



## Attention City & Lodge Unit Members

### Attention CUPE Local 5167 Members – City of Hamilton Employees

#### Update #3 – September 15, 2021

We have consulted with an employment lawyer we work with frequently and have provided a FAQ on the City of Hamilton's Vaccine Verification Policy.

#### What is the Policy?

On August 26, 2020, the City of Hamilton (the "City") adopted a Mandatory COVID-19 Vaccination Verification Policy (the "Vaccination Policy" or the "Policy"). The Vaccination Policy applies to all City employees as a condition of their employment.

The Policy, among other things, requires all City employees to receive two doses of the COVID-19 vaccine and any subsequent recommended booster to attend a City facility for work, unless:

- they have a medical or human rights exemption; or
- they have completed the vaccination education offered by the City and declared in writing they do not want to be vaccinated.

The Policy requires City employees to provide proof of their COVID-19 vaccination status by September 30, 2021. The Policy does not prohibit disclosure prior to September 30, 2021. Employees who are unvaccinated or who have not disclosed their vaccination status by September 30, 2021, will be required to attend a mandatory vaccination education course. If an employee is unvaccinated, they must provide proof of the first dose by October 15, 2021, and proof of the second dose by November 15, 2021.

Those employees who have a valid exemption or declare that they will not be vaccinated after completing the mandatory education program are required to have regular COVID-19 antigen testing and demonstrate a negative result to attend a City facility for work.

Vaccinated City employees are required under the Policy to provide proof of their COVID-19 vaccination status. If an employee has only received one dose of the vaccine, they must provide proof of the first dose and, as soon as reasonably possible, proof of the second dose.

### **How do I seek an exemption?**

Proof of a medical exemption may be provided by providing proof of a medical reason in writing from a physician or nurse practitioner that states that the employee cannot be vaccinated and for how long the contraindicated medical condition will continue.

At this time, the province has confirmed that there are only two valid medical exemptions: (i) a PEG allergy, which must be diagnosed by an allergist and/or immunologist; and (ii) myocarditis or pericarditis experienced after receiving the first dose of the COVID-19 vaccine. Both conditions are rare. At this time, autoimmune disease, cancer, and a family history of blood clots are not recognized bases for a medical exemption.

Requests for accommodation under the Ontario *Human Rights Code* on other grounds may be made to Human Resources.

### **Who must participate in COVID-19 testing?**

Employees who have a valid exemption, who are unvaccinated and declared in writing that they do not want to be vaccinated, or who do not provide proof of their vaccination status to the City will be required to participate in ongoing testing and provide proof of a negative COVID-19 test to access City facilities. The testing will be required for as long as the Policy is in place and the employees are not fully vaccinated.

What happens if I am not vaccinated and do not intend to be vaccinated?

Employees who are not vaccinated must participate in a mandatory educational program on COVID-19 vaccination. After completing the program, they may declare in writing that they do not intend to be vaccinated. To attend work, these employees will be required to participate in regular COVID-19 testing.

### **What if I do not disclose my vaccination status?**

Employees who do not disclose their vaccination status are required to participate in a mandatory COVID-19 vaccination education program and then declare in writing that they will not be vaccinated. To access City facilities, these employees will be required to participate in regular COVID-19 and provide proof of a negative COVID-19 test.

### **What is the City doing to assist unvaccinated employees who want to be vaccinated?**

The City will make reasonable efforts for unvaccinated employees to attend COVID-19 vaccination clinics during work time. To attend a vaccination clinic during work time, employees must obtain approval from their supervisor in advance. If an employee cannot attend a vaccination clinic during working hours, the City will compensate staff for a period of 30 minutes outside of work time to attend a vaccination clinic.

### **What authority does the City have to implement this Policy?**

All Ontario employers are obligated to provide a safe workplace under the Ontario *Occupational Health and Safety Act* ("OHSA"). Under OHSA, employers are required to take every reasonable precaution keep workers safe in the workplace, including having policies and procedures with respect to preventing the transmission of COVID-19.

Additionally, [Ontario Regulation 157/20](#) authorizes municipalities like the City to "take any reasonably necessary measure to respond to, prevent and alleviate the outbreak of the coronavirus (COVID-19) ("the Virus") so as to prevent, reduce or mitigate the effect of the Virus on critical municipal services that are delivered by its employees". Critical services include maintenance of municipal LTC homes, delivery of public health services, operation of shelters, provision of drinking water, waste management, public transit, provision of assistance under the *Ontario Works Act*, administration, operation and funding of childcare programs and services, enforcement of by-laws, and services related to the implementation of the municipality's emergency plan. Among other things, this regulation authorizes municipalities like the City to "require and collect information from staff, contractors or volunteers about their likely or actual exposure to the Virus, or about any other health conditions that may affect their ability to provide services".

