

CLIENT VACCINATION MANDATES - BEFORE YOU SIGN ON THE DOTTED LINE DURING COVID-19 - BULLETIN #11

COVID-19 SPECIAL BULLETIN #11

Although mandatory government vaccination mandates seem to be ending in many jurisdictions (for example, the Ontario government has announced March 1 2022 as the date for [changes to proof of vaccination requirements](#), project owners may still choose to have their own vaccination mandates for work on their projects. Although the original version of this bulletin was published on December 3, 2021, during government enforced mandates, the comments still apply to mandates being requested or imposed by clients. *February 22, 2022.*

MATTERS DESERVING IMMEDIATE ATTENTION **COVID-19 Vaccination Mandates**

Architects will have noticed that project owners across the province have begun unveiling their vaccination mandates. While these mandates typically apply to the owner's own employees, many also require compliance by consultants and other project parties. The mandates themselves may be quite similar, from project to project, but the details of each and the contract language used to enforce them can vary widely. It is important for all architects to review their client's vaccination mandate, with an understanding of what to look out for.

What exactly is a vaccine/ vaccination mandate? Simply put, it's a legally enforceable requirement to be vaccinated in order to do specific things like working, traveling or attending an event.*

1. MAKE SURE YOUR OBLIGATIONS UNDER THE VACCINATION MANDATE ARE CLEAR AND EXPLICIT

To begin with, when reviewing a client's vaccination mandate, the architect should ensure that all details for compliance are clearly set out and reasonable:

A. WHAT IS REQUIRED FOR COMPLIANCE?

- Full vaccination? What proof is required?
- Proof of a negative COVID test? What kind of test; how often; how long is it deemed valid?

B. WHO IS REQUIRED TO COMPLY?

- Anyone providing services?
- Only those appearing in person at the client's office, on the jobsite, or elsewhere?
- Do legal exemptions apply?

C. WHERE IS COMPLIANCE REQUIRED?

- Client's offices; architect's offices; project site; project vehicles?

D. WHEN IS COMPLIANCE REQUIRED?

- On what specific dates does the mandate begin and end?

Where any of this information is missing, unclear, or unreasonable, more details should be requested, and the terms revised for certainty and fairness. Take, for example, the following vaccination attestation:

"The Architect certifies that, as of December 1, 2021, and through to final completion of the Services, all personnel of the Architect, including personnel of its sub-contractors and sub-consultants at all tiers, who require access to the Client's worksite in order to perform Services under the Contract will be fully vaccinated against COVID-19. For clarity, "fully vaccinated" means that a complete series of a Health Canada-approved COVID-19 vaccine has been received and the Client's worksite includes any place where employees or personnel of the Client are or could be present."

In this clause, the What, Who, Where and When are well covered, but holes exist. For example, there is no mention of persons with legal exemptions. In addition, the "Where" is broad enough to introduce uncertainty – an architect might cross paths with a client's employee at the supermarket

or on public transit. It is unlikely that such an interpretation is intended, and enforcing such a broad obligation would be difficult or impossible. Improvement to this clause would provide more clarity on these points. For example:

*“The Architect certifies that, as of December 1, 2021, and through to final completion of the Services, all personnel of the Architect, including personnel of its sub-contractors and sub-consultants at all tiers, who require access to the Client’s worksite in order to perform Services under the Contract will be fully vaccinated against COVID-19. For clarity, “fully vaccinated” means that **the Architect has received proof that** a complete series of a Health Canada-approved COVID-19 vaccine has been received **or proof that a legal exemption to such vaccination requirement has been obtained** and the Client’s worksite includes **the project site and** any place **owned, operated, leased or otherwise controlled by the Client or Architect** where employees or personnel of the Client are or could be present.”*

2. THE ARCHITECT SHOULD NOT BE REQUIRED TO DISCLOSE ANY PERSONAL INFORMATION

Vaccination status is a simple yes or no and does not include personal information. But vaccination records and any related details do include such information and are protected by the *Ontario Personal Health Information Protection Act, 2004*.

Although an architect is permitted to collect and store details of its own employees’ vaccination records (kept strictly confidential, like any employee medical records), disclosure of this information should not be required to comply with a vaccination mandate. Only a confirmation of full vaccination should be required. Further, an architect may not provide vaccination records of its employees to third parties, such as an owner or contractor, without the employee’s express written consent, which may be onerous (or impossible) to obtain.

To avoid potential liability that might result from divulging personal information, it is recommended that the architect avoid vaccination mandates and related contractual obligations that require or contemplate the collection, storage or sharing of personal information. Architects should review an employee’s vaccination records to confirm fully vaccinated status and then delete them.

