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Getting Back To Business FAQ

September 2021

In May of 2020, the team at Rudner Law prepared a thorough, comprehensive return-to-work guidebook. At the time, few expected COVID-19 lockdowns to last more than a few weeks. We were hopeful, like most Canadians, that the problem had been caught quickly and that an aggressive lockdown strategy would allow us to resume our normal activities in the Spring or Summer.

Needless to say we were just slightly naive, and 18 months later very few things are back to 'normal.' Yet with a widely vaccinated population, businesses across the country are gradually starting to welcome employees back to the office. Headlines are filled with discussions of mandatory vaccinations and vaccination passports, as well as reluctance to return to the workplace. There are many questions from employers and employees on what they can and can't do, how to keep the workplace safe, and what rights and responsibilities each party has in this process.

We wanted to offer a guide to some of the most common issues that we have been asked about in recent weeks about returning to the office. This guide is by no means comprehensive, and more information is available on our website. Most importantly, though, every situation is different, and you should get advice based on yours; **contact our office to set up a Strategy Session before taking any crucial steps.**

None of the answers in this document should be taken as legal advice, as they are general in nature and have not taken into account the specifics of your particular situation. In addition, please keep in mind that this information is current as of September 17, 2021 and that circumstances are evolving rapidly.

Can employers implement a mandatory vaccination policy?

The short answer is yes, but there are some key considerations to remember.



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This is obviously a very contentious issue. There has been lots of debate, and the reality is that we are trying to apply age-old laws to new and novel circumstances. There is no clear legal answer to this question, but the prevailing wisdom is that employers can require that employees be vaccinated.

It is *crucial* to note though that “mandatory vaccination” can have different meanings. Despite the headlines, many “mandatory vaccination policies” have stopped short of stating that an individual who chooses not to be vaccinated will lose their job. Rather, many provide for education on the benefits of vaccination and have left the door open to various ways of ensuring safety without 100% vaccination. That can involve requiring that unvaccinated employees submit to regular testing, maintain physical distancing and the ongoing use of masks, and/or work remotely.

Furthermore, human rights legislation protects employees who cannot be vaccinated as a result of medical conditions or genuinely held religious beliefs. Those employees would have a human rights claim if they were dismissed due to their failure to be vaccinated; instead they are entitled to accommodation to the point of ‘undue hardship.’ That may mean regular testing, or distancing and masking, or a work from home arrangement as needed. In appropriate circumstances, it could also mean an unpaid leave of absence. Accommodations do not need to be perfect, but they do need to be reasonable, so they may look different for every workplace.

We write these policies for a living - employers, please contact us so we can discuss your workplace and strategize on how to best structure your policies. We will help you implement policies to meet your specific needs without resulting in a costly human rights claim, the loss of a valued employee, or an unsafe workplace.

Can employers ask employees to show proof of vaccination?

Although this does relate to personal information that is protected by privacy rights, those rights can be superseded by safety concerns in appropriate circumstances. These are appropriate circumstances; and proof of vaccination is a reasonable request. Furthermore, Toronto’s Medical Officer of Health is recommending that employees who cannot be vaccinated must show proof from their physician confirming this fact. That is not unreasonable, particularly since those employees will be entitled to accommodation.

Remember, though, that as much as vaccines are a topic of conversation, a person’s vaccination status should still be handled as a sensitive matter. An individual may be unable to



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get a vaccine for a reason that they have not publicly disclosed. 'Out-ing' them as unvaccinated can inadvertently disclose sensitive health information, so employers should proceed with caution and seek legal guidance as necessary. Even revealing the fact that an employee has been vaccinated is questionable, and businesses that confidently assure customers that "this employee" or "all of our employees" have been vaccinated are revealing personal information about those employees without their consent.

Can employers dismiss employees who refuse to take the vaccine? Will they have to give them severance if they do?

In short, yes, and yes; well, in most cases. The reality is that most workers in Canada do not have job security; what they have is an entitlement to severance if they lose their job through no fault of their own¹.

The vast majority of employees can be dismissed at practically any time for practically any reason, or no reason at all, so long as that employee is paid out properly. What does this mean when it comes to vaccinations? In short, an employee who refuses to be vaccinated without any sort of human rights exemption can be let go. Employers are not required to provide a reason for termination, but they are required to pay an employee the appropriate termination pay according to the law and that person's employment contract. Lastly, we frequently hear chatter about protections from the Charter of Rights and Freedoms, but since that only applies to government actions, it actually only covers a small subset of workers and not the actions of private employers.

