

APT ARMSTRONG LAW

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Sent via email to takeaction@takeaction.ca

September 6, 2021

Dear Take Action Canada Gandhi.Siddh@gmail.com

Re: ONTARIO REGULATION 577/21

In accordance with our prior correspondences, particularly your message of September 5 2021, APT ARMSTRONG LAW has agreed to provide you with a letter explaining Ontario Regulation 577/21.

Please note that this is for information purposes only. In addition, the information provided herein is current as of September 7, 2021, as such this information will not be updated by APT ARMSTRONG LAW after September 7, 2021.

ONTARIO REGULATION 577/21

In full force and effect

This Regulation has been filed on August 24, 2021. As such, it is in full force and effect from August 24, 2021.

What does Ontario Regulation 577/21 say?

This regulation reads as follows:

AMENDING O. REG. 364/20 (RULES FOR AREAS AT STEP 3 AND AT THE ROADMAP EXIT STEP)

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1. **Section 2 of Schedule 1 to Ontario Regulation 364/20** is amended by adding the following subsections:

(2.1) **The person responsible for a business or organization that is open shall operate the business or organization in compliance with any advice, recommendations and instructions issued by the Office of the Chief Medical Officer of Health**, or by a medical officer of health after consultation with the Office of the Chief Medical Officer of Health,

(a) requiring the business or organization to establish, implement and ensure compliance with a COVID-19 vaccination policy; **or**

(b) setting out the precautions and procedures that the business or organization must include in its COVID-19 vaccination policy.

(2.2) In subsection (2.1),

“medical officer of health” means a medical officer of health as defined in subsection 1 (1) of the *Health Protection and Promotion Act*.

2. **Section 2 of Schedule 4 to the Regulation** is amended by adding the following subsections:

(2.1) **The person responsible for a business or organization that is open shall operate the business or organization in compliance with any advice, recommendations and instructions issued by the Office of the Chief Medical Officer of Health**, or by a medical officer of health after consultation with the Office of the Chief Medical Officer of Health,

(a) **requiring** the business or organization to **establish, implement and ensure compliance** with a COVID-19 vaccination policy; **or**

(b) setting out the precautions and procedures that the business or organization **must include** in its COVID-19 vaccination policy.

(2.2) In subsection (2.1),

“medical officer of health” means a medical officer of health as defined in subsection 1 (1) of the *Health Protection and Promotion Act*.

Commencement

3. This Regulation comes into force on the day it is filed.

[emphasis added]

What does Ontario Regulation 577/21 do?

Ontario Regulation 577/21 amends Ontario Regulation 364/20: RULES FOR AREAS AT STEP 3 AND AT THE ROADMAP EXIT STEP under *Reopening Ontario (A Flexible Response to COVID-19) Act, 2020, S.O. 2020, c. 17 (ROA)*. With this amendment to the Ontario Regulation 364/20, it is now a requirement for businesses to follow the advice, recommendations or instructions from the Chief Medical Officer of Health (CMOH) with respect to a “COVID-19 Vaccination Policy”.

The Chief Medical Officer of Health is defined under the *Health Protection and Promotion Act*. The Ontario Regulation 577/21 amendments have granted the Chief Medical Officer of Health to utilize their power/authority while we are in “Step 3” or during the “Roadmap to Exit Step”. The Ontario Regulation 577/21 has solely amended Ontario Regulation 364/20. As such, during the least restrictive regulation, businesses are required to follow the advice, recommendations and instructions from the Chief Medical Officer of Health pursuant to “COVID-19 Vaccination Policies”. This power/authority exercised by the Chief Medical Officer of Health is broad.

What does it mean when it says “advice, recommendations and instructions of the CMOH?”

The Chief Medical Officer of Health may issue Orders under the Health Protection and Promotion Act (HPPA). These may be Orders under section 13 RE: Health Hazards, or section 22 RE: Communicable Disease. Section 22 Orders specifically may be issued against a “Class” (I.e., specific businesses) requiring them to follow certain Orders including “Vaccination Policies” and requirements. If any Order is issued against an individual business or class of businesses/individuals then that Order may be appealed within 15 days of its issuance. Orders are appealed to the Health Services Appeal and Review Board.

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In the alternative, there have been situations, including certain employment whereby the CMOH has provided Directives. Directives can be made under Section 77.7 of the HPPA (Directives to health care providers) whereby the CMOH directs that a “COVID-19 Vaccination Policy” must be “establish[ed], implement[ed] and ensure compliance”. Directives do not have a clear appeal process, if any. However, these Directives “may not be used to compel regulated health professionals to provide services without their consent” (section 77.7(4) HPPA) and cannot be in conflict with the *Occupational Health and Safety Act* (section 77.7(5) HPPA). **Directives are not “COVID-19 Vaccination Policies”**, but instead are requiring a business or employer to “establish, implement, and ensure compliance” with a “COVID-19 Vaccination Policy”. The CMOH may provide options for the types of requirements an employer may implement/adopt in their “COVID-19 Vaccination Policy”; however, the employer still has the option to choose from the options listed therein the Directive.

