



# Uncharted waters: mandatory vaccinations on project sites

As we enter the fourth wave of the COVID-19 pandemic, some industries have been mandated to require vaccinations. More recently, some municipalities and some general contractors have also announced that they will impose policies that will require proof of vaccination on their jobsite. Can owners or general contractors impose a requirement that all persons attending their jobsite be vaccinated against COVID-19?

From a purely contractual perspective, it is arguable that imposing a mandatory vaccine during the course of a contract would impose a unilateral change to the contract that may not be agreed to by the other party. The imposition of a new contractual term part way through a contract is not enforceable, and the party seeking to impose such a term cannot terminate a contract on the basis that the other party has not complied with that new term. Thus, setting a requirement for mandatory vaccines on a project could be interpreted as a unilateral change to the contract such that the term would be unenforceable.

As always, you have to review your contract carefully to see whether you may have already agreed to be bound to changes in policies and regulations. For instance, the City of Ottawa has introduced a mandatory vaccine policy that requires all employees and contractors to have received their second dose of a vaccine by October 15, 2021. The City of Ottawa will most likely take the position that compliance with such a policy has already been made a requirement of all its contracts with its contractors by virtue of its General Terms and Conditions. For greater clarity going forward, and to avoid uncertainty, any contract that is being procured should now be clear on whether there is a mandatory vaccination requirement for the project.

If such a term is present in the contract, then care must be taken to pass that obligation down to those whom are being contracted to perform work on the project. It could be that while you are contractually bound to such a term, if you have not passed that obligation down to your subcontractors and suppliers then they could argue that this new obligation does not apply to them.

The new *Reopening Ontario (A Flexible Response to COVID-19) Act* arguably expands who is responsible to ensure a safe workplace. It does not distinguish between owner, contractor, subcontractor, corporation, or individual. If you are in any way responsible for the operation of a business, you must ensure that the business operates in accordance with any advice, recommendations or instructions from public health officials, and with the *Occupational Health and Safety Act*.

If there has been any advice, recommendations, or instruction issued by public health officials requiring a specific industry (such as the healthcare industry) to be fully vaccinated or have a vaccine policy, then the *Reopening Ontario Act* mandates that there has to be a vaccination policy in place for jobsites in that industry. Thus, this act requires compliance with such policies.

Even if no such instructions have been issued, under the OHSA, owners, constructors, employers, and supervisors all have independent duties to ensure safety of a jobsite. For instance, a “constructor” (that is anyone who undertakes a project for an owner) must ensure that “the health and safety of workers on the project is protected”. An “employer” (that is anyone employing persons on a project, including contractors and subcontractors) has a statutory obligation to “take every precaution reasonable in the circumstances for the protection of a worker”.

Contractually then, the issue becomes whether compliance with the *Reopening Ontario Act* and the OHSA is a term of your contract. Compliance with this legislation is not optional. In the event there are instructions from a public health official, or if it is “reasonable in the circumstances” that vaccines are administered, you will have to follow such requirements. One would be hard pressed to argue that the OHSA is not applicable to them, in the same vein as arguing that a contract does not require them to wear a hard hat on the project.

This of course assumes that vaccination would be found by a court to be “reasonable in the circumstances”. Absent convincing scientific evidence that vaccines are ineffective at preventing, contracting, and spreading COVID-19, it is more likely than not that such a requirement would be necessary and found to be a requirement under the OHSA. Think of how such an analysis might apply to a mandate for safety goggles on a site. Is there evidence that makes the requirement “reasonable in the circumstances”?

We must chart a course for the future that balances the safety of the workers and the freedom to contract. This is nothing new. However, given the seemingly political nature of the COVID-19 vaccine, it is unlikely that the province will step in and clearly legislate a contractual term. Until then, there will continue to be rough waters ahead. This may leave individuals and companies to legislate on the fly or risk the consequences.

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