Reasonable safety policies and procedures must first attempt to eliminate workplace hazards, like COVID-19. According to Ontario public health guidance, vaccination is the most effective means of preventing the spread of COVID-19, but it does not completely eliminate the risk of transmission. Accordingly, the City must also implement other means to reduce the risk of exposure by, for example, limiting employee interactions when reasonably feasible, implementing physical distancing, and requiring employees to wear PPE.

### **Is the Policy contrary to the Collective Agreement?**

The Collective Agreement does not contain any provisions that prevent the City from implementing new health and safety policies or policies requiring vaccinations or testing as part of a health and safety program as long as the policies are reasonable.

### **How does the Policy impact my right to privacy?**

The right to privacy in the workplace is not absolute. Reasonable requests for personal information, even medical information, are permitted to provide a safe and healthy workplace. In a number of recent cases, arbitrators have distinguished random or mandatory drug and alcohol testing (which raise privacy concerns) in dangerous workplaces from mandatory testing for COVID-19. Unlike intoxicants, COVID-19 is infectious and so the workplace safety concerns are heightened. Because of this threat to employee health and safety in the workplace, requesting that employees disclose their vaccination status and/or participate in regular COVID-19 testing is permissible under the circumstances.

### **Does the Policy comply with privacy legislation?**

To ensure employees' privacy, the Policy provides that vaccination status information and other personal information will be collected in accordance with applicable privacy legislation.

You may have heard of the *Personal Information Protection and Electronic Documents Act* ("PIPEDA"), which is federal privacy legislation that regulates the collection of use of information in the course of commercial activities or about employees in a federally regulated organization, which the City is not. PIPEDA does not prevent the City from asking for employees' vaccination status or proof of vaccination. In any event, even if it did apply, PIPEDA allows organizations to collect personal information as long as it uses that information in a manner consistent with the purpose for which it was disclosed and does not disclose it to third parties without consent.

OHSA does not prohibit the City from collecting personal health information from employees. It prohibits employers from seeking the disclosure of health records without the employee's consent. OHSA does not prohibit employers from asking an employee directly for health information if it is reasonably necessary to provide a safe workplace.

The *Personal Health Information Protection Act* ("PHIPA") likewise does not prevent the City from asking for this information. This legislation applies to health information custodians, like hospitals, long-term care facilities, and pharmacies. It sets out a process by which individuals may request access to their health records and personal health information from these organizations. Information collected in the course of employment is excluded from the definition of "personal health information" under PHIPA. (s 4(4)). Therefore, PHIPA does not restrict the City's collection of vaccination information from employees, though it could restrict the City's disclosure of such information to third parties without consent.

Neither the *Freedom of Information and Protection of Privacy Act* ("FIPPA") nor the *Municipal Freedom of Information and Protection of Privacy Act* ("MFIPPA") prevent the City from asking for this information. MFIPPA applies to municipal institutions like the City, but it does not prohibit the City from requesting disclosure of an employee's vaccination status and using that information for the purposes stated under the Policy. Similarly, FIPPA does not prohibit the City from collecting personal information.

### **Does the Policy impermissibly infringe my *Charter* rights?**

Section 7 of the *Charter* states that "everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." Two things must be established to make out a violation of section 7. First, that there has been a deprivation of life, liberty or security of the person caused by a law or state action. Second, that the deprivation did not occur in accordance with the principles of fundamental justice. The Supreme Court of Canada has found that a law or state action will violate the principles of fundamental justice when it is arbitrary or overbroad, or when it has consequences that are grossly disproportionate to its goal.

The Policy likely does not violate section 7 because it does not result in a deprivation of liberty or security of the person. Under the Policy, an employee may choose to participate either in vaccination or rapid testing, or they may not. If they do not, they will not be forced to undergo vaccination or testing. They remain free to make personal choices regarding vaccinations and

their bodily integrity remains intact. While some may argue that their ability to make a living could be affected by any negative consequences of refusing to adhere to a vaccination policy, the courts have found that purely economic interests, as well as a right to participate in a particular profession, are not protected by section 7 of the *Charter*. 5

Additionally, even if the Policy contravened section 7, the analysis would not be over. The burden then shifts to the City, which may justify the Policy if it can show that the Policy has a goal that is pressing and substantial, and that the Policy is proportional to that goal. The City could probably justify the Policy given the efficacy of the COVID-19 vaccines and the government mandate to promote and protect public health and prevent the transmission and spread of COVID-19.

We will be meeting with the employer at the end of the month to gain more information about the testing that will be required by employees that are exempt or not vaccinated. The employer is still working on the details.

Please note we will continue to update membership as information unfolds.

Please contact your Unit Vice President with any questions or concerns regarding your personal situation.

We encourage all members to watch the CUPE Ontario Townhall from September 15, 2021, at the following link: <https://youtu.be/C1M76j2Vnw8>

You can also access this video via the website or social medial.

[www.cupe5167.org](http://www.cupe5167.org)

In solidarity,  
The Executive