

## Can I Ask my employees for proof of vaccination?

The short answer is **Yes**. However, there are many risks to consider, including it must be justifiable for health and safety reasons which would be more likely to be the case in only certain sectors, like health care or educational settings. The policy must also be fair, flexible and no more intrusive than it has to be.

As for the legal risks, here's what employers should know to before implementing a Proof of Vaccination policy.

### Proof of Vaccination & Privacy Law

Canadian health laws but don't require individuals to get vaccinated. For as long as vaccination remains voluntary, making employees submit proof of vaccination puts employers on shaky legal ground. Personal privacy laws ban collection, use and disclosure of protected health information without consent. Information about a person's vaccination status clearly counts as protected health information protected by the laws.

There are however some exceptions. Privacy commissions throughout the pandemic have stressed that employers can collect information about an employee's COVID-19 status as a reasonable workplace safety measure, if they collect no more information than what they need to accomplish that purpose. These same principles, which so far have been invoked to allow employers to perform workplace screening, make employees get tested and/or disclose an employee's positive status to third parties for contact tracing, apply equally to requiring proof of COVID vaccination.

### Proof of Vaccination & Human Rights Law

Requiring employees to show proof of vaccination can also create problems under human rights laws, which ban discrimination and require employers to make accommodations to the point of undue hardship. Three potential red flags:

- **Disability discrimination:** Employers aren't allowed to ask employees or job applicants about their disabilities;
- **Religious discrimination:** Requiring proof of vaccination may discriminate against employees who refuse to be vaccinated because of their religious beliefs; and
- **Creed discrimination:** Requiring proof of vaccination may also discriminate on the basis of creed, generally defined as a system of non-religious beliefs that are integral to a person's self-identity.

Human rights duties are subject to exceptions, including for otherwise employment practices that discriminate on the basis of a person's race, sex, disability, etc., but which are still okay because they serve a legitimate, non-discriminatory purpose and do it in a way that's reasonable, limited and used only when less discriminatory alternatives aren't available.

On January 12, 2021, the Ontario Human Rights Commission (OHRC) reissued its COVID guidance to address the vaccination question: *"Requiring proof of vaccination to ensure fitness to safely perform work may be permissible if the requirement is made in good faith and is reasonably necessary for reasons related to safety."* But, the OHRC continues, employers still must accommodate people who may be unable to be vaccinated due to disability or creed unless it would amount to undue hardship based on cost or health and safety.

### The 5 Things to Do

Employers can make proof of vaccination a mandatory condition for entry by adopting a screening policy that includes appropriate safeguards and mechanisms for accommodations. (The government of Ontario is currently considering the exact same strategy in deciding whether to require people to show proof of vaccination to participate in certain public activities.) Five key pointers:

1. Clearly explain the reasons why proof of vaccination is required;
2. Remember that asking about an employee's disabilities is a red flag for discrimination;
3. Keep records of proof secure and confidential and disclose them to third parties on a strict need-to-know basis;

4. If employees can't take the vaccination because they have a disability or principled objection based on religion or creed, activate the accommodations process by doing an individualized assessment to determine whether letting the employee enter the workplace would pose an unacceptable threat to health and safety;
5. Accommodations to consider may include letting the employee work from home or allowing entry provided that the employee take additional safety precautions at the workplace, such as:
  - Wearing a mask at all times;
  - Remaining physically isolated from other people;
  - Following specific medical self-monitoring protocols; and/or
  - Taking extra personal hygiene, cleaning and disinfection measures.

## The Need for Flexibility

The need to be flexible and prepared to account for external factors based on practical reality, such as agreeing to relax the rules when employees can't get vaccinated because of inadequate supplies. You should also consider giving employees who must get the vaccine during work hours paid leave, so they don't have to sacrifice vacation days or part of their wages.