



NEWFOUNDLAND AND LABRADOR
MEDICAL ASSOCIATION



NLMA Guidance: Mandatory Vaccine Policies for Physicians' Staff

Updated October 12, 2021

****DISCLAIMER: This document is provided in response to questions from NLMA members. It is provided only for information purposes and does not constitute legal advice.***

Mandatory Vaccine Policies for Physicians' staff

Some employers may be considering whether they will require their employees to be fully vaccinated by a Health Canada approved COVID-19 vaccine(s) or provide proof of a vaccine passport for COVID-19 vaccination status. The NLMA has received requests from its members seeking guidance on their rights as employers who wish to implement mandatory COVID-19 vaccination policies for their staff.

Employer Rights and Responsibilities

The CMPA advises that “clinics and private offices generally have an obligation to provide a safe environment for their patients and staff pursuant to occupational health and safety legislation. Members are encouraged to consult with their local public health authority and/or their personal or business legal counsel to assess the necessity of a mandatory COVID-19 vaccination policy and any consequences for non-compliance.”

While receiving a COVID-19 vaccine remains voluntary, mandating and requiring proof of vaccination as part of a clinic’s occupational health and safety policy is generally permissible as a condition of employment as long as protections are put in place to ensure that employees who are unable to be vaccinated are reasonably accommodated.

If an employee refuses to be vaccinated, refuses to confirm that they had the vaccination or refuses to show or provide a vaccination certificate, the employer will need to decide if it will require the employee to wear a mask at work, isolate from other employees, work from home, send the employee home without pay or end the employment relationship.

The [Newfoundland and Labrador Human Rights Commission](#) advises that “vaccine mandates, in some cases, are reasonable and justifiable.” It says that policies should be:

- Proportional to the health and safety risks they seek to address
- Time-limited and/or reviewed regularly
- Aware that less intrusive means of ensuring health and safety may exist
- Based on scientific evidence and the health and safety recommendations of the CMOH
- Ensure privacy of personal medical information.

Precedents in the Canada

The Government of Newfoundland and Labrador announced that as of December 17, 2021, all public service employees in core provincial government departments, agencies, boards and commissions, as well as the staff of any vendor, supplier or contractor who regularly works alongside Provincial Government employees, must be fully vaccinated for COVID-19. The Government of Newfoundland and Labrador policy is available [here](#), which you may consider using as a template for your own employees.

The Government of Canada also announced that effective October 29, 2021 all federal public servants in the Core Public Administration, including members of the Royal Canadian Mounted Police, will be required to confirm their vaccination status. Those who are unwilling to disclose their vaccination status or to be fully vaccinated will be placed on administrative leave without pay as early as November 15, 2021. Employers in the federally regulated air, rail, and marine transportation sectors will have until October 30, 2021, to establish vaccination policies that ensure employees are vaccinated. The Government of Canada has also asked Crown corporations to implement vaccine policies mirroring the requirements for the rest of the public service. The Acting Chief of the Defence Staff will also issue a directive requiring vaccination for the Canadian Armed Forces.

Medical Exemptions

Some people are not able to receive the COVID-19 vaccine for medical reasons. Therefore, employees must be permitted to apply for medical exemptions. There are very few acceptable medical exemptions to the COVID-19 vaccination.

The College of Physicians and Surgeons has provided guidance on issuing medical exemptions, which is available [here](#).

Given the rarity of these exceptions, and in light of the fact that vaccines have been proven to be both safe and effective, an employee seeking a medical exemption should provide an employer with:

- the reason they cannot be vaccinated against COVID-19 (e.g., medical information that supports the exemption); and
- the effective time period for the medical reason (e.g., permanent or time-limited).

Religious Exemptions

While many people claim to have a religious exemption to vaccination, those requests may not be valid in the context of the province's human rights laws. The [Newfoundland and Labrador Human Rights Commission](#) advises that "personal preferences or singular beliefs against masks or vaccines do not amount to a religious creed/belief for the purposes of the *Human Rights Act*... A person who chooses not to get vaccinated because of a personal choice or belief, is not protected under the *Human Rights Act* and does not have the right to be accommodated."

According to the NL Human Rights Commission, no major religion has come out in opposition to COVID-19 vaccines. The Commission states that "the person requesting the accommodation would need to provide a note or other information that their religion, particular faith or genuinely held religious belief has a theological reason for objecting to vaccines. The Commission is not aware of any major religion having a theological opposition to vaccines."

The Ontario Human Rights Commission and British Columbia's Office of the Human Rights Commissioner have also advised that people receiving exemption letters from a member of their church are not guaranteed to have a valid religious exemption to COVID-19 vaccines. One's religious beliefs must be based on an established religious practice that prevents one from receiving the vaccination in question. In this regard, religious exemptions cannot be a personal belief – it must be grounded in established religious practices. The Ontario Human Rights Commission says that it is not aware of any tribunal or court decision in Canada that found a singular belief against vaccinations or masks that amount to a creed.

