

# How to Create an Enforceable COVID-19 Vaccination Policy for your Workplace

by Heather C. Devine

**W**ith the provincial COVID-19 vaccination delivery programs being implemented across Canada, now is the time for employers to draft and implement a mandatory vaccination policy (CVP) as a condition of continuing employment. Any CVP will have to overcome the tension

between an employer's obligation to provide a safe workplace and the employee's rights and entitlements under common law and/or collective agreement. Here, we review the considerations necessary to ensure your CVP is reasonable, necessary and flexible so that it is both enforceable and creates a safe work environment.

To begin, there are at least five issues that an employer should consider and address to create an enforceable mandatory CVP:

## 1. Understanding the Benefits and Limits of Available Vaccines

The first issue and a key challenge to implementing an enforceable CVP is that the scientific evidence regarding the vaccines is developing daily. Consider retaining

an expert to provide reliable advice regarding the efficacy and reliability of the vaccines. Use this expert advice as the basis for the CVP and secure the advice in a manner so that it can be produced as evidence in support of the CVP, if necessary.

To date, Health Canada has authorized two COVID-19 vaccines: Moderna and Pfizer-BioNTech.

**Moderna COVID-19 vaccine.** Health Canada reported that "based on studies in about 30,000 participants, the Moderna COVID-19 vaccine was 94.1% effective in preventing COVID-19 beginning two weeks after the second dose."

**Pfizer-BioNTech COVID-19 vaccine.** Similarly, Health Canada reported that "based on studies in about 44,000 participants, the Pfizer-BioNTech COVID-19 vaccine was 95% effective in preventing COVID-19 beginning one week after the second dose."

Generally, the reported percentages mean that people vaccinated with either vaccine may still be vulnerable—of 100 vaccinated



people, approximately five were reported to be COVID-19 positive, although with generally less severe symptoms and no deaths. Further, it is not yet known whether a vaccination with either vaccine means that a person cannot be a source of infection for others.

## 2. What is the Purpose of the Mandatory CVP?

Some environments, such as warehouses, distribution centers, and construction sites, which are referred to as "congregate work

settings," require workers to work for periods of time in proximity to one another, which can lead to massive COVID-19 outbreaks. These and similar work environments represent a higher risk of transmission of COVID-19 among workers, compared to others, and in these workplaces it will be reasonable to implement a mandatory CVP.

However, an employer must not implement a blanket CVP, but instead must consider whether

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less intrusive options for workers (or some workers) would suffice. Consider the potential protections offered by physical distancing, personal protective equipment (PPE), masks and plexiglass barriers, as well as whether some employee job descriptions are such (or can be modified) so they can work from home.

Importantly, any policy for mandatory vaccination should show that it is considered, flexible and predicated upon ensuring a safe workplace for all.

A recent decision by an arbitrator regarding a nursing home (healthcare environment) workplace with unionized workers provides some insight into the considerations employed in the enforcement of a similar policy. In *Christian Labour Association of Canada v. Caressant Care Nursing & Retirement Homes*, an Ontario arbitrator dismissed a grievance challenging the reasonableness of a unilaterally imposed policy implementing mandatory COVID-19 testing.

The union tendered evidence that the employer's policy was overbroad and argued the testing was only reasonable in circumstances where an employee is symptomatic. Note this position did not address the employees who may be COVID-19 positive, but asymptomatic.

The employer tendered evidence that the testing was an "important tool" recognized by both medical professionals and the Ministry in controlling and tracking outbreaks. The employer

allowed throat swabs instead of nose swabs when requested for medical reasons and compensated the employees for the time taken to undergo testing conducted by third parties.

Arbitrator Dana Randall held that the rationale found in drug and testing cases, relied upon by the union, was a "reasonable starting point for the analysis" because the appropriate analysis requires "weighing the privacy breach against the goals of the policy." However, Randall concluded, "controlling COVID infection is not the same as monitoring the workplace for intoxicants."

In the nursing home workplace, the intrusiveness of the test was found to be reasonable when compared to the goal of preventing the spread of COVID-19. Essentially, the legal determination will require a balance of the intrusion on the employee's privacy and breach of dignity against the control of a highly infectious and potentially deadly disease.

Therefore, in support of the CVP, the employer must conduct a workplace assessment. This assessment is factual and should also take into consideration the scientific findings and explanations regarding the protections the vaccines can or may deliver in the workplace.