Do You Get Severance?

There is an exception to the entitlement to severance: when just cause for dismissal exists. Just cause can result from misconduct, such as theft, or insubordination, which means refusing to follow a reasonable direction.

The key question is whether a rule requiring vaccination would be a reasonable one in the eyes of the law. If so, refusing to be vaccinated would constitute insubordination. That will depend very much on the specifics of the situation; it is far more likely that requiring an emergency room nurse to be vaccinated will be seen as reasonable, as opposed to a clerical worker who does

¹ Unionized workers and some federally regulated workers are treated differently.



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their job from home. Even where it is reasonable, there would have to be clear warning of the expectations and consequences of failing to meet them.

The bottom line is that employees can be dismissed if they refuse to be vaccinated without a medical or religious exemption, but the jury is still out on whether or not they could be dismissed without any severance pay. In all likelihood, some employees could be.

Can employers insist that all team members return to the office when it's safe to do so? What if they refuse?

Yes. Employers 'rule the roost' when it comes to making those sorts of decisions, so employers can instruct employees to return to the workplace provided that it is safe to do so and there is no contract or collective agreement that dictates otherwise. If an employee was always allowed to work from home, the employer cannot change the rules and insist that they be in the office full-time. But the reverse is also true: if an employee always had to be in the workplace, they cannot insist that they will now work from home, even if they have done so effectively for the last year and a half. The main consideration should be the 'safe to do so' portion - employers should always follow all public health guidelines in issuing their directives. Currently, these guidelines are still recommending that employees who can work remotely continue to do so.

If employees are still refusing to come back even though public health has declared things safe, then they are refusing to follow a direct order from their employer. Before penalizing though, it is always worth taking a closer look at the circumstances and talking to the employee to find out why. If they're refusing for medical reasons, that may be a unique situation that requires accommodation. If they are refusing because of childcare obligations that have changed since the pandemic began, that may also be a human rights issue that is protected by a person's family status. A conversation with the employee may shed more light on their reasoning, and then a conversation with us can help determine what next steps, discipline or otherwise, should be taken.

Should workplaces insist that employees continue to distance and wear masks? How should a workplace handle employees that have not been vaccinated?

First and foremost, employers are responsible for maintaining a healthy and safe workplace. Employers are always advised to take health guidance from public health authorities; depending on current conditions that may mean implementing masks and distancing for some time until



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local health authorities suggest otherwise. Employers should also keep employees informed of important COVID-19 information, such as the proper procedures to follow if they are experiencing symptoms, and the important numbers to call.

Because there will be unvaccinated employees for a number of different reasons, and there may be a need to interact closely with customers, clients and suppliers that are unvaccinated, precautions should remain in place.

Employees should be encouraged to keep their vaccination status private and discrete in the workplace. Obviously this is no easy feat considering the prevalence that vaccination rates play in the news cycle, but employers and managers should remind employees that their vaccination status is a private matter, and should not be discussed openly. This may be the safest way to ensure that an employee is not bullied or discriminated against based on what may be a protected human rights ground.

Can employees say that they refuse to come back unless everyone is vaccinated?

As we said, employees cannot refuse to work or choose where they will work unless they have a contractual right to do so. We have heard of many individuals insisting that they are “not ready to come back yet”, or similar circumstances. Unfortunately, this is not a choice available in most cases.

Employees may be entitled to delay a return to work if they are unable (not just unwilling) to work for COVID-19 related reasons, or if there is a human rights-based reason such as childcare obligations or medical restrictions, including mental health. While employees have a right under the law to refuse unsafe work, the Ministry of Labour has repeatedly rejected claims that a risk of COVID transmission creates an actual safety risk where the employer is complying with public health guidelines.

We have also met with many individuals who were scared to return to work, not because of the workplace itself, but due to more general fears of being out in public or using public transit.

The reality is that there may be coworkers present who are ineligible or unwilling to take the COVID-19 vaccine, and their colleagues may never know if employers do their part about keeping sensitive information quiet. Employers must make reasonable efforts to provide a safe



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workplace, and employees can only rely on their right to refuse unsafe work if there is a specific and legitimate risk in the workplace.

