay if they work in a congregate setting
* the policy was communicated to the employee
* it outlines the employment consequences which will be taken by management if the policy is not followed, e.g., placing the staff on unpaid leave
* the employer is consistently applying the policy to all employees who refuse to be vaccinated
* ensure there is not a human rights issue at play, for example, the staff has an autoimmune deficiency and their doctor has advised they should not have the vaccine. Or the staff may be Muslim and is heeding the guidance of Muslim leaders that vaccines are unacceptable.
  + Note, where this is the case you may need to consider alternative measures (enhanced PPE, re-deployment to a work location where the people support and staff in the worksite are at lower risk of infection (either because they have all been vaccinated, are younger, healthier and/or better able to observe Covid-19 precautionary measures)). Where this is not possible then an unpaid leave may the other only option short of undue hardship.

Ensuring these requirements are met will result in reduced risk where an agency chooses to place an employee who chooses not to vaccinate during periods of elevated Covid-19 risk on a leave of absence without pay.

**Disclaimer**

Legal input and feedback included in this policy were provided by [PooranLaw](http://www.pooranlaw.com/) lawyers as members/consultants of the Sector Pandemic Plan Initiative’s Governance working group. However, the legal input and feedback included in this policy should not be construed as legal advice. Each agency’s circumstances and legal rights may vary and there will also be nuances within each agency. The goal of the legal input and feedback included in this document is to help present options and highlight risks and other considerations. Agencies may wish to seek legal advice specific to their agency’s circumstances, the types of support they provide, their regional risks etc., once they have selected the options that meet the needs of their organization.

1. Queens Park Ontario: *Occupational Health and Safety Act*, R.S.O. 1990, C.0.1. s. 25.<https://www.ontario.ca/laws/statute/90o01>; O. Reg. 67/93: *HEALTH CARE AND RESIDENTIAL FACILITIES,* s. 8 & s. 9. [↑](#footnote-ref-2)