We do know that vaccination combats the spread of the virus, which was a factor that led Randall to conclude, "What is known is that it is highly infectious and often deadly for the elderly, especially those who live in

contained environments." Like testing, vaccination is of limited value to the individual employee who is vaccinated, but it is of high value to the employer who is responsible for all workers, the workplace and customers.

In summary, record the workplace assessment and consult an expert for advice where necessary. This record of workplace consideration in light of applicable science will also assist in the defence of the CVP.

### 3. Occupational Health and Safety Considerations

When performing the workplace assessment to form the basis of the CVP, an employer should consider its occupational health and safety obligations. Generally, the Ontario Occupational Health and Safety Act (OHSA) and its regulations requires employers to take every precaution reasonable in the circumstances for the protection of a worker's health and safety.

Under this legislation, employers should consider whether all (or some) employees should be vaccinated to make the workplace safe. Employers should assess functions carried out by their workforce to ensure they take action to protect against the hazards presented by exposure to COVID-19. For example, equipment operators, material handlers, office staff, distribution or operations managers, and other warehouse sector employees participate in work that requires interaction with co-workers,

customers and work surfaces.

These interactions, as well as the need to touch surfaces, could increase the likelihood the employees or customers could come into contact with the virus. Some employees may be exempt from this nature of work though. Therefore, the workplace assessment is very important to ensure that the foundation for the CVP not only takes into account the functions carried out by the workforce, but it is flexible enough to reflect the different roles employed by various workers.

Employers will have to contend with opposition, however. Until we know whether vaccination reduces risk of transmission to others, there is scope for employees to argue they do not wish to undergo the risk of vaccination, particularly since there is no accepted proof their undertaking of this risk will protect others.

However, this argument does not address the fact that a person who is vaccinated likely has less risk of serious illness due to COVID-19. After a two-week period during which a person is recognized as potentially being a contagious virus host, the likelihood of transmission by a vaccinated person will decrease until the risk is eliminated.

When it is proven that vaccination does inhibit the ability to spread the vaccine, then the unvaccinated would be proven to represent the risk of contagion. Not only do the unvaccinated take on the risk to themselves, but they pose a risk to the five persons

who are vaccinated, but who are still potentially susceptible to COVID-19.

#### 4. Human Rights Considerations

Employers who implement a mandatory CVP must anticipate that some employees may present a medical or other (protected) reason to avoid vaccination. With a mandatory CVP, the employer may lay off the non-vaccinated employee or terminate their employment if a worker's continued refusal to be vaccinated leads to the worker frustrating the employment contract—particularly where a work from home option is unavailable for that position.

In the event the employee claiming a medical reason is laid off or their employment is terminated, they may file a complaint with the Ontario Human Rights Tribunal. The employee would allege their right to be accommodated under the Human Rights Code for their disability is violated by the employer that refused to accept their medical reason to avoid vaccination.

However, a claim alone is insufficient to win an award. The employee's claim would have to be supported by a physician who would testify regarding the reason to avoid vaccination based upon scientific evidence. (An employer who has already consulted an expert to ensure their CVP has a scientific basis will be able to show that it has obtained expert evidence supporting the mandatory vaccination policy in advance of the complaint that is credible and persuasive.)

If the employee's scientific evidence supports a medical reason to avoid vaccination, then the employer could continue to

require all employees to take precautions within the workplace, including requiring vaccinated employees to practice physical distancing (staying two metres away from others); minimizing contact with droplets of mucous or saliva; keeping hands, surfaces and objects clean, and preventing contact with potentially infected people for an indefinite future.

However, if the employer is unable to enforce vaccinated employees to comply with COVID-19 related restrictions (where the vaccinated employees have taken the risk of being vaccinated to alleviate the

requirements to take precautions indefinitely), the employer may be able to prove that it has accommodated the non-vaccinated employee to the point of undue hardship required by Ontario human rights law.

Employees who chose not to vaccinate could counter the employer's undue hardship defence by arguing they do not need to attend at the workplace and, for example, explain they can perform their duties at home. However, this will have been

addressed, in advance, with the workplace assessment on a position-by-position basis. With this evidence obtained in advance of the complaint, forming the basis for the CVP, the evidence of undue hardship for accommodation is credible and persuasive in favour of the employer.

