



International Lawyers Network



**Vaccine Requirements – Canada:
Montréal**





This paper offers an overview of legal aspects of vaccine requirement in the named jurisdiction. It is meant as an overview in this marketplace and does not offer specific legal advice. This information is not intended to create, and receipt of it does not constitute, an attorney-client relationship, or its equivalent in the requisite jurisdiction.

Neither the International Lawyers Network or its employees, nor any of the contributing law firms or their partners or employees accepts any liability for anything contained in this guide or to any reader who relies on its content. Before concrete actions or decisions are taken, the reader should seek specific legal advice. The contributing member firms of the International Lawyers Network can advise in relation to questions regarding this paper in their respective jurisdictions and look forward to assisting. Please do not, however, share any confidential information with a member firm without first contacting that firm.

This paper describes the law in force in the requisite jurisdictions at the dates of preparation. This may be some time ago and the reader should bear in mind that statutes, regulations, and rules are subject to change. No duty to update information is assumed by the ILN, its member firms, or the authors of this guide.

The information in this guide may be considered legal advertising.

The contributing law firm is the owner of the copyright in its contribution. All rights reserved.



Canada: Montréal

Introduction

Canada's Constitution makes it such that the presumptive and preeminent jurisdiction in matters of employment, labour relations writ large, privacy and health and safety at work is provincial, not federal. This is in marked contrast to the U.S. In Canada, federal legislation applies only to select industries where the federal government is given exclusive or at least primary legislative competence by specific constitutional provisions or, whereas in the case of privacy, specific provinces have opted to apply the federal regime rather than create their own.

Vaccine mandates and responses to COVID-19 raise concerns that involve privacy, health, and safety at work and, as some allege, issues of “inherent civil rights” that intersect with and challenge public interest. This may and does lead to differing responses as between provinces. Ideology of the governing party of each of the provinces and that of the federal government also plays an important role in determining each jurisdiction's response. That the debate regarding COVID-19 responses — vaccine mandates, obligatory mask wearing etc. — has become politicized and polarized is reflected by the ongoing “truckers' occupation”, in Ottawa, the nation's capital, and the virtual blockage also by “truckers” of the Alberta–U.S. border, COVID-19 fatigue has melded with certain populist ideologies to produce civil disobedience which, while its primary focus may have begun as opposition to vaccine mandates, compulsory masking and/or other governmental controls, has now morphed into demands upon governments that are as ill-defined as their impact is substantial. In short, as respects COVID-19 responses and constraints, one size definitely does not fit all, and varies from province to province, shifting and evolving even as we speak. Definitely a work in progress.

A first arbitration award in Quebec on vaccination against COVID-19 in the workplace

The situation of COVID-19 in Quebec

In contrast to the situation in the United States, since the beginning of 2022, demonstrations have taken place in Quebec and Ontario against the health restrictions in effect. The year began with a rally of hundreds of people in the Old Port of Montreal to protest the imposition of the vaccine passport and the third dose of COVID-19 vaccine in Quebec. Then, on January 28, 2022, convoys of truckers “protested” in downtown Ottawa against all health measures related to COVID-19 adopted by all governments in the country engaging in what amounts to civil disobedience by “occupation” of the city's downtown core. A similar anti-COVID measure

**Robinson Sheppard
Shapiro**



Theodore Goloff
tgoloff@rsslex.com

Dimka Markova
dmarkova@rsslex.com

www.rsslex.com/en/

Tel: (514) 878-2631
Fax: (514) 878-1865



Canada: Montréal – (cont'd)

convoy planned for Quebec City took place in early February though with more controlled effects. Some dissatisfied Quebecers weary of COVID-19 restrictions or having bought into “fringe” points of view are demanding an end to the public health emergency and health measures presently in effect.

Currently, in the Province of Quebec, “teleworking” is mandatory for any activity that can be performed remotely. When not possible, a minimum physical distance of two metres between people and the wearing of a quality mask is obligatory.

Although the Quebec government is empowered under s. 123 of the *Public Health Act* to impose mandatory vaccination of the entire population or a portion thereof when a state of emergency is in effect, this power has been exercised “sparingly” and only with respect to specific groups. As of October 15, 2021, all health care workers, in Quebec, are required to be doubly vaccinated against COVID-19, failing which they can be reassigned to other duties, where possible, or be placed on leave without pay.

Meanwhile, last fall, the Government of Canada imposed mandatory vaccination for all federal public service employees. This was subsequently the subject of a request for injunctive relief denied by the Federal Court.

As long as the level of government involved does not clearly require mandatory vaccination, it may be problematic for employers under provincial jurisdiction to impose vaccination on their employees. Indeed, the wrongful dismissal remedy under the *Labour Standards Act* in Quebec may expose the employer to costly litigation before a tribunal that is not particularly employer-friendly, should an employer seek to enforce such rule. Could imposing a new compulsory vaccine rule be viewed as a substantial change in working conditions leading to an allegation of “constructive dismissal”? How far can an employer discipline a recalcitrant employee?

