

# Mandatory Vaccination Policies in the Dental Office

April 16, 2021

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With vaccination rollouts now going strong and workers in the dental field being prioritized for vaccines, we are getting daily calls from dentists asking, “Should I make COVID-19 vaccinations mandatory for my staff?”

My lawyer answer is, “it depends”. But I’ll try to guide you through how you can make this very important decision for your own practice.

First, you must clarify the decision you need to make. To do so, you have to figure out how to strike a balance between staff, patient and business protection in the face of a new risk. A mandatory vaccination policy could be the solution, but maybe not. Let’s explore some different consideration factors.

## Human Rights and Privacy vs Health and Safety

On one hand, vaccination is an elective medical procedure that is ultimately a very personal and private choice. To infringe on someone’s human and privacy rights by requiring them to (a) undergo a medical procedure and (b) disclose details of that procedure as part of their employment, you must have a very good reason for doing so.

On the other hand, COVID-19 presents a genuine safety risk. Employers have a legal duty under the *Occupational Health and Safety Act* to take every precaution reasonable in the circumstances to protect their workers. Failure to do so may result in company and/or personal liability of the employer.

What’s more, an employee could sue their dentist employer directly for injuries suffered on the job (such as contracting COVID-19). This was confirmed recently when employers were purposely excluded from legislation that protects other entities (such as corporations and the government) from liability towards anyone who has contracted COVID-19 in the workplace. Under this legislation, employers covered under WSIB can have employees claim through that program. However, dentist employers are not required by law to be part of WSIB and generally do not opt into that program. As such, the liability for COVID infection in the dental office will fall squarely on the employer’s shoulders.

## Constructive Dismissal

Aside from breaching human rights legislation and an employee’s privacy rights, another matter that should be seriously considered when making a mandatory vaccination policy is the potential of employee claims of constructive dismissal.

Constructive dismissal is when an employer *unilaterally* changes the terms of employment such that the employer can be seen as no longer willing to be bound by the terms of employment. Constructive dismissal is a form of wrongful termination and triggers the employee’s termination rights (which may include termination pay, severance pay, the continuation of benefits, etc.). Telling an employee that they must undergo a medical procedure under the threat of termination, unless justifiable in the circumstances, may amount to constructive dismissal and the employee can quit their job and claim that they were wrongfully terminated. For more on termination liability, click [here](#).

## Regulatory Guidance for Dentists

### RCDSO’s Stance on Vaccination

Another piece of the puzzle for dentist employers is the protection of their patients. After all, “the paramount responsibility of a dentist is to the health and well-being of patients.”

The risk of COVID-19 to patients is genuine, and the RCDSO quickly took action at the start of the pandemic to implement stringent additional precautions in the dental office to prevent the spread of the disease. But does that mean that the RCDSO is advocating for mandatory vaccination to ensure patient protection?

The RCDSO has previously taken a stance on vaccination concerning other vaccine-preventable diseases. In the 2018 “Standards of Practice” document, the RCDSO states that “immunizations are an essential part of IPAC programs” and in the *Dispatch Magazine*, “All OHCWs [Oral Health Care Workers] should be adequately immunized against the following diseases: hepatitis B, measles, mumps, rubella, varicella, influenza, diphtheria, pertussis, tetanus, polio.”

However, when it comes to COVID-19, the RCDSO will not make vaccination against this disease mandatory unless required to do so by Ontario’s Chief Medical Officer of Health or other governing body having authority over it. When interviewed regarding mandatory vaccination, a member of the Practice Advisory Committee at the RCDSO stated that there is no basis for making the COVID-19 vaccine mandatory at this time. This is because there is currently no evidence in Canada or elsewhere to suggest a heightened risk of patients contracting COVID-19 at the dental office, provided the dental office is adhering to the additional protective protocols put in place since the start of the pandemic.

Although the RCDSO does not have a plan to add COVID-19 to the list of “should have” vaccines at the moment, they were careful to state that it is up to each individual dentist to make a decision on whether they will make vaccination against COVID-19 mandatory in their office.

## PIDAC’s Stance on Vaccination

Public Health Ontario (PHO) relies on another body concerned with patient safety, being the Provincial Infectious Diseases Advisory Committee (PIDAC) when it comes to information about infection prevention and control (IPAC). PIDAC is a multidisciplinary committee with expertise and experience in IPAC. The RCDSO also references PIDAC literature regarding infection control, and public health units routinely rely on PIDAC’s best practices documents to conduct IPAC inspections at dental offices (and have, on occasion, temporarily shut down offices that did not comply with PIDAC guidelines).

Here’s where PIDAC stands concerning other vaccines:

PIDAC’s “IPAC in Clinical Office Practice” document states that, “To protect the health of patients and themselves, it is particularly important that staff be immune to measles, mumps, rubella, pertussis, varicella, hepatitis B and receive influenza vaccine annually. Staff **should** know their immunization status and have their immunizations up to date. Immunizations appropriate for health care providers include: annual influenza vaccine, measles, mumps, rubella (MMR) vaccine (two doses) or serologic documentation of immunity, varicella vaccine (two doses) or serologic confirmation of immunity for staff who may be exposed to blood, body fluids or contaminated sharps in their work, tetanus vaccine (every 10 years), acellular pertussis vaccine (one dose Tdap).”