#### 5. Privacy & Constructive Dismissal Considerations

Implementation of the CVP contemplates requiring employees to report or prove their vaccination status, and perhaps changes their job descriptions. Either aspect can lead to a breach of privacy

costs, depending upon whether an employee has an enforceable termination provision in their employment contract, or if not, whether the employee is entitled to reasonable notice at common law.

In anticipation of this issue, consider requesting and obtaining consent to the mandatory CVP, or providing reasonable advance notice of the implementation date of the policy, calculating roughly one month per year of employment for the average employment term of the employees. For example, if the policy is implemented for June 1, 2021 but not put into effect until January 1,



laws or constructive dismissal. In advance of implementation, ensure the reporting requirements comply with privacy law obligations.

Further, evaluate whether the implementation of the CVP can result in a unilateral substantial change to a fundamental term of employment for if so, the affected employee may conclude they have been constructively dismissed.

An award of damages for constructive dismissal can include significant termination

2022, then the employees (who do not consent) will have received six-months notice. Whether this is sufficient notice would require a legal determination on an employee-by-employee basis; but as a guide, it indicates the benefit of a notice requirement for the implementation of a policy intended to control a highly contagious and potentially deadly disease. ■

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# HOW AON ADJUSTED TO THE COVID REALITY

***COVID-19 confinement changed the nature of work for every organization. Aon was no exception. Here, Eric Gagnon, branch manager of the firm's Quebec region, and Rony Rokach, branch manager of the Montreal office, shared their experience and priorities since the COVID confinement started.***

When the COVID-19 confinement started, Aon focused its energy on addressing the needs of its employees. Security and safety were the two focuses. Employees would be working from home with the proper tools to continue to offer the service they were

office remained open since they were declared essential services. Only a few employees working in those departments needed to access the office in order to continue the issuance of the documentation needed to support their client's operations.

to accomplish their work from home. Support and training are now the main requests they receive from their employees.

In retrospect, Aon believes it made the right decision when they decided to invest in their technology infrastructure—it has

the forefront. Others requested accommodation from their insurers to implement premium payment installments based on the severe revenue reduction due to the confinement. These simple questions triggered many phone calls with insurers and clients. The Canadian management was already involved with their clients increased their presence to support and address the needs of their clients. It resulted in more interaction between management and clients to address all questions and provide support to those affected by the confinement.

Aon saw this as a good opportunity to increase their offering to clients. WebEx meetings and presentations on COVID-19 were organized. This new initiative was most popular with the real estate and manufacturing sectors. Aon also created a website dedicated to COVID-19 that incorporates a vast library of articles and webcasts with sections dedicated to working from home and cyberrisk.

Gregory Case, president and CEO of Aon, set the tone since the beginning of the pandemic.

In the early days, he addressed employees once a week to keep them informed. Although this communication is less frequent now, it remains important and has evolved to include local perspective to help the organization address concerns and meet customer needs amid an uncertain environment. ■

providing their clients before the pandemic. Worldwide, employees were 91% efficient on the first day working from home and it took two weeks to become fully efficient. In Canada, the full efficiency was obtained after only a few days.

To accommodate the bonding needs of some employees, the

Aon also offered all of its employees the opportunity to return to the office. Even with the authorities allowing up to 25% of the workforces to reintegrate the office, a much smaller percentage requested access to their office. Most of the employees have now a proper set-up at home, providing full efficiency

largely facilitated remote access for all employees, while providing seamless service for its clients.

From the client perspective, the first question many clients asked was, "Am I covered for my business interruption loss due to COVID?" The anticipated business interruption and other losses were brought to



## SUE MEPHAM HONORED WITH 2021 HEART OF RIMS AWARD

by Katherine Dawal

This past year, it was my privilege and pleasure to nominate Sue Mepham for the 2021 Ron Judd Heart of RIMS Award. This award recognizes the volunteer contributions of a RIMS member who serves as a role model while keeping the Chapter, and hence the Society, vibrant and resilient.

Sue not only puts her heart and soul into serving our Saskatchewan Chapter, but has had a significant impact on the Canadian risk management community as demonstrated by the many letters of recommendation and stories of her impressive career that were shared from across Canada to form part of the nomination. Risk professionals jumped at the opportunity to highlight Sue's dedication and achievements for both the Saskatchewan Chapter and at the national level as the longest-serving volunteer of the RIMS Canada Council and its subcommittees. Sue's vibrant personality and exemplary work ethic has made her more than deserving to be honoured with such a prestigious award. Saskatchewan RIMS would not be the Chapter it is today—if it even existed at all—without Sue's commitment and passion for our members, the Chapter and the risk management profession.