Currently, it is uncertain as to the “advice, recommendations and instructions” of the CMOH as it pertains to private businesses and “COVID-19 Vaccination Policies”. As such, it is important to be aware of any Orders issued by the CMOH or any Directives of the CMOH. In addition, Medical Officers of Health (MOH) may also issue Orders or Directives if they have been in consultation with the CMOH. As such, being informed of your local Public Health Unit’s Orders or Directives will be important.

What are the legal implications, if any?

Legal implications vary from the “advice, recommendation and instructions” of the CMOH or the MOH, as noted above, there are several different avenues that the CMOH or MOH may take under the HPPA. As such, whether it is a Directive or an Order will provide different routes towards negotiation, mediation, appeal or litigation.

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If you are an employee, you may want to ask your employer about what their “COVID-19 Vaccination Policy” will be in clear and unequivocal terms. If you are an employer, be aware of whether it is an Order or Directive and what is truly required of you. It is important to note employment law standards vary depending on Union representation and other factors including applicable legislation, private versus public sector, etc.

In addition, the amendment to Ontario Regulation 364/20 is applicable to both “Step 3” and “Roadmap to Exit Step”, as such there is no certainty as to its anticipated end date for “COVID-19 Vaccination Policy” enforcement. This may create issues of uncertainty and ambiguity when assessing the necessity and proportionality of any “COVID-19 Vaccination Policy”. However, if there is no amendment to Ontario Regulation 82/20 (Shutdown and Step 1) or Ontario Regulation 263/20 (Step 2) with the amendments in Ontario Regulation 577/21, then there may be further legal implications about extended “COVID-19 Vaccination Policies” utilized outside of Ontario Regulation 364/20.

Contact a lawyer or legal representative to best understand your rights as an employee or employer about “COVID-19 Vaccination Policies”.

Is a “COVID-19 Vaccination Policy” mandatory?

Under the Ontario Regulation 364/20, a “COVID-19 Vaccination Policy” is not mandatory. However, once the CMOH or MOH directs or orders your business to implement and enforce a “COVID-19 Vaccination Policy” then it may be mandatory. That being said, there are still opportunities to refute and appeal an Order, if it is made under the HPPA, as mentioned above, Directives do not have clear appeal processes, if any. As such, if you are directed or ordered to implement and enforce a “COVID-19 Vaccination Policy” you may want to seek legal advice to know your options, or seek clarification as to the expectations.

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To be clear, an employer's onus to "implement, establish and enforce" a "COVID-19 Vaccination Policy" **does not** mean that vaccination is mandatory for employees. Vaccination cannot be made mandatory for employment without accommodation, reasonable alternatives, exemptions, and other considerations (with the caveat of certain employment). Medical intervention of any sort ought to be a choice and any "encouragement" or "requirement" to get vaccinated ought to be in consideration of the type of employment and other considerations. Also, necessary risk assessments must be made available for transparency and negotiation as to the policy requirements and why these specific requirements are being adopted by the employer. Termination based on vaccination status may have further legal implication for employers and employees. As such, it may be advantageous to engage in transparent and fulsome discourse with your employer and employees before a "COVID-19 Vaccination Policy" is established to best understand your legal obligations should a "COVID-19 Vaccination Policy" be implemented at your work. In addition, it is best to seek legal advice before signing or acquiescing to any "COVID-19 Vaccination Policy".

As the requirements are fast-changing, it is important to ask questions and be aware of what is truly required and what is simply recommended. Timing will be an important consideration given that timelines may be imposed and deadlines may be restrictive, as such always look out for important dates including the date of "effectiveness" or "issuance". Lastly, it is further important to understand that the *Reopening Ontario Act* is a continued section 7.0.2 Order made under the *Emergency Management Civil Protection Act*, as such it is held to the following:

Section 7.0.2(1) EMCPA "The purpose of making orders under this section is to promote the public good by protecting the health, safety and welfare of the people of Ontario in times of declared emergencies in a manner that is subject to the Canadian Charter of Rights and Freedoms."

As such, any regulation under the ROA is subject to the *Charter*. Currently we are living through some complex legal issues whereby the ROA, EMCPA, *Charter*, OHSA and HPPA may be

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implicated. Given the multiple acts, legislation, and regulations utilized, it is important to understand that these issues will take time to investigate and legal outcomes are uncertain. Should you require further assistance in knowing your rights and legal avenues available, please feel free to connect with me at aptarmstronglaw@gmail.com.

Sincerely,

/s/ Amanda Armstrong

Amanda Armstrong
Barrister & Solicitor