

ARCHITECTS' VACCINATION MANDATES

COVID-19 SPECIAL BULLETIN #12

On March 1, 2022, [updated COVID-19 public health measures](#) come into effect, most notably, that “proof of vaccination requirements [are] lifted, *with businesses being allowed to implement them voluntarily.*” It is therefore important for architects considering their own vaccination policies to understand what may be included in a vaccination mandate as well as the key risks associated with their implementation and enforcement.

1. AN ARCHITECT IS NOT REQUIRED TO CREATE ITS OWN VACCINATION MANDATE

An architect is not required to create and implement a vaccination mandate for its own employees and workplaces – this is not part of the architect’s professional obligations and, to date, no law has been passed requiring persons attending at construction sites or commercial offices (e.g., of clients, contractors and consultants) to be fully vaccinated.

The architect’s implementation of its own vaccination mandate is to be distinguished from its implementation of the vaccination mandates of others. For example, the architect may be required to comply with a client’s vaccination mandate when attending their site and offices or where it has agreed by contract to do so. As legal challenges to vaccine mandates have been adjudicated, it has become clear that third-party mandates from an architect’s clients can be enforced for all employees who may attend such a site. For more information regarding what an architect should consider when entering into a contract for compliance with a client’s vaccination mandate, read [COVID-19 Special Bulletin #11](#), or

<https://mcmillan.ca/covid-19-resource-centre/mandatory-covid-19-vaccination-policy-upheld/>

2. AN ARCHITECT CAN CHOOSE TO CREATE ITS OWN VACCINATION MANDATE

Although it is not legally required, where the architect would like to have its own vaccination mandate in place it may do so and may require compliance with this mandate by its employees and persons attending at its offices. The architect may also contractually require its subconsultants to comply with its vaccination mandate.

Importantly, the implementation of a vaccination mandate is not a violation of employees' human rights. For example, on September 22, 2021, the Ontario Human Rights Commission issued a policy statement confirming that vaccine mandates are "generally permissible under the *Human Rights Code* (Code) as long as protections are put in place to make sure people who are unable to be vaccinated for Code-related reasons are reasonably accommodated".

There are nevertheless certain matters that the architect should consider when creating its own vaccination mandate to ensure clarity of terms and compliance with applicable laws. These considerations are detailed below.

3. ALL VACCINATION MANDATES MUST ADDRESS POTENTIAL EXEMPTIONS

Regardless of the vaccination and testing requirements established in a vaccination mandate, as part of good practice and for compliance with human rights legislation (including the Ontario *Human Rights Code*), all vaccination mandates must include a protocol for review of exemption requests.

Although successful requests for exemption from vaccination for medical, religious, or other reasons are rare, all vaccination mandates must establish a process for submitting and reviewing exemption requests. Architects implementing a vaccination mandate will therefore need to create an internal process for documenting and evaluating exemption requests. Such policies and processes should include the architect's ability to request proof and/or additional information to assess each request, such as reports from medical specialists or detailed reasons from religious leaders. As the law relating to vaccination mandates continues to evolve daily, it is strongly recommended that this process for review of exemption requests include the obtaining of legal advice. The time and costs associated with implementing such a review process is therefore an important consideration when deciding whether or not to create your own vaccination mandate – these impacts can be significant.

4. KEY FACTORS TO CONSIDER IN AN ARCHITECT'S VACCINATION MANDATE

In addition to review of exemption requests, several factors should be considered by an architect creating its own a vaccination mandate, including:

- **Nature of work performed:** How does the policy distinguish between persons who can

perform their work from home and persons that need to be in-person for part or all of their job performance? How has work been accommodated throughout the pandemic?

- **Workforce tolerance:** What will happen if the policy is implemented? What is the potential for the architect to lose part of its workforce? How might this impact on-going and future projects?
- **COVID testing:** When will a negative COVID test be sufficient for access to the architect's office instead of full vaccination, if at all? How frequently must an unvaccinated person obtain a COVID test? What type of COVID test must a person obtain? Who pays for the COVID test?
- **Government mandates:** Are there applicable government mandates (i.e., for travel) that need to be considered and integrated?

With these factors in mind, an architect should include as part of its vaccination mandate any one or more of the following:

- A requirement that all employees be fully vaccinated by a stipulated date in order to attend at the architect's office and other premises (which date may be chosen at the architect's discretion)
- A requirement that all employees (whether vaccinated or not) obtain a negative COVID test prior to attendance at the architect's office and other premises
- A requirement that any employees who are not fully vaccinated obtain negative COVID tests a stipulated number of times per week in order to attend any office or site (e.g., 3 times per week or as otherwise recommended by health officials)

Architects should do their best to establish policies appropriate to their working conditions with a primary focus on protecting employee health and safety.