In another example:

“Client requires all individuals attending the Site to be fully vaccinated against COVID-19. Architect agrees that its employees, subconsultants, vendors, guests or patrons will be fully vaccinated if attending the Site unless they are unable for medical reasons or for grounds protected under the Ontario Human Right Code, and will provide proof of their vaccination status, if requested. If such persons are not vaccinated for such reasons, Architect agrees they will have a negative COVID-19 PCR test within 72 hours (or as per local public health) prior to attending the Site and will provide proof of their negative test while attending the Site, if requested. “Fully vaccinated” means 14 days following the recommended number of doses of a Health Canada-approved vaccine or a Health Canada recommended vaccination schedule following other vaccines. Given the changing nature of the pandemic, if the applicable public health authorities announce a different meaning of “fully vaccinated”, that definition will take precedence. Visitors do not include children under 12 years of age until such time as they are able to be vaccinated.”

In this clause, while the What, Who, and Where are clearly stipulated, the When – the duration of this obligation – is unspecified. More significantly, the clause requires that proof of vaccination status be provided to the client upon request – an obligation that the architect may not be able to comply with. Improvement to this clause would thus provide better clarity on these points, for example:

*“Client requires all individuals attending the Site to be fully vaccinated against COVID-19. **From commencement until final completion of the Services, the** Architect agrees that its employees, subconsultants, vendors, guests or patrons will be fully vaccinated if attending the Site unless they are unable for medical reasons or for grounds protected under the Ontario Human Right Code, and will **attest to** their vaccination status, if requested. If such persons are not vaccinated for such reasons, Architect agrees they will have a negative COVID-19 PCR test within 72 hours (or as per local public health) prior to attending the Site and will provide proof of their negative test while attending the Site, if requested. “Fully vaccinated” means 14 days following the recommended number of doses of a Health Canada-approved vaccine or a Health Canada recommended vaccination schedule following other vaccines. Given the changing nature of the pandemic, if the applicable public health authorities announce a different meaning of “fully vaccinated”, that definition will take precedence. Visitors do not include children under 12 years of age until such time as they are able to be vaccinated. **For certainty, the parties acknowledge and agree that, notwithstanding any other term of this Contract and even if***

requested by the Client, under no circumstance shall the Architect be obligated to provide or disclose to the Client or any other third party the personal information of any of the Architect's employees, subconsultants, vendors, guests or patrons."

3. THE ARCHITECT'S CONTRACT - ESPECIALLY FEE AND SCHEDULE - SHOULD ACCOUNT FOR COMPLIANCE WITH THE VACCINATION MANDATE

A client's vaccination mandate may entail additional time and expenses for the architect. These costs and scheduling implications should be identified by the architect, promptly communicated to the client, and expressly addressed in the contract. COVID testing requirements, for example, may involve both time and money, especially if a vaccination mandate results in loss of workers. Significant costs, such as legal costs, may also be incurred when assessing requests for vaccine (i.e., alleged medical or religious) exemptions. The architect and client should address who is responsible for these costs and how any resultant delay impacts will be handled.

When undertaking a new project, these matters should be addressed up front, prior to execution of any contract imposing a vaccination mandate, and the architect should be sure to account for any extra costs or time associated with a vaccination mandate in its proposed fee and schedule.

Where compliance with a vaccination mandate is requested under an existing contract, this constitutes a change, since new responsibilities are being imposed on the architect. In such cases, the architect should promptly give notice of this change to the client, and the cost and schedule implications of the change should be addressed by a Change Order or amendment.

4. IN YOUR CONTRACT, IDENTIFY AND CONSIDER ANY CONSEQUENCES FOR FAILURE TO COMPLY WITH A CLIENT'S VACCINATION MANDATE

If an architect agrees, in a contract, to comply with a client's vaccination mandate, failure to do so will constitute breach of contract. The client will then have a cause of action against the architect to recover any resulting losses. Further, if it can be established that the breach is "material," (i.e., it renders the agreement "irreparably broken" and defeats the purpose of making the contract in the first place), the client could also seek to terminate the contract. Because this cause of action arises "at law," it is not necessary for the contract to explicitly set out these rights.

Even so, the contract could expand upon these rights by imposing further consequences or

broadening the client's ability to claim losses or terminate the contract where the architect has failed to comply with a vaccination mandate. Careful review of the contract terms is recommended to identify any stipulated consequences for failure to comply with a vaccination mandate, and any overly broad or inappropriate terms should be revised or removed if possible.

5. IN SIMPLE TERMS

Carefully review your clients' vaccination mandates, including the contract language for their implementation. In all instances your obligations for implementing a vaccination mandate should be clear and reasonable, with the resultant cost and schedule impacts expressly and fairly allocated between the parties. Where a vaccination mandate or contract language is unclear or imposes unreasonable risk to the architect, the issue should be raised with the client and the relevant terms appropriately revised – *before* you sign on the dotted line.

**Not all vaccination mandates are law, but they are enforceable at law, for example, through contract or through property rights.*



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