

## El Online Reference Tool

El ORT > Policies

# El Eligibility and refusal to comply with a mandatory vaccination policy – BE 2021-10 (BE Memo)

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**BE Memo number:** BE 2021-10

**Date:** October 19, 2021

**Subject:** Refusal to comply with an employer's mandatory vaccination policy and El Eligibility


The purpose of this memorandum is to provide information to all staff with regard to the eligibility to Employment Insurance (EI) regular benefits for clients who refuse to comply with their employer's mandatory vaccination policy. The memorandum is not linked to any legislative or regulatory amendments.

## Background

On January 30, 2020, the World Health Organization (WHO) declared an outbreak of what is now known as 2019-nCoV (COVID-19) acute respiratory disease to be a Public Health Emergency of International Concern (PHEIC). On March 12, 2020, the WHO labelled COVID-19 a pandemic.

There are several ways to protect against COVID-19 and the spread of the virus, like hand hygiene, wearing a mask, practising social distancing. Since December 2020, vaccination has proven to be a very effective tool to reduce the

This is Exhibit "2" referred to in the  
Affidavit of Alex Acker  
sworn before me at Nanaimo, B.C., this  
17 day of October, 2023

  
A commissioner for taking affidavits for  
British Columbia

risk of COVID-19 transmission for Canadians and to protect broader public health. The Government of Canada is continuing to take many actions to ensure as many Canadians as possible are getting vaccinated.

Employers across the country, both in the public and private sectors, have begun to implement mandatory COVID-19 vaccination policies for employees. Many other large employers in education, healthcare and government sectors have announced similar mandatory vaccination policies.

## Application

Mandatory COVID-19 vaccinations as a condition of employment could lead to employees voluntarily leaving or being dismissed or suspended without pay from their employment if they refuse to comply. Whether these employees would have access to Employment Insurance (EI) benefits depends on several factors and all claims for benefits must be adjudicated based on individual circumstances.

A fundamental principle of the EI program is that clients must lose their employment through no fault of their own to be eligible for EI regular benefits. The *Employment Insurance Act* states that a client is disqualified (or disentitled) from receiving benefits if they have voluntarily left their employment without just cause or been suspended or dismissed as a result of their own misconduct.

More details on the adjudication of the different reasons for separation in relation to the refusal to comply with the employer's mandatory vaccination policy can be found below.

## Voluntary leaving

The EI program provides temporary income support to employees during periods of involuntary unemployment. To receive benefits, clients who have voluntarily left their employment must show just cause for having taken this action. Generally, this means that these clients must demonstrate that they had no reasonable alternative but to leave their employment.

The definition of "reasonable alternative" can vary from one case to another. The legislation does not ask employees to do the impossible in establishing just cause for voluntarily leaving. All it requires is what is reasonable under the circumstances. To make this determination, consideration should be given to:

- the situation that led to the voluntary separation;
- whether other measures or reasonable alternatives that could have remedied this situation existed or were exercised; and
- the employees' reasons for not using what appears to be reasonable and available solutions.

All claims must be assessed on an individual basis in the context of the client's work history, willingness to immediately accept employment and job search efforts made to re-enter the workforce.

In the context of a mandatory vaccination policy, an employee would not have just cause to voluntarily leave their employment unless they left due to exceptional circumstances. Examples of such exceptional circumstances could be a medical condition that would prevent them from being vaccinated or a religious belief or other grounds protected under the Canadian Charter of Rights and Freedoms.

Some clients could argue that a new mandatory vaccination policy is a major change in the terms or conditions of employment and their duties. The just cause exception is usually used in the context of changes that have a direct

impact on the work and therefore the employee had no other choice than to leave their employment (i.e., reduction of hours, change in the shifts, direct change in work duties). A mandatory vaccination policy may not change an employee's specific duties, but merely changes the work environment and therefore an employee who voluntarily left employment because of a refusal to be vaccinated may not have had just cause.