The “should” language indicates a recommendation that is not mandatory. However, PIDAC’s “IPAC Dental Checklist Core Elements” document has the following checklist item that does not seem to be optional:

“Staff members are immunized, as recommended by the National Advisory Committee on Immunization (NACI).”

So far, the COVID-19 vaccine has not made it into PIDAC’s IPAC documents as either recommended or mandatory. Where they will land on this point has yet to be seen.

## Legal Precedents – What Can Other Cases Teach Us?

At the time of writing this blog, there are no comparable precedents in case law that we can hang our hats on to mandate COVID-19 vaccines in the dental office. There are a few union-related arbitrations in health care settings that we can look to for guidance, but the comparisons are limited because:

- The policies in question had to do with the flu vaccine only.
- The policies were “vaccinate or mask” policies, thereby giving a choice of one or the other.
- Masking was not, at the time, shown to be an effective way to prevent the spread of the flu.
- Flu vaccines, at the time, were only between 20-60% effective.

Although there are no mandatory vaccination policy cases, there is at least one arbitral decision about COVID-19 mandatory testing policy that we can examine:

*Caessant Care Nursing & Retirement Homes v Christian Labour Association of Canada*. In this case, the nursing home instituted a policy (following government guidelines) that every worker at the home must be tested by nasal swab every 2 weeks regardless of symptoms. The union grieved the policy as being an unreasonable exercise of the home’s management rights for the following reasons:

- It is an intrusion on privacy and a breach of workers’ dignity, as was previously found in mandatory drug/alcohol testing cases
- There is no compelling justification against which the intrusion can be weighed (i.e. it is not required) because:
  - the home adapted all the other mitigation strategies recommended by the government, and employees have cooperated in this regard
  - there has been no cases or outbreaks at the home
- The policy is unfair and incoherent because the majority of people in the home are residents, and residents are NOT required to get tested absent symptoms (nor does the home have authority to make such a policy about residents)
- The policy doesn’t accomplish what it purports to do because a negative test only shows that a person doesn’t have COVID at the moment, and that same person could have COVID and be infectious the next day

The arbitrator, in this case, dismissed the grievance and upheld the mandatory testing policy, sighting the following reasons:

- COVID-19 is not the same as monitoring the workplace for intoxicants. COVID-19 is a potentially deadly disease, especially for the elderly – the drug/alcohol testing cases can be distinguished on this basis, and the breach of privacy can be justified
- Regardless of the fact that there were no cases in the home, waiting to act until a case comes along is not a reasonable option
- Even though testing is not perfect and a negative test may have limited value to the employee tested, it does have a very high value to the home. And a positive test leads to identification, isolation, contact tracing and the whole panoply of tools used in combatting the spread of the virus.

What we can take away from this case and the other mandatory policy cases is the rationale by which the arbitrators came to their decisions. The most notable common thread is the concept of reasonableness. In other words, “is the policy reasonable in the circumstances?”

Whether a mandatory vaccination policy would be “reasonable” in a dental setting will depend on a variety of factors, including:

- The need for the policy and whether a less invasive approach will achieve the same goal
- The level of risk posed in the dental practice (i.e. is there a unique or heightened risk of COVID in your dental practice)
- The nature of the dental practice and its operations (i.e. do you have a practice focusing on geriatric patients or working within elderly care facilities, etc.)
- The competing rights and obligations of employees (privacy, dignity, autonomy), employers (liability, obligations to ensure employee and patient safety) and patients (the right to be safe during dental procedures).

## Bottom Line – What Is Your Risk Tolerance?

So, after reviewing the rules and regulations and potential legal precedents, you have a clear answer, right? Not quite. What you need to do now is evaluate that information against your goal *to balance staff, patient and business protection in the face of a new risk* for each of your potential solutions. As we have seen, if you are considering a mandatory vaccination policy, then you better be prepared to defend your decision with fact-based assessments. You will need to show a heightened risk of COVID-19 in your dental office and the extent to which vaccination (and nothing else) will help to mitigate that risk.

With so many ways a mandatory vaccination policy can go wrong with the employer paying the price, it may be worth considering less-invasive ways to achieve the same objective such as a comprehensive testing policy, alternative scheduling arrangements to ensure fewer staff/patients in the office at one time, additional structural/special precautions or PPE, etc.

If you are prepared to go forward with a mandatory vaccination policy after weighing the benefits and potential risks of different solutions, there are some standards the policy must adhere to. Specifically, the policy must be:

- reasonable
- unequivocal and clear
- brought to the attention of all of the affected workers, including the discipline which they may face in the event of non-compliance
- consistently enforced (while making exceptions for cases that must be accommodated)

If you need advice on your particular practice’s options, please reach out. We are dedicated to helping dentists understand and minimize the risks associated with being an employer and happy to help and offer more information on this and any other employment issues.

### About the Author



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