

## **Commentary on the Ontario Human Rights Commission’s Position regarding Mandatory COVID-19 Vaccinations in the Workplace**

On September 22, 2021, the Ontario Human Rights Commission (“OHRC”) issued a [policy statement on mandatory COVID 19 vaccination policies in the workplace](#).

Set out below in **bold print** are the specific **statements** made by the OHRC in its policy. My commentary follow each statement:

**1. OHRC Statement: Mandatory COVID-19 vaccination policies are generally permissible under the Ontario Human Rights Code (the “Code”)**

Commentary: This OHRC statement is not law. The Ontario Human Rights Tribunal makes the laws. The Commission (OHRC) makes policy statements which are often followed by the Tribunal. As such, the OHRC’s position on mandatory COVID-19 vaccination policies is a powerful support for employers, who must defend against challenges to such a policy.

Unfortunately, the OHRC’s statement does not resolve the issue of whether an employer can legally terminate an employee who refuses to get vaccinated “for cause” and without paying any notice in lieu of termination. We will have to wait for the first court decision to determine that issue.

**2. OHRC Statement: Mandatory COVID-19 vaccination policies should be used for the shortest period of time. These policies should be reviewed and updated to match up to date public health information.**

Commentary: I recommend all vaccination policies contain a statement that reserves the employer’s right to amend the policy based on evolving public health information regarding COVID 19.

3. **OHRC Statement: Employees are required to submit medical documentation in support of a medical exemption request.**

The OHRC encourages employers to use documentation required by the Ontario [provincial proof of vaccine policy](#) as proof of a medical exemption. This consists of a written document provided by a physician or registered nurse extended class or nurse practitioner stating, *“there is a medical reason for the exemption from being fully vaccinated against COVID-19”* and the *“effective time period”* of the medical reason for the exemption. The OHRC stated this written documentation can be required until recognized medical exemptions can be integrated as part of a digital vaccine certificate.

Commentary:

According to the OHRC’s statement, employers may ask employees if there is a medical reason for the exemption request. The OHRC has not said whether an employer can (or cannot) ask employees to advise of the medical reason for the exemption (i.e., such as an allergy or myocarditis).

Ordinarily, employers are advised not to ask for the medical reason for a requested accommodation, as this could amount to a diagnosis.

However, employers should note that the College of Physicians and Surgeons (“CPSO”) and the Ontario Ministry of Health (“MOH”) have issued guidelines to healthcare practitioners who will be completing medical documentation in support of exemption requests. These guidelines specifically direct healthcare practitioners to provide documentation that *clearly indicates why the employee cannot be vaccinated against COVID-19 (i.e., clear medical information that supports the exemption)*. This suggests that employers can ask for more than confirmation of a medical reason why the person cannot be vaccinated.

The CPSO guidance document is the September 1, 2021 [Frequently Asked Questions](#) (the “FAQ”).

The MOH’s publication is the September 14, 2021, *“Medical Exemptions to COVID-19 Vaccination”*. This document is attached.

The CPSO and MOH’s guidelines also state the following: (again, these guidelines are for the healthcare practitioners who will complete medical documentation in support of exemption requests).

- Medical exemptions will be rare. There are *very few* contraindications to COVID-19 vaccines that will qualify as a medical exemption.
- Anyone with a contraindication to COVID-19 vaccines should be referred to an allergist/immunologist or other appropriate specialist for further assessment. The MOH states medical exemptions should be supported by expert consultation (i.e., immunologist/allergist, cardiologist)

As such, when employers are faced with a medical exemption request, they have options regarding the scope of medical information they can request from the employee's healthcare practitioner.

One option is to limit the request based on the guidelines in the OHRC's policy statement, specifically asking for confirmation that the employee is exempt from getting vaccinated against COVID-19 for a medical reason and how long this exemption will apply.

Another option is to ask for more extensive information based on the CPSO and MOH guidelines. As these are the guidelines that the healthcare practitioners are required to follow in filling out medical notes in support of exemption requests, it is not unreasonable for employers to ask for the information required by the CPSO and MOH. The following is a sample clause setting out the medical documentation requirements for an exemption request, based on the CPSO and MOH guidelines.

*Medical documentation in support of a medical exemption request must be provided by a nurse practitioner or physician and:*

- *clearly specify the reason you cannot be vaccinated against COVID-19 (i.e., document clear medical information that supports the exemption)*
- *advise whether the exemption is permanent or temporary. If temporary, the date when the employee can receive a COVID-19 vaccination*
- *confirm that you have been referred to an allergist/immunologist or other appropriate specialist for further assessment and the expected date of the appointment with the allergist/immunologist or other appropriate specialist. Follow up medical documentation may be required from the allergist/immunologist or other appropriate specialist*

If an employer uses the second, more extensive option and it is challenged by an employee, I recommend the employer seek legal advice in responding to the challenge. But part of the response will be to advise the employee that the request is based on the CPSO and MOH's

guidelines for medical practitioners completing the medical documentation. Employers should check these guidelines for updates and adjust if necessary.

4. **OHRC Statement: With respect to religious exemption requests, the OHRC was silent on what will constitute proof of a religious exemption. It only stated that “a person who chooses not to be vaccinated based on personal preferences 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 amount to a creed within the meaning of the Code.”**

Commentary: It appears that religious exemptions requests will also be rare. I am not aware of any major religious which prohibits its followers from becoming vaccinated against COVID 19.