In order to properly determine that a client had just cause for voluntarily leaving their employment, thorough fact-finding must be conducted and documented to support the existence of exceptional circumstances. It would be insufficient to rely only on a client's statement.

## **Suspension or Dismissal**

The purpose of the EI program is to protect those who, through no fault of their own, become temporarily unemployed. All claims for benefits are processed and adjudicated based on individual circumstances. To do so, every attempt is made to ensure that all pertinent facts of the case are obtained.

When clients are suspended without pay or dismissed from their employment, the Commission must determine whether they lost their employment by reason of their own misconduct. The Commission is required by legislation to provide both clients and employers with an opportunity to provide details of the suspension or dismissal.

If, based on all of the facts of the case, the Commission determines that misconduct has been proven, a disqualification from receiving regular benefits is imposed.

In this context, if an employee willfully refuses to comply with their employer's mandatory vaccination policy and there is clear causality between the refusal to get vaccinated and the dismissal or suspension, then a finding of misconduct

can be established, if:

- The employer has adopted and communicated a clear mandatory vaccination policy to all affected employees;
- The employees are aware that failure to comply with the policy would cause a loss of employment; and
- The application of the policy to the employee is reasonable within the workplace context.

In addition, even if a policy was implemented after the employee was hired, the application of the policy could be viewed as reasonable in the context of the COVID-19 pandemic.

## Leave of absence

The EI legislation provides for clients to be disentitled from receiving benefits if they have taken a voluntary leave of absence from their employment without just cause. To prove just cause, clients must show that they had no reasonable alternative but to take a leave from their employment.

Making the choice to take a leave of absence from employment because one does not wish to be vaccinated would normally not constitute just cause within the meaning of the Act, unless the client shows that in their circumstances, taking a leave of absence was the only reasonable alternative.

For employers that choose to place employees on leave without pay rather than imposing a termination or suspension for misconduct, the leave without pay could be considered equivalent to a suspension, if the reason for the leave without pay was non-compliance with the mandatory vaccination policy.



# Availability

Entitlement to benefits does not rely solely on the fact that a person is available for work but rather on their proving it.

In the context of the mandatory vaccination policies, the issue of availability must be examined very closely. For example, a client who voluntarily leaves their employment with just cause because they had a valid medical condition could have difficulty proving their availability, knowing that several other employers could also have mandatory vaccination policies in place.

A client's availability for work is assessed in the context of the client's desire to immediately accept suitable employment and the personal efforts made to re-enter the labour market. Clients must prove that, for each day they request payment of regular benefits, they are available for and actively seeking employment and are not placing undue restrictions on their availability. All pertinent facts of each case are considered in rendering a decision.

When determining whether availability for work has been proven, the following questions will be helpful:

1. Does the client's attitude reflect a sincere desire to work or, conversely, the lack of concern of a person not really seeking employment?
2. Are there any circumstances which obstruct the client's desire to work?
3. Is the client's willingness to work subject to expectations which greatly reduce chances of obtaining employment?
4. Is the client unable to obtain suitable employment despite their personal efforts to find work?

The circumstances surrounding a separation from employment, personal efforts made to find work and the interest shown when a new job opportunity arises, are all factors that must be considered in assessing a person's attitude towards seeking and accepting employment.

Factors which impact a client's desire to work include any circumstances beyond the client's control, such as physical limitations or family constraints. These circumstances may be distinguished from other restrictions arising out of a client's own choice, such as when a person is simply not prepared to accept certain working conditions which would be considered suitable. Clients who do not prove they are available for work will be disentitled from receiving benefits.

In order to establish their availability for work, clients are expected to make every effort to remove any restrictions to doing so, such as family obligations and other personal responsibilities. Clients who have not made arrangements to remove restrictions to allow them to seek and accept all suitable hours of work, may be denied benefits for failing to prove their availability for work.

## Exemptions

As previously mentioned, a client could refuse to comply with the employer's mandatory vaccination policy for exceptional reasons. A client who does not want to receive the COVID-19 vaccine could therefore submit a request for exemption to their employer.