Sue truly is the Heart of SKRIMS—and arguably the Heart of RIMS Canada. Thank you Sue for being so awesome!



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**Katherine Dawal** is president of Saskatchewan Chapter (SKRIMS).

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## CAROLYN EXELBY WINS FRED H. BOSSONS AWARD



Every year, the Fred H. Bossons Award honours the risk management professional who earns the highest average mark on the three examinations required to attain the Canadian Risk Management (CRM) designation. This year's winner is Carolyn Exelby, enterprise risk manager for Flight Centre Travel Group.

The CRM designation provides risk professionals a foundation of knowledge and skills needed to identify, assess, monitor and limit risks. The award is recognized by RIMS and awarded by GRMI.

**Congratulations Carolyn!**

# MOT DE LA PRÉSIDENTE

**Il y a un vieil adage qui dit que les années se suivent et se ressemblent. Souhaitons tout de même que 2021 soit quelque peu différente de 2020 !**

Heureusement, les années se suivent et se ressemblent aussi pour nos chapitres qui continuent de s'engager pour supporter votre développement professionnel et ce, malgré les déraillements provoqués par la pandémie. La COVID-19 n'aura pas seulement été néfaste, elle aura au moins eu un effet positif : nos chapitres ont tous dû changer de perspective et sont tous passés au virtuel, permettant aux membres de participer lorsqu'ils ne pouvaient pas le faire auparavant et leur permettant même d'assister aux activités d'autres chapitres. Nous avons ainsi eu davantage d'opportunités d'apprentissage et il en est ressorti une plus grande collaboration.

L'échange d'information et la collaboration entre tous les membres canadiens de RIMS demeure importante. Je pense particulièrement à l'innovation dans nos façons de faire et le partage d'expériences pertinentes et enrichissantes. C'est encore plus important entre membres d'une même région qui ont des réalités de terrain semblables.

RIMS aussi a dû s'adapter et passer au virtuel; son équipe a travaillé très

fort pour nous offrir une conférence virtuelle cette année. Eh oui, à défaut d'être à Chicago, le 21<sup>e</sup> siècle et l'évolution de nos moyens de communications nous permettra à tout le moins de se rencontrer virtuellement cette année. Comme vous le savez, l'inscription est déjà ouverte et RIMS nous promet un événement haut de gamme sur une période de 10 jours. Attendez-vous à un environnement invitant et engageant où l'accent sera mis sur l'expérience. D'ailleurs, laissez-moi vous en donner un avant-goût:

- 3 conférenciers principaux de haut niveau
- Plus de 195 conférenciers
- Plus de 140 sessions éducatives
- Opportunités de réseautage grâce à une plateforme qui permettra d'être jumelé aux participants en fonction de notre profil et de nos intérêts
- La fonctionnalité sera dans le fuseau horaire qui correspond au vôtre
- Et bien plus encore

Si malheureusement vous n'êtes toujours pas tenté par RIMS LIVE 2021 et que vous aviez payé pour la conférence de 2020 et demandé que votre paiement soit utilisé pour celle de cette année, RIMS vous permettra de reporter ces frais d'inscription pour 2022. Vous n'avez qu'à en faire la demande le plus tôt possible.

Autre bénéfice de l'évolution de

nos moyens de communications, les examens pour le RIMS-CRMP sont maintenant disponibles à distance, donc beaucoup plus facile d'accès pour tous (aucune excuse pour ne pas y prendre part!). Voir les informations sur le site Web de RIMS, sous Certification.

Je m'en voudrais de ne pas mentionner que depuis Janvier 2021, une nouvelle présidente est entrée en fonction à RIMS, s'agissant de Ellen Dunkin. Avocate de formation, Ellen a déjà été à l'emploi de RIMS où elle a été avocate générale et directrice des affaires gouvernementales. Sa présidence sera guidée par le mot Indispensable. N'est-ce pas là une bonne façon de définir les gestionnaires de risques que nous sommes? Pour reprendre les paroles d'Ellen, « La dernière année a été un défi pour plusieurs, mais nous a aussi beaucoup appris. Après 2020, les gestionnaires de risques deviendront vraiment indispensables et prouveront leur valeur. RIMS et vos Chapitres, grâce à leurs nombreuses ressources, sont là pour vous supporter, renforcer vos compétences et vous aider à faire entendre vos voix. »

A ce propos, je vous invite à encourager et reconnaître le dévouement, le travail et l'implication des membres des différents chapitres et de leurs conseils d'administration



qui consacrent leur temps personnel à développer des activités qui contribuent à vous rendre indispensables.

