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To: REGIONAL VICE PRESIDENTS
BRANCHES & FACILITIES

Mandatory Vaccinations Update

As you know, employers in all industries and sectors are considering the prospect of implementing some sort of vaccination policy, and NAV Canada is no exception. Concurrently, we are considering the impact of such policies on employee privacy and individual rights. While a large majority of eligible Canadians have received COVID-19 vaccines, we understand that some individuals will continue to decline the vaccine for various reasons including religion, medical restrictions, fear, or assertions over their bodily autonomy.

To date, no government in Canada has enacted legislation that mandates COVID-19 vaccinations. However, given the previous government announcement, it remains possible that legislation could be enacted broadly, or in relation to working in specific industries now that the vaccine has become available to all individuals over the age of 12. As such, employers in these areas are taking steps to prepare for this potential eventuality. In the meantime, other employers, both federal and provincial, have already moved ahead with mandatory vaccine policies and we are watching closely on the outcome of any legal challenge.

There are currently no cases in the individual employment, or unionized employment context, where the lawfulness of workplace COVID-19 vaccination or disclosure policies have been litigated. There is, however, relevant jurisprudence that sheds light on how a court, administrative tribunal and/or privately appointed labour arbitrator may assess the matter. This jurisprudence suggests that a "one size fits all" policy is likely not appropriate and that any policy must strike an appropriate balance of workplace party interests and give consideration to a number of other factors, which include:

- a. legitimate employee privacy, medical and human rights interests;
- b. legitimate employer business and health and safety-related objectives and interests, including the nature of the industry where the work is being performed;
- c. and any government, public health agency and/or third-party legislation, rule and/or policy that may directly or indirectly impact the employment relationship.

The current case law also confirms that any decision on the legal enforceability of any Employer COVID-19 vaccination policy will involve the consideration and balancing of many

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factors. Each reasonableness inquiry will necessarily be fact-based. For workers employed in congregate settings, health care, education, and other sectors where populations are vulnerable, where physical distancing or wearing masks is difficult, it is extremely unlikely that a challenge to a mandatory vaccination policy will succeed. The same result is very likely for people whose presence at work is a necessary requirement, for those who are in contact with the public, and for workers who must travel to different workplaces, or sites, as part of their duties.

In assessing the reasonableness of each policy, the nature of the industry and workplace, the type of work performed by a worker, and the relative safety risks to co-workers, customers and the public, as well as the potential damage to the employer's reputation and other interests will be taken into account. It will also be important to consider the importance of public health advice, guidance, legislation and recommendations in the midst of a global pandemic in context of the growing number of cases and a worrying increase in the number of cases with variants.

Policies that provide education, testing, and screening as alternatives to vaccination are, from the employee perspective, generally more acceptable. That said, there is no strict legal requirement that such measures be put in place and, in some cases, the employer may reasonably consider such measures to be inadequate.

On the other hand, it can be clearly stated that an employee has the right to refuse to be vaccinated. However, if policies mandating vaccination are deemed reasonable, which most experts agree is far more likely than not in many workplaces, workers who choose not to be vaccinated may face serious occupational consequences. This may include unpaid time off work or even termination of employment. The union will need to look at each case where disciplinary action is taken to determine what, if any, action is likely to result in relief. However, the employees involved should be aware that such decisions may be difficult to reverse in many workplaces.

All of this said, we are still awaiting more information from both government and NAV Canada. Until then, we continue to lobby NAV Canada to weigh the balance mentioned above when considering their policy. This issue is extremely complex as CATCA represents members with legitimate, conflicting rights. Our duty is to ensure that all members are represented justly while giving due consideration that any COVID-19 policy enforced by NAV Canada respects each member's rights, while also maintaining a healthy and safe workplace for all. We will continue to monitor and share the progress of caselaw and legislation on this issue and will share any updates as they arise.

In Solidarity,
CATCA Executive Board