VACCINE ROLLOUTS AND THE ROLE OF EMPLOYERS

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The federal government has released its COVID-19 delivery list, together with tables identifying doses per province/territory, and projected dates for further deliveries.[1] One might have expected people to clamour for a vaccine, but there appears to be caution, or even ambivalence, toward COVID-19 vaccines. For example, survey data from November 2020 indicates that only 54% of Canadians would take a COVID-19 vaccine as soon as they could, with 82% of those polled indicating that they might favour waiting for reports about effectiveness and side-effects.[2]

In any event, the current state of play brings to the fore questions about the most appropriate and effective ways to deploy vaccines so as to achieve maximum uptake and, therefore, maximum societal benefit. One key question is the appropriate role of mandates specific to COVID-19.
Some narrow non-COVID-19 mandates are already in effect in Canada. For example, under Ontario's Ambulance Act, medical attendants and paramedics must be free from all communicable diseases as outlined in the Standards, and must hold a physician-signed certificate certifying that they are immunized against diseases listed in the Standards.[3] Under Ontario's Immunization of School Pupils Act, school children must be vaccinated pursuant to the childhood immunization schedule applicable there unless they are excepted, and certain procedural conditions are met.[4] On the softer side, Nova Scotia's Day Care Regulations require daycare facilities to maintain records of all their children's immunization dates, suggesting that immunization is required for enrollment.[5] Additionally, those who travel internationally will be familiar with government-mandated vaccination against specific diseases in order to achieve entry into a country.

Views toward government mandates have been surveyed, with support for them falling from July to September 2020,[2] However, while governments may for a variety of reasons decline to mandate, there remains the possibility—in light of the COVID-19 vaccine roll-out and the desire of businesses to quickly return to full operational status—that employers may turn to mandates in relation to their employees. This begs the question: Should or can private enterprises stipulate COVID-19 vaccination as a condition of continued employment?

There can be some compelling justifications for mandates, particularly during an evolving and still uncontrolled pandemic resulting in deaths, ill-health, and massive social and economic disruption. And, of course, there are clear social and individual benefits of vaccination, mandated or otherwise. However, in a country that favours individual freedom and choice, we must be cautious about using mandates in relation to healthcare interventions. Further, that caution should be exercised not only by governments and health authorities, but also by private actors such as employers, who have a high degree of influence over us.

If an employer is considering mandates, then it must be circumspect in doing so because employees forced to accept a vaccine or vacate the workplace could claim that they are being discriminated against in the workplace contrary to human rights legislation. Note that the Canadian Charter of Rights and Freedoms does not apply in private settings, so private employers do not have Charter duties like government.[6] To succeed in such a claim, employees would have to show (1) that they are a member of group protected under such Acts (e.g., a group characterized by religion, creed, ethnic origin, sex, genetic characteristics, disability, etc.), and (2) that they were subject to adverse treatment for which that prohibited ground was a factor.[7]

The most common ground for claims of this nature will be based on religion or creed; 'creed' is a set of sincerely held beliefs and practices.[8] Although they need not be based on the edicts of an established church or particular denomination, they must have a nexus with religion, whereby an individual demonstrates a sincere belief, or a sincere effort to connect with the divine as a function of his or her spiritual faith.[9] Another possible claim is that, for this employee, vaccination is medically contraindicated (or not advisable) because of previous adverse reactions to vaccination, which seems to be a more fruitful ground if it is medically supported.

Assuming an employee can meet this burden, the employer would have to justify the mandate by showing that it is a bona fide occupational requirement. To do this, the mandated vaccination must be: (1) rationally connected to the performance of the job; (2) adopted in an honest and good faith belief that it is necessary to the fulfilment of that legitimate work-related purpose; and (3) reasonably necessary to accomplish that legitimate work-related purpose.

One can foresee mandated vaccination being supportable in a range of healthcare employment settings, one of which has already been noted above in relation to medical attendants and paramedics. Others might be hospitals, care facilities, as well as shelters and prisons.

Even if the mandate is held to be a bona fide occupational requirement, the employer will have to show that it would be an undue hardship to make an accommodation for a claimant employee or those in a like position, taking into account all the circumstances, including health, safety, magnitude of risk, bearers of risk, cost, employee morale, etc. If this cannot be done, an exception for the employee is warranted.
All told, imposing a mandate on employees will have its challenges. A much more beneficial approach for employers—particularly large employers or employers in critical sectors (e.g., healthcare, social care, transport and shipping, education, etc.)—is to actively partner with public health authorities in the delivery of vaccines, helping to ensure ease of access as well as ease of obtaining necessary information to make the vaccination decision. Employers have an incredible capacity to facilitate voluntary vaccination by working with public health authorities and employees. Employers can:

- solicit (on a voluntary basis) information relevant to vaccinators about their employees' desire for a vaccination and history with reactions to vaccines;
- carve out vaccination times in the workday that are convenient for their employees;
- set up, in cooperation with public health authorities, vaccination spaces at the workplace that are comfortable for employees;

- ensure that there is someone present to speak to employees, answering questions, allaying fears, comforting them (i.e., a well-known hurdle to people getting vaccinated is fear of needles, or fear of pain from needle pricks; having someone present to talk them through that, or to distract them is helpful);
- distribute to employees in manageable amounts and useful formats, reliable, evidence-based information from health authorities.

These pursuits and interactions can be more valuable to overcoming barriers to vaccination, including vaccine hesitancy in relation to COVID-19 vaccines, than mandating vaccinations. It is important to view employers as important components of a more effective and resilient vaccine delivery system.

[1] Government of Canada, Vaccines and Treatments for COVID-19: Vaccine Rollout, 11 January 2021, at https://www.canada.ca/en/public-health/services/diseases/2019-novel-coronavirus-infection/prevention-risks/covid-19-vaccine-treatment/vaccine-rollout.html.
[2] IPSOS, 'Many Canadians Aren't in a Hurry to Receive COVID-19 Vaccine', 6 November 2020, at https://www.ipsos.com/en-ca/news-polls/many-canadians-arent-in-a-hurry-to-receive-covid-19-vaccine.
[3] O. Reg. 257/00: General, under the Ambulance Act, RSO 1990, c. A.19, and Ontario, Ambulance Service Communicable Disease Standards, Version 2 (2015), at http://www.health.gov.on.ca/en/pro/programs/emergency_health/docs/ehs_amb_srvc_comm_disease_standards_v2_en.pdf.
[4] Immunization of School Pupils Act, RSO 1990, c. I.1.
[5] Day Care Regulations, OIC 2010-456, as amended, under the Day Care Act, RSNS 1989, c. 120.
[6] McKinney v. University of Guelph, [1990] 3 SCR 229.
[7] British Columbia v. BCGSEU, [1999] 3 SCR 3.
[8] Ataellahi v. Lambton County (EMS), 2011 HRTO 1758.
[9] Syndicat Northcrest v. Amselem, [2004] 2 SCR 551.

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