Duty to Accommodate

The Newfoundland and Labrador Human Rights Commission says “employers still have a duty to accommodate people whose protected personal characteristics (prohibited grounds) prevent them from getting vaccinated (e.g. medical exemption).” Possible accommodations might include:

- continued use of masks
- maintaining physical distancing
- remote work
- modified shifts
- possible reassignment and/or regular testing

Limits to Accommodation

The Newfoundland and Labrador Human Rights Commission advises that “the duty to accommodate is required up to the point of undue hardship. This may mean that the requested accommodation creates health and safety risks to others, be inordinately expensive or not allow a person to do their job properly. If the undue hardship rule is met, the person requesting the accommodation may face the choice of complying with the policy or being terminated.”

An example of undue hardship would occur if accommodating one employee places others at risk of contracting the COVID-19 virus.

The Government of Newfoundland and Labrador’s policy defines undue hardship as “the limits of reasonable accommodation beyond which the employer does not have a duty to accommodate. The word “undue” implies that the employer may be expected to bear some hardship in fulfilling the duty to accommodate. Undue hardship is assessed on a case by case basis, considering various factors relating to the situation, including but not limited to health and safety risk; impact on a collective agreement or other contract; legitimate operational requirements and disruption to the public; impact on rights of others; interchangeability of the workforce and job duties; workplace size; and the type of work.”

Developing the Workplace Policy

[The Office of the Information and Privacy Commissioner Newfoundland and Labrador](#) advises that it is important that employees clearly understand an employer’s Mandatory COVID-19 vaccination policy. For example:

- Will the program apply to all employees, or just those in certain positions or locations?
- Will the program be mandatory or voluntary?
- Will the program be part of a larger public health effort including masking, hand washing and social distancing, or will it be an isolated initiative?
- If employees are expected to be vaccinated, what are the consequences if employees are not?
- Will there be a grace period to allow employees to comply?
- What if an employee seeks an exemption?

Physicians may consider adopting the recommendations that the Government of Canada is requiring its agencies to implement as part of their mandatory vaccine policies. It states that such policies must:

- include a provision for employee attestation/declaration of their vaccination status;
- include a description of consequences for employees who do not comply or who falsify information;
- meet standards consistent with the approach taken by the Government of Canada for the Core Public Administration; and
- after a short phase-in period, guarantee employees are fully vaccinated or they will be unable to work.

It is also recommended that a mandatory vaccine policy include a statement on:

- the purpose of the policy;
- where their vaccine status information will be stored (if collected);
- with whom, if anyone, the employee's information will be shared;
- when/how their information will be destroyed.

Privacy Requirements

The [Office of the Information and Privacy Commissioner Newfoundland and Labrador](#) states that "vaccination status is personal information, therefore any public body that collects the vaccination status of employees must comply with *ATIPPA, 2015*. At its most basic, public bodies must establish the purpose and authority for any collection, collect the least amount of information to meet the purpose, share it only with those who need to know, keep it secure and destroy it when no longer needed."

More information from the OIPC about collecting proof of vaccination from employees, privacy considerations, use and disclosure, is available [here](#).

[The Office of the Information and Privacy Commissioner of Saskatchewan](#) has also provided recommendations to employers about how they can ask employees about their vaccination status. It suggests the following:

- Are you planning to get vaccinated?
- When will you receive your first injection?
- Have you received your first injection?
- When will you receive your second injection?
- Have you received your second injection?
- Do you have a vaccination certificate?
- Will you show me a vaccination certificate?
- Will you provide me with a vaccination certificate?

The least intrusive approach would be that an employer requests, "Please show me your vaccination certificate". The employer looks at the certificate and does nothing else.

Legal Considerations

Requiring employees to receive the vaccine or provide a vaccination certificate could potentially result in a court challenge if the employee has a medical condition or religious belief that they allege was not accommodated by their employer. NLMA members are encouraged to consult with their personal or business legal counsel to assess any consequences for non-compliance.

An employee who files a human rights complaint on the ground of a medical condition will need to provide medical information to confirm they have a condition that prevents them from being vaccinated. Likewise, an employee who files a complaint on the ground of religious beliefs will need to provide information to show it is a facet of their belief that they cannot receive vaccinations and that belief is sincerely held and connected to their faith.

Following the enactment of the *Canadian Charter of Rights and Freedoms* in 1982, the Supreme Court of Canada formulated a methodological test to determine whether the violation of a Charter right is nonetheless justifiable in a free and democratic society. Stemming from the case *R. v. Oakes*, this became known widely as the Oakes test. It requires:

- **Necessity:** there must be a clearly defined necessity for the use of the measure, in relation to a pressing societal concern (i.e. a substantial, imminent problem the security measure seeks to treat),
- **Proportionality:** that the measure (or specific execution of an invasive power) be carefully targeted and suitably tailored, so as to be viewed as reasonably proportionate to the privacy (or any other rights) of the individual being curtailed,
- **Effectiveness:** that the measure be shown to be empirically effective at treating the issue, and so clearly connected to solving the problem, and finally,
- **Minimal intrusiveness:** that the measure be the least invasive alternative available (in other words, ensure that all other less intrusive avenues of investigation have been exhausted).