More information about these exemptions in cases of a refusal to comply with the employer's mandatory vaccination policy is below.

## Medical reasons

A client could submit a request for exemption for medical reasons to their employer. In these cases, a medical certificate must adequately support the client's decision to not be vaccinated.

In some cases, the employer can refuse to accept a medical certificate because it does not meet the conditions of the employer's mandatory vaccination policy.

A client could still receive EI benefits if the medical reasons or the description of the client's state of health in the medical certificate is directly related to their refusal to be vaccinated.

For example, an employer could specifically name the types of illnesses for which they would grant an exemption, such as an allergy. However, the client could have another credible medical reason, such as a mental illness or other condition justifying their refusal.

## **Religious reasons**

Since religion is a protected reason under human rights legislation, a client who does not want to receive the COVID-19 vaccine could submit a request for exemption for religious reasons to their employer. It is possible that the employer does not offer exemptions for religious reasons due to the nature of the work done by their employees, as well as for security reasons. A client could still make the request.

When the employer is unable to grant an exemption for religious reasons, the client could receive EI benefits if they are able to demonstrate that their religious belief is authentic and their faith requires a particular practice. It must be possible to conclude that the client's religion is preventing them from being vaccinated. The client must show the link between their religious belief and their refusal to be vaccinated. Does the client's religion present clear conditions or teachings against vaccination? The simple allusion to free choice by the religious body is not considered an instruction by that body that can justify a refusal to comply with the vaccination policy.

In addition, the interpretation of sacred texts by the client themselves must not be seen as a particular practice required by their faith.



When examining the facts about a request for exemption, it is important to ensure that the exceptional circumstances provided by the client are actually of a religious nature, and not of a personal or political nature.

## Canadian Charter of Rights and Freedoms

Only the Canadian Charter of Rights and Freedoms and the Canadian Human Rights Act constitute the human rights regime that is applied when considering a federal EI application.

The Canadian Charter of Rights and Freedoms guarantees the extended right to equality and to the other fundamental human rights and freedoms, such as the freedom of religion.

A client could, for example, invoke one or more protected reasons under the Canadian Charter of Rights and Freedoms to justify the fact that they lost their job.

Simply invoking that the employer's mandatory vaccination policy is discriminatory is insufficient to explain the end of employment. In such a case, the client must be able to demonstrate how they were discriminated against and on what grounds. It is important for the officer to establish the facts in order to understand the link between the supposed discrimination and the nature of the employer's professional expectations.

## Fact-finding

The decision-maker is responsible for ensuring that fact-finding is complete before making a decision. "Complete" means that all facts necessary to make a sound decision have been obtained and are included in the claim file. In some

instances, determining when enough facts have been gathered to make a decision is difficult. However, if the answer is "yes" to each of the following questions, the fact-finding is sound.

Have all interested parties been contacted?

If one of the parties rebutted or contradicted earlier statements given by another party, have they been given the opportunity to respond?

In the case of a refusal to comply with a mandatory vaccination policy, fact-finding is essential for understanding the file.

Certain elements must be on file:

The details of the employer's policy, whether it is written or verbal.

When and how was this policy communicated to the client?

Does the policy include any accommodations for exemptions due to medical or religious reasons?

Did the client request an exemption and did they provide the information required by the employer?

A timeline of the events leading to the client's end of employment.

## **Processes and Procedures**

Processes and procedures in regards to EI eligibility and the refusal to comply with a mandatory vaccination policy are available in the Online Reference Tool.

We ask that you share this guidance with all staff involved in the processing of claims.

Questions regarding this policy should be directed to Regional Business Expertise who may refer questions to the EI Operational Policy Service Desk as appropriate. In order to streamline the analysis process, all questions must

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be accompanied by complete fact-finding and a recommendation from the region.

Questions regarding processes and procedures should be directed to the El Operational Processes and Procedures Service Desk .

Previous versions

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