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Can your employer force you to take the COVID-19 vaccine?

Josh Rubin

You're sitting in a hospital waiting room, and a nurse walks in to see you. You wonder to yourself if they've been vaccinated against COVID-19.

The answer? Not necessarily. Nor, for that matter, is there any guarantee the cashier at the grocery store, your bus driver, or your kid's schoolteacher has had the shot.

Even once vaccines have been widely distributed, legal experts disagree on whether employers can make it mandatory for employees to get the shot.

At its heart, those experts say, is a conflict between the Occupational Health and Safety Act (OHSA), and human rights legislation, such as the Ontario Human Rights Code or federal Charter of Rights and Freedoms.

"As things stand, there is no legislative or health order which would permit employers to mandate vaccine use.... The OHSA only provides a certain amount of cover," said Trevor Lawson, a partner in the labour and employment practice at McCarthy Tétrault.

Don't expect any new mandatory COVID-19 vaccine legislation or health order from the province. Asked about it last week for employees in health care and other front-line workers, Ontario Health Minister Christine Elliott said Premier Doug Ford has been clear.

"The premier has been very clear that he wants this to be a voluntary assumption, that people will receive the vaccine voluntarily. We don't want to make it... mandatory," Elliott said.

The OHSA, says lawyer and law professor John Craig, obliges companies to take all reasonable steps necessary to keep their employees safe. That, he argues, could include making sure employees have been inoculated against COVID-19.

"Requiring a vaccine during a global pandemic seems like an eminently reasonable thing to do," said Craig, a labour and employment partner at Fasken and co-director of the graduate program in labour and employment law at York University's Osgoode Hall Law School.

Once people start to head back to their

A nurse holds the Pfizer-BioNTech COVID-19 vaccine at Guy's Hospital in London, U.K., Tuesday, Dec. 8, 2020, as U.K. health authorities rolled out a national mass vaccination program.

workplaces in earnest, says Craig, many companies will likely try to impose mandatory COVID-19 vaccinations.

"Some employers will do this, and they'll probably get legal advice that they can," Craig said, adding that some clients have already started drafting mandatory COVID-19 vaccination policies.

Still, Craig acknowledges, even if they get the go-ahead from their lawyer, it doesn't mean a company's better off with a mandatory vaccine policy.

"Just because someone tells you you've got legal justification to do something doesn't mean that it's smart to do it. From an HR standpoint, it's going to be a lot better and easier in many cases to focus on education and discussion," Craig said.

Cara Zwibel, a lawyer with the Canadian Civil Liberties Association, says one

of the purposes of human rights legislation — in addition to fighting discrimination — is to keep governments and companies from intruding where they don't belong. That includes, she says, your own body.

“It's a very intrusive thing to have your employer force you to do something to your body that you don't want to do or are medically unable to do,” said Zwibel, director of the CCLA's fundamental freedoms program.

Some unions which have in the past fought against mandatory flu vaccinations are still trying to work out how to handle the COVID-19 vaccine for their members, and wouldn't comment.

Neither the Ontario Nurses Association, which won an arbitrator's decision against a mandatory flu vaccination or mask policy in 2018, nor the CUPE Ambulance Committee of Ontario — the province's biggest paramedics union — would comment for this article.

Nor would Unifor, the country's largest private sector union. All three unions, sources say, are currently trying to come up with policies on how to handle potential mandatory COVID-19 vaccines in the workplace.

Zwibel says the possibility of mandatory vaccines pits two kinds of legal principles against each other: labour law, which demands companies ensure the safety of their employees, and human rights legislation.

“There's a basic conflict between the OHSA, and the Human Rights Code and Charter,” said Zwibel, who's against mandatory COVID-19 policies not just as a matter of principle, but also practicality.

“For people who are reluctant, having something mandated is probably going to be counterproductive anyway. They may really dig in and be even less likely to get vaccinated,” Zwibel said.

The best alternative, she says, is for employers to focus on persuasion.

“The better approach is to focus on educating and persuading as many people as possible to get it,” Zwibel said.

Still, just because there's no legislation or health order imposing mandatory COVID-19 vaccinations now, doesn't mean things will stay that way, says McCarthy Tétrault's Lawson. Health rules have changed as the pandemic has progressed, from making masks mandatory in public places, to social distancing rules and business closures, Lawson pointed out.

“In the ever-changing world we're in, what is unacceptable today is perfectly acceptable tomorrow,” Lawson said.