D'ailleurs, pourquoi ne pas vous joindre à cette communauté de volontaires et être actif dans des comités? Si le temps vous manque, pensez à un membre de votre équipe qui serait intéressé par cette implication (belle forme d'encouragement professionnel).

Pour terminer, je me permets de paraphraser John F. Kennedy: « Demandez-vous ce que vous pourriez faire pour votre Association, et non pas ce que votre Association peut faire pour vous. » Votre implication et vos idées contribuent énormément au développement d'activités et d'outils qui vous permettent d'atteindre d'autres niveaux et d'élever votre indispensabilité!

Nous faisons tous et toutes partie de cette belle famille de gestionnaires de risques qui vie et s'anime grâce à chacun d'entre vous. ■

Au plaisir,

**Ginette Demers**, CRM, RIMS-CRMP  
Présidente, RCC Canada

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# A Message from RCC Chair Ginette Demers

**T**here is a saying that years go by and look the same. Hopefully 2021 will be somewhat different from 2020!

Fortunately, the years go by and are similar for our chapters as they continue to be committed to supporting your professional development, despite the derailments caused by the pandemic. COVID-19 will not only have had negative impacts, it will at least have had one positive effect: Our chapters have all had to change perspective and have all gone virtual, allowing members to participate when they could not before and even allowing them to attend activities of other chapters. As a result, we had more learning opportunities and greater collaboration.

Information exchange and collaboration among all Canadian members of RIMS remains important. I am particularly thinking of innovation in our ways of doing things and the sharing of relevant and enriching experiences. It is even more important between members of the same region who have similar realities.

RIMS also had to adapt and go virtual; their team worked very hard to offer us a virtual conference this year. Although we would all have liked to be in Chicago, thanks to the 21st century and the evolution of our means of communication, we will, at the very least, be able to meet virtually this year. As you know, registration is already open, and RIMS promises us a top-notch event which will spread over a period of 10 days. Expect an inviting and engaging environment where the focus will be on the

experience. By the way, let me provide you a hint of what is in store:

- Three keynote speakers
- More than 195 speakers
- More than 140 educational sessions
- Networking opportunities through a platform that will allow participants to be matched according to their profile and interests
- Functionality in the time zone which matches yours
- And much more

If this is still not enticing you to attend RIMS LIVE 2021 and if you paid for the 2020 conference and requested that your payment be used for this year's conference, RIMS will allow you to defer those registration fees for 2022. You simply need to make the request as soon as possible.

Another benefit of the evolution of our means of communication, the exams for the RIMS-CRMP are now available remotely, making it much easier for everyone to access, so no excuse not to take it! Pertinent information is available via the RIMS website, under Certification.

I would be remiss if I did not mention that since January 2021, a new president has taken office at RIMS: Ellen Dunkin. A lawyer by training, Ellen was once employed by RIMS where she served as General Counsel and Director of Government Affairs. Her presidency will be guided by the word *Indispensable*. Isn't it a great way to describe the risk managers that we are? To use Ellen's words, "The past year has been a challenge for many but has also taught us a lot. After 2020,



risk managers will become really indispensable and prove their worth. RIMS and your Chapters, through their numerous resources, are there to support you, strengthen your skills and help you make your voices heard."

With this in mind, join me in encouraging and recognizing the dedication, work and involvement of the members of our various Chapters and their boards of directors who devote their personal time to developing activities that help make you indispensable. Besides, why not join this community of volunteers and be active in a committee? If you are short on time, think of a member of your team who would be interested (great form of professional encouragement).

In closing, let me paraphrase John F. Kennedy: "Ask yourself what you could do for your Association, and not what your Association can do for you." Your involvement and your ideas greatly contribute to the development of activities and tools that allow you to reach new levels and achieve indispensability!

We are all part of this great family of risk managers who lives and comes alive thanks to each of you. ■

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