



Canadian Media Guild

La Guilde canadienne des médias

CWA Canada Local 30213 / Section locale 30213, SCA Canada

CMG Position Paper on Mandatory Vaccinations 2021
Presented to the NEC – Sept. 2021

As governments and employers introduce mandatory vaccination policies, the Guild has received a number of questions from members about their rights and about the Guild's positions on these policies.

These are complicated issues, and we know different members have different views on them. We strongly encourage all our members to be caring and respectful of one another and to accept the sincerity of colleagues who have different views on these issues.

As a union, as mandatory vaccination policies have come to the fore, we have sought the advice of our legal counsel and consulted and considered the views of other unions. Our conclusions at this time stated briefly are as follows.

Overview

We recognize first of all that public health authorities are now promoting vaccinations as the key measure for addressing the COVID-19 pandemic and that governments are now bringing forth or are about to bring forth regulations to make vaccinations mandatory in many places and situations.

We recognize as well that employers are required by law to follow public health guidelines and government regulations (unless and until a regulation is struck down by a court), and that there are also longstanding occupational health and safety laws that require employers to provide safe workplaces.

At the same time, we also know that unions and employees have to be vigilant and aware of the potential of mandatory vaccination policies to hand employers overreaching powers, inconsistent with what is necessary to create a safe workplace and going beyond what is necessary to comply with government COVID-19 regulations.

General principles regarding vaccination policies

Vaccination policies need to be worked out in consultation with the Union.

Vaccination policies need to be clear, and the measures being implemented need to be rationally connected to the objectives that the policy is attempting to achieve which is a safe workplace. More precisely, these policies need to be rationally connected to compliance with government regulation and/or prevention of transmission of COVID-19.

Vaccination policies need to be consistent with human rights legislation and set out clearly the process(es) through which employees with disabilities needs (or other needs arising from human rights set out in human rights legislation) will be accommodated and protected.

Vaccination policies must be consistent with privacy legislation and contain strict privacy protections for employee's health information and immunization status. Policies must contain tight restrictions on the ability of management and other personnel to access or share confidential health information or vaccination status.

Vaccination policies must be consistent with collective agreements.

Vaccination policies must be consistently enforced.

Vaccination policies should not be punitive. Threatening discipline or termination is rarely conducive to a healthy or well-functioning workplace. Policies that aim to encourage participation in a vaccination program should utilize other ways, such as providing employees with information, to promote participation, and should provide temporary alternatives. As well, where possible, policies should provide consideration of permanent alternatives to mandatory vaccination such as remote work, leaves of absence, regular testing, PPE, and other proven health and safety measures.

Vaccination should not be the sole workplace method for addressing COVID-19 and ensuring that workplaces are safe.

What if an employee does not agree with their employer's vaccination policy?

What rights do employees have if their employer requires them to be vaccinated or to disclose their vaccination status?

When an employee in a unionized workplace thinks that their employer does not have the right to ask them to do something and, as a result, does not want to comply with an employer's directive, the employee can ask their union to file a grievance to challenge the employer on the issue. When a grievance is filed, a resolution is then looked for by the union and the employer, and where no resolution can be found, the union can take the grievance to an independent arbitrator for a ruling.

In the meantime, however, as a general rule, until the grievance is resolved or arbitrated, the employee must comply with the employer's directive and do as the employer asked.

There are two general exceptions to this:

(1) Occupational health and safety (OHS) work refusal

If an employee has a reasonable belief that what they are being asked to do may be hazardous to their own or someone's health or safety, they can refuse. Under OHS legislation, such a refusal will trigger an Internal Investigation process. If the refusing worker is not satisfied with the results of the

Internal Investigation and continues their work refusal, OHS legislation provides that the work refusal must be referred to a government Safety Officer.

Other than the federal jurisdiction, the government Safety Officer is required to investigate. In the federal jurisdiction, the Safety Officer is not required to investigate if they make a determination that either the work refusal could more appropriately be dealt with by other legislation or the work refusal is trivial, frivolous, vexatious or in bad faith.

At the conclusion of their investigation, most jurisdictions require that the Safety Officer report their findings, in writing, to the employer, the OHS Committee and the refusing worker. The Safety Officer will advise the parties that either:

- There is an unsafe condition or danger. The worker will be able to continue their work refusal until the corrective measures are implemented.
- An unsafe condition or danger does not exist. The Safety Officer will advise the worker that they can no longer engage the work refusal process and must return to work.

At the end of that process, if the employee's position is found to be without basis, then the employee will be required to comply with their employer's directive.

(2) Interim Orders

If a Union files a grievance, and an "irreparable harm" to an employee will happen prior to the grievance being arbitrated, then the Union can, before the grievance is arbitrated, ask the arbitrator to issue an "interim order" to temporarily prevent the irreparable harm from happening. Such an order would be in effect until the case is heard in full and a final decision is issued by the arbitrator.

Interim orders are very rare and require there to be an irreparable harm going to happen.

We have reviewed with our legal counsel the likely impact of mandatory vaccination policies, and asked for their advice on whether there might be grounds for interim orders. We have been advised as follows.

Where an employer policy requires an employee to disclose their vaccination status and/or be vaccinated in order to continue to work, and an employee does not comply with that policy, the immediate impact of non-compliance would likely be that the employer will not let the employee work, and then the employee will not be working and earning their pay. This impact is very serious and similar to the impact on an employee who is laid off improperly or fired without just cause. The impact is loss of income.

Arbitrators and courts have been very consistent, however, that such an impact, though very serious, is rarely an irreparable harm because the loss of income can be fixed by an order at the end of the arbitration if the union is successful – an order that the employer pay the employee for any

and all of their losses. In a nutshell, temporary loss of income by itself (i.e. without a demonstration of additional unavoidable personal consequences that would constitute irreparable harm) is rarely considered by arbitrators or courts to be an irreparable harm, and as a result, "interim orders" or injunctions are rarely issued in such situations.