What happens to a Quebec service provider, when its customer requires that all persons entering be adequately vaccinated against COVID-19? What happens to employees who are not vaccinated and are denied access to the workplace by that customer? Arbitrator Denis Nadeau seems to have been the first to address these issues in an arbitration award rendered on November 15, 2021: *Union des employés et employées de service, section locale 800, et Services ménagers Roy Itée (grief syndical)*, [2021 QCTA 570](#).

First case on mandatory vaccination in the workplace in Quebec

Customers of different industrial or commercial maintenance or cleaning companies have adopted policies requiring that employees assigned to their buildings be adequately vaccinated. Since those businesses are bound by contracts with these customers, and must abide by their requirements, they must be able to confirm the vaccination status of employees, failing which





Canada: Montréal – (cont'd)

Robinson Sheppard
Shapiro



their customer could terminate the contracts. Unvaccinated employees would have to be transferred to worksites which do not have such vaccination requirements or, in the absence thereof, would be laid off.

Naturally, the union challenged the right of employers to require proof of the vaccination status of employees, alleging that such collection is both unnecessary and violates the right to private life and physical inviolability guaranteed by the *Charter of Human Rights and Freedoms* [Charter] (s. 5 and 1 of the *Charter*). According to the union, this interference is not justified by a legitimate objective of protecting health and safety.

Arbitrator's decision

In his decision, the arbitrator acknowledged that the requirement to produce a vaccination certificate infringes the right to respect for private life (s. 5 of the *Charter*), but concluded, considering the principle that “no right is absolute”, that this obligation is justified in the light of “public order and the general well-being of the citizens of Quebec”. The preamble to the Charter also provides that “the rights and freedoms of the human person are inseparable from the rights and freedoms of others and from the common well-being”. Therefore, a claim to a right must be “reconciled with countervailing rights, values, and harm”.

The parties also agree that the vaccination requirement stipulated by customers is essentially based on two scientific findings:

- An unvaccinated employee who contracts COVID-19 is likely to suffer the most serious consequences of COVID-19, unlike a vaccinated employee.
- An unvaccinated employee who contracts COVID-19 has a higher viral load than a vaccinated employee and, as a result, is more likely to transmit the virus. [para 43]

Considering the science in the light of employers' occupational health and safety statutory, the arbitrator concludes that an employer's customers are justified in imposing a vaccination requirement on subcontractors.

Impact of the *Occupational Health and Safety Act*

Under section 51 of the *Occupational Health and Safety Act* [OHSA], an employer must take the necessary measures to protect the health and ensure the safety and physical well-being of his workers. In the specific context surrounding the pandemic, the employer must use methods and techniques to identify, control and eliminate the risks associated with the SARS-CoV-2 virus that may affect the health and safety of workers. Accordingly, the employer must take all necessary, humanly logical and reasonable means to protect the health and safety of workers in their



Canada: Montréal – (cont'd)

Robinson Sheppard
Shapiro



establishment. However, these responsibilities are just as topical and applicable in tripartite relations. The employer's customers have this obligation not only to their own employees, but also to their suppliers and subcontractors under section 51.1 OHSAA.

Employees have corresponding obligations under section 49 of OHSAA to protect both their own health and that of others. Unvaccinated employees represent not only a risk to themselves, but also to other employees to whom the virus can be transmitted in the workplace.

Collection and communication procedure

As for the manner in which information is collected, the arbitrator suggests that it be carried out by a human resources representative rather than by immediate or hierarchical superiors. A simple observation on the Vaxicode application of the "Adequately Protected" status or a paper version of this document is more than enough to allow employers to respond to their customers' requests. In fact, if there is confirmation from the employer that affected employees are adequately vaccinated, the client should be communicated.

Caveat

- This award dealt with a "policy grievance": it leaves the door open to direct challenges based on specific individual factors such as working hours in specific buildings, whether people work solo or in teams, in large or cramped premises.
- The award does not directly empower an employer to impose a vaccination requirement on its own employees itself, but rather how an employer might react when such a policy is adopted by its customers. Since the arbitrator states that the vaccination requirement of the customers necessarily becomes that of the employers by "adoption" can his conclusions be transposed to a policy of the employer's own creation.
- As well, the arbitrator indicated that he did not intend to rule on the particular case of employees who refused vaccination on religious or medical grounds.

Finally, the decision takes account of the collective agreement binding the parties, but only as regards the transfer to other positions of unvaccinated employees. It remains to be seen whether restrictive language elsewhere in the agreement such as the management rights clause itself may bring different results. Stay tuned!