In one case that I dealt with, an employee stated she was a member of a specific (but relatively obscure) religion and her religion prohibited her from getting vaccinated against COVID-19. I did some research and was able to locate a document published by the head of this religious organization which stated that followers were not prohibited from and in fact were encouraged to get vaccinated against COVID 19. This document was presented to the employee when her exemption request was denied.

In other cases I have dealt with, employees have cited specific parts of their religion’s founding documents (such as the Bible) in support of their personal position that their faith prevents them from getting vaccinated against COVID -19. Although we acknowledged the employee’s sincere and firmly held beliefs; we advised the exemption request was based on the employee’s *singular belief against vaccinations and did not amount to creed within the meaning of the Human Rights Code*. As such, the exemption request was denied.

It should also be noted, that even if an employee can prove a religious exemption, the employer must then determine what is reasonable accommodation. Based on the circumstances, allowing the employee to continue working while unvaccinated may not be possible for health and safety reasons. This of course, will depend on the facts. Further discussion on accommodation for approved exemptions is set out immediately below.

5. **OHRC Statement: If an individual has a Code related reason for not being vaccinated (medical or religious), the employer has a duty to accommodate them, unless it would significantly interfere with people’s health and safety. The duty to accommodate is**

**limited if the accommodation will significantly compromise health and safety amounting to undue hardship, such as during a pandemic.**

Commentary: If a person qualifies for a medical or religious exemption, then this creates a legal duty to accommodate. The process for determining the duty to accommodate is the same as for any other types of medical accommodation requests. Specifically, an employer should engage in a discussion with the employee as to whether accommodation is possible and if so, what it might look like.

If possible, the employer should accommodate approved medical or religious exemptions by allowing the employee to work from home or work on site with appropriate PPE or other IPAC processes, if this is possible or reasonable. Working from home may not be possible or reasonable for many positions. PPE/IPAC may not appropriately protect against the health and safety risk for employees who have close contact with patients. In some cases, the only appropriate accommodation will be to place an employee, with an approved medical or religious exemption, on an unpaid leave of absence. Employers should check with their STD or LTD insurers to determine if there is any coverage for this situation.

The key is to avoid imposing a “one size fits all” rule regarding accommodation for those with approved medical or religious exemptions. Each situation must be considered individually, and employers should engage in a discussion with the employee regarding accommodation options. The employer gets to make the final decision on what accommodation is reasonable. I recommend employers clearly and respectfully communicate their decision to the employee and the reasons for the decision, especially if the decision is not what the employee was hoping for.

**6. OHRC STATEMENT: COVID testing might be an appropriate accommodation in some cases for employees with legitimate human rights exemptions. The employer should pay for testing for employees with approved human rights exemptions.**

Commentary: Testing is not mandatory for those with an approved medical or religious exemption. The OHRC’s statement recognizes that employer **may** use testing as part of an accommodation plan in certain circumstances.

If an employer determines that an employee **with an approved medical exemption** can continue to work if they submit to weekly testing, I recommend employers implement the OHRC’s statement and cover the cost of testing for these individuals. I also recommend the

testing be done during the employee's work time if possible. Approved exemptions are going to be very rare, as such, paying for testing in the rare case where an exemption is approved should not be a significant drain on an employer's resources.

If an employer's policy allows unvaccinated employees to continue working without an approved exemption (i.e., the employee is choosing not to become vaccinated based on personal choice) and the employer allows these employees to submit to testing; then in my view it is reasonable to require these unvaccinated employees to cover the cost of such testing and to get tested on their own time. If this is challenged, employers should seek legal advice.

### **BOTTOM LINE**

1. The OHRC supports mandatory COVID-19 vaccinations policies in the workplace, at least during the pandemic. The OHRC's position provides employers with great support for any legal challenge to the validity of mandatory vaccination policies. However, the OHRC's position does not address the legal question of whether an employer can terminate an unvaccinated employee for cause and without providing any payment of notice/severance
2. Mandatory COVID-19 vaccination policies should only be used during the pandemic. Employers should revise their policies based on evolving public health information.
3. Approved medical exemptions will be rare. Employers have options regarding the scope of medical information they can ask for in support of a medical exemption request. Employers can base the request for information on the OHRC's guidelines. Alternatively, employers can use the more extensive guidelines published by the CPSO and MOH to establish the type of information needed in support of a medical exemption request. Employers should seek legal advice if employees challenge the medical documentation request.
4. Religious exemptions will be rare and such requests can be denied if the religious organization does not prohibit its followers from getting vaccinated and/or the exemption request is based on an employee's "singular belief".
5. Approved exemption requests (medical or religious) create a duty on the employer to accommodate. The accommodation process requires an individual analysis based on the specific facts of the employee's situation. Accommodations may include working from home, testing, enhanced PPE/IPAC processes. Accommodation may not be possible due to health and safety concerns, and it may be necessary to place the employee on an unpaid leave of absence.

6. It COVID testing is implemented as an accommodation for employees with approved exemptions (medical or religious), the employer should pay for the testing. If employers allow unvaccinated employees without an approved exemption, (i.e., those who choose not to get vaccinated) to continue to work subject to getting COVID tested, it would be reasonable for employers to require these employees to pay for the testing and also to get tested on their own time. If this is challenged, employers are encouraged to seek legal advice.

Please contact me if you have any questions or concerns about employment issues or if you want me to send you any former E-Alerts.

Kind regards

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**Please read:** The following is legal information. It is **not** legal advice. This is important because in these difficult times we have to be very careful not to overstate answers or solutions to what can be complex decisions. Our legal environment is changing day by day. This information is limited to the date it was written. Municipal, provincial or federal governments may introduce new laws as days go by. Future court decisions may require revisions to the comments provided above.