If an employee is refusing to return, employers should discuss the issue with them and see if there may be human rights issues or other legitimate concerns motivating their hesitancy. If there are none, employers may wish to explore a reasonable accommodation, or they may wish to draw a hard line and provide the employee with a direct warning that their continued refusal will lead to the end of their employment. As we said, employees did not gain a new right to choose when and where they will do their job as a result of COVID.

In any event employers would be advised to contact our office before making any decisions, and employees can always contact us to consult on their rights in this situation.

What if we as a workplace decide not to go back to the office at all - what should employers be watching out for?

If you are anything like our office, then you may have decided during the past 18 months that the virtual model works so well that you are making a permanent transition!

For employers, there are lots of things to consider if you decide to stay fully remote. Remember that so many of your workplace policies would have been designed for an office environment, so everything from your office security policies to your technology usage policies will likely need updating. Other mandated policies, such as violence and harassment policies, will also need revisiting through a unique lens. While employers are responsible for maintaining a safe workplace, that can look quite different when the employees are all working from home.

Employers will also need to take a practical view of the situation, and revisit the control that they once had over a traditional workplace setting. Throughout the past 18-months most employers have learned that remote work is feasible, but can often require some spontaneous flexibility and understanding. An employee's dog might bark in the background of a video call, or their doorbell might ring unexpectedly. Employers can still set expectations for productivity, and employees will be expected to meet those reasonable expectations, but a bit of grace on both sides can go a long way.



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How should employers recall workers from a layoff? Do they need to be recalled in a specific order?

Unless the workplace is unionized, there is no set order in which employees need to be recalled. The recalls can happen according to the needs of the business, but employers must be careful not to let any protected human rights grounds such as age, disability, family status etc. factor into their decision-making. Ontario's Human Rights Commission has also put forth that an individual's actual or perceived status with regard to COVID-19 infection should be considered a protected human rights ground.

While the rules can be hazy in some provinces on how to recall workers, recall notices should always be given in writing as a matter of best practice. Employers should let employees know

the day that they are expected to return to work, and that their failure to return to work will be interpreted as a resignation from their position.

Employees should also be informed of any changes that have taken place within their position, such as if their location of work has changed or if they will be permanently working from home. Employers should note though that any significant change to the working relationship must be met with the employee's approval, otherwise the employer may be risking a claim of constructive dismissal.

What do employers and employees need to know about IDEL and CEWS?

There were significant changes in legislation both federally and provincially to help employers and employees through the height of the pandemic, but it now looks like both of those changes will be winding down shortly.

The Canada Emergency Wage Subsidy ("CEWS") was a program offered to employers starting in 2020 to help assist with covering employees' wages during pandemic-related business interruptions. Payments are issued to employers relative to the actual decline in earnings in order to cover a percentage of wages, and the numbers can get complicated (read more about the sliding scale [here](#)). At this time the CEWS is scheduled to wind down this Fall, but the exact



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date of the program ending is still to be determined, and will likely be assessed based on the state of the pandemic.

In Ontario, the provincial government amended the *Employment Standards Act, 2000* and created the Infectious Disease Emergency Leave (“**IDEL**”), which was intended as a job-protected leave for employees who have been infected with COVID-19 or who have been ordered to quarantine as a public health measure because of their exposure to infection. In addition, during the “COVID-19 Period”, employees who were unable to work for certain reasons related to COVID-19 were deemed to be on IDEL. At this point, the COVID-19 period is scheduled to end on September 25, 2021² and employees who were deemed to be on leave (save for those battling infection at that time or otherwise eligible to remain on IDEL) can be recalled to work. The IDEL is only intended to cover employees who cannot work, so if an employee is recalled but does not return to work then they are not protected from being penalized or terminated for their decision.

² Please note that paid IDEL will remain available to employees up until December 31, 2021.



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This information is only an overview of some of the most common questions that we have received, but we know that there are countless issues that will arise as we continue to unpack all of the changes to follow in the coming months. Please feel free to reach out to us at any time and discuss your specific issues with a member of our team. We regularly help employers and employees navigate difficult issues, and while COVID-19 may be the most seismic disruption that we have dealt with in some time, we are well-prepared to help you handle whatever challenges you are facing.

**The bottom line is that if you are uncertain, we can help.
As we often say:**

If you think you might need an Employment Lawyer, you probably do.

**We want to be your Trusted Advisor, your Chief HR Law Officer, your business partner.
Let us be part of your team, so that we can look after your employment law issues, and
you can focus on your business.**



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