5. VACCINATION MANDATES CAN EXPOSE EMPLOYERS TO LITIGATION RISK

Architects should also consider the potential employment implications of imposing a vaccination mandate. For example, employees who are put on unpaid leave of absence because they remain unvaccinated by a stipulated deadline may claim they have been constructively dismissed because they will not be permitted to work until the pandemic is over. Alternatively, employees who are terminated (whether with or without cause) for remaining unvaccinated by a stipulated deadline may claim they have been wrongfully dismissed. In all instances, the architect will need to demonstrate that the vaccination mandate imposed was reasonable in the circumstances for performance of the subject employee's work. Where an employee has been able to perform their

work effectively from home throughout the pandemic, the case for constructive or wrongful dismissal may be stronger. As each circumstance is unique, we strongly recommend that any architect facing such claims, or threats of such claims, obtain legal advice before responding.

While many employers are cautious about exposing themselves to litigation risk, many others have said “bring it on” and are prepared to defend such claims on principle. These employers may also anticipate reputational benefits to standing up in favour of vaccinations to protect public health. Architects may have similarly varied perspectives. As the potential for litigation risk will depend on each architect’s specific circumstances, we recommend obtaining legal advice to help consider and evaluate this potential risk when implementing a vaccination mandate.

6. VACCINATION RECORDS ARE PERSONAL INFORMATION

Vaccination records and related details (i.e., type of vaccination received, date of vaccination, who administered the vaccination, whether the person experienced any adverse reactions, etc.) are personal health information protected by the Ontario *Personal Health Information Act* and other applicable privacy legislation & common law in other provinces, but vaccination status (i.e. yes/no) is not.

An architect, as employer, is permitted to collect and store details of its employees’ vaccination, such as the date the vaccine was administered and the type of vaccine administered. Where an architect has decided to collect and keep records of this information, such as copies of vaccination receipts, it must keep this personal health information strictly confidential and treat it with the same care as any other employee medical records.

However, collection of this information should not be required to fulfil the health and safety objectives of a vaccination mandate – only confirmation that an employee is fully vaccinated is needed. Deletion of an employee’s vaccination records following review and confirmation of fully vaccinated status is thus strongly recommended.

An architect may not provide vaccination records of its employees to third parties, such as a client, without the employee’s express written consent. In order to avoid potential liability relating to individual’s personal information, it is recommended that the architect avoid accepting vaccination mandates and related contractual obligations that require or contemplate the collection or storage of personal information.

7. COMPLIANCE WITH VACCINATION MANDATES SHOULD BE CONFIRMED WITHOUT THE SHARING OF VACCINATION RECORDS

As previously noted, employers, including architects, may not share their employees' vaccination records without each employee's express written consent. Therefore, it is recommended that the architect's vaccination mandate set out how it will confirm compliance by third parties, such as its subconsultants, while avoiding the collection, storage and sharing of personal information. Options for obtaining this confirmation include the following:

- **Sworn Attestation:** The architect may, by contract, require the provision of a sworn attestation confirming compliance with the vaccination policy, including through review of the necessary records of the attesting party's own employees. This sworn attestation could be provided by a stipulated date (e.g., the deadline for full vaccination) or, alternatively, with each invoice submitted by the subconsultant under their contract.
- **Vaccination Passports:** In order to allow the architect and its representatives to confirm an individual's fully vaccinated status without having to review their private vaccination records, a vaccination passport system may be created.
 - **Architect-Issued:** The architect could establish its own form of vaccination passport. For example, each subconsultant or other third party would be responsible for verifying the vaccination status of its own employees and, upon confirmation of fully vaccinated status, a vaccination passport in the architect's chosen form (e.g., laminated card) could be issued. All persons attending at the architect's offices and other premises could then be required to show their vaccination passport for access.
 - **Government Issued:** Ideally, vaccination passports established by provincial governments may be used by the architect to administer their vaccination mandates. In such a case, vaccination mandates could simply require that as of a stipulated date the province's vaccine passport will need to be shown by any person accessing the architect's offices and other premises. Here in Ontario, the architect can simply confirm the fully vaccinated status of any person attending at its offices or premises by scanning the Province-issued "enhanced vaccine certificate" (QR code) and confirming the corresponding identity of the individual presenting the certificate. Reliance on government issued vaccination passports like that in Ontario, however, will be subject to the passport procedures in each jurisdiction. For example, some jurisdictions issue such a certificate to persons who are not vaccinated due to a valid exemption. In such a situation, an architect-issued vaccination passport system may be preferable to ensure exempt persons are still tested regularly in order to access the architect's offices and other premises.

As detailed above, there is no “one-size-fits-all” vaccination mandate for an architect. Each mandate should be tailored to the specific needs of the architect’s business with the primary objective of protecting employee health and safety as well as personal information. As with many pandemic-related issues, the law surrounding vaccination mandates continues to evolve and architects would be well advised to obtain legal advice in the preparation and administration of their vaccination mandates, including related contract terms.



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