

Employment Update: When Can Employers Provide an Exemption to COVID-19 Vaccination Policy Requirements?

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In our September 9, 2021 [Employment Update: Reopening Workplaces and Vaccination Policies](#), we reported on recommendations for employers in Ontario to institute a workplace vaccination policy to protect their employees and the public from COVID-19, as well as some considerations for such policies.

While the provincial government has not mandated vaccination for *all* workplaces, Ontario's mandatory proof of vaccine requirement for patrons of certain indoor public settings commenced on September 22, 2021. In the context of these new regimes, the question that has been left for employees and employers alike, is: Who can be exempt from these vaccination policies?

Medical Exemptions

The College of Physicians and Surgeons of Ontario (CPSO) has published guidance stating that there are very few and rare medical reasons not to get vaccinated against COVID-19, including:

1. people who are at risk of a severe allergic reaction to one of its components, or
2. people at elevated risk of developing a rare heart condition known as myocarditis.

The CPSO's recommendations have been implemented into the policy developed by Ontario's Ministry of Health and Long-Term Care. [Medical Exemptions to COVID-19 Vaccination](#) contains a short list of conditions that may warrant an exemption from COVID-19 vaccination. The list of exemptions is restricted to severe allergic reactions or anaphylaxis to a component of a COVID-19 vaccine, a reaction to a dose of the vaccine, a history of inflammation of the heart muscle (Myocarditis) for those aged 12 to 17, a history of four conditions specific to those receiving the Vaxzervia (AstraZeneca) vaccine, and those actively receiving two specific types of therapies for the treatment or prevention of COVID-19.

The CPSO has also gone further and stated that the circumstances of the pandemic support physicians declining to provide documentation for an exemption where a patient requesting the exemption does not have an identified medical reason. Given the rarity of these exceptions, and considering that vaccines have been proven to be both safe and effective, any notes written for patients who qualify for a medical exemption need to clearly specify:

- the name and contact information of the physician or nurse practitioner (for example, phone number and address)
- a logo or letterhead identifying the physician or nurse practitioner
- a statement that there is a medical reason for your exemption for being fully vaccinated against COVID-19 (i.e. document clear medical information that supports the exemption)
- an effective timeperiod for the medical reason within the date the individual is seeking access to the business or organization (i.e. permanent or time-limited)

Interestingly, however, despite the identified narrow medical exceptions to the COVID-19 vaccine, Ontario's Chief Medical Officer of Health, Dr. Kieran Moore, has suggested that there is evidence pointing to an exemption rate amongst Ontario employers that is hundreds of times higher than it should be.^[1] In fact, Dr. Moore stated that he has heard anecdotal reports from employers suggesting that the medical exemption rate for employees is between one and two per cent, and a "review" into these circumstances is warranted. The CPSO has recently gone so far as issuing suspensions and/or instituting court proceedings against doctors regarding the issue of granting exemptions.

Ontario's Ministry of Health and Long Term Care recently released a [Sample Statement of Medical Exemption COVID-19 Immunization](#) for medical practitioners to use when recommending an exemption to the COVID-19 vaccine, which narrowly outlines the acceptable reasons for a medical exemptions (as noted above), and also includes a possible length of the exemption where it is time-limited.

The CPSO's guidelines, together with the Ministry of Health and Long-Term Care's policy and template forms, will assist medical professionals with specific parameters for approving employees for exemptions from vaccination. In turn this will assist employers who are enforcing vaccination policies and may be dealing with an influx of exemption requests.

[Ontario Human Rights Commission Releases Policy](#)

The Ontario Human Rights Commission (OHRC) has also released a [policy statement](#) on COVID-19 vaccine mandates and proof of vaccine certificates (the "Policy"). The Policy provides further guidance and clarity regarding the nexus between Human Rights Code (Code) protections and vaccinations in the context of the COVID-19 pandemic.

The Policy confirms the OHRC's position that mandating and requiring proof of vaccination to protect people at work or when receiving services is generally permissible under the Code as long as protections are put in place to make sure people who are unable to be vaccinated for Code-related reasons (e.g. medical or disability-related reasons) are reasonably accommodated. However, the OHRC goes on to state that vaccine mandate policies and proof of vaccination

requirements that result in people being denied equal access to employment or services on Code grounds may only be justifiable during a pandemic or shorter periods. The Policy highlights that proof of vaccine and vaccine mandate policies should only be used for a reasonably appropriate duration, be regularly reviewed and updated to match pandemic conditions, and reflect up-to-date evidence and public health guidance.

An integral point coming out of the Policy is the OHRC's position that a person who chooses not to be vaccinated based on "personal preference" does not have the right to accommodation under the Code, and that personal preferences or "singular beliefs" do not amount to creed for purposes of the Code. Furthermore, even if a person could show they were denied a service or employment because of a creed-based belief against vaccinations, the duty to accommodate does not necessarily require they be exempted from vaccine mandates, certification or COVID testing requirements. This is based on the idea that the duty to accommodate can be limited if it would significantly compromise health and safety amounting to undue hardship – such as during a pandemic.

Reasonable Accommodation

The OHRC has explained that exempting individuals with a documented medical inability to receive the vaccine is a reasonable accommodation within the meaning of the Code. In other words, organizations must reasonably accommodate people who are unable to be vaccinated due to Code-related reasons unless the accommodation would significantly interfere with people's health and safety.

When considering whether a legitimate human rights exemption request can be accommodated, organizations should carefully consider whether the individual's circumstances can be accommodated short of undue hardship. Requests need to be addressed on an individual basis, and supporting documentation should be evaluated. This process should be documented to protect against future scrutiny.

Organizations may elect to put COVID testing in place as an alternative to mandatory vaccinations or as an option for accommodating people who are unable to receive a vaccine for medical reasons in circumstances where this approach is considered to be acceptable from a health and safety perspective. The OHRC's view is that organizations should cover the costs of COVID testing for those employees who have a valid medical exemption as part of the duty to accommodate.

Overall

While there is still much uncertainty in these unprecedented times regarding vaccination mandates and proof of vaccination policies generally, both the medical exemption classifications from the Ministry of Health, as well as the recent guidance from the OHRC, may help employers and businesses to both respect human rights when implementing their policies, as well as navigate and appropriately scrutinize exemption requests.

[1] <https://www.cp24.com/news/i-think-it-deserves-a-review-top-health-official-says-medical-exemptions-being-granted-far-too-frequently-1.5611799>

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