# Hard Line in the Sand – Medical Privacy and Choice

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Disclaimer: Dear United Health Care Workers of Ontario (UHCWO) - this means each and every one of you who have come together under this grass roots movements to unite under our shared mission of standing up for our rights. None of us under the banner of the UHCWO, nor Stand Up Canada, are lawyers and are not giving legal counsel. We are all volunteers, doing our best to give information, resources, and ideas on how to navigate through these illegal policies. Stand Up Canada in particular is a federally registered non-profit organization and their Statement of Purpose is to educate Canadians to know first and foremost that they have legal rights and how to use the law to defend their civil liberties. As such, the following document should not be construed as legal, medical or union advice.

Dear United Health Care Workers of Ontario (UHCWO),

First of all, congratulations to the over 1,500 (confirmed) 1,900 (unconfirmed) health care workers who have united under the banner of the UHCWO to stand against these medical policies. Our numbers are growing as people find out about our initiative. There is strength in numbers! 'We the People' hold the power.

By coming together and sharing knowledge of what is happening in our different health regions, we are learning valuable information.

Below is our latest update, and it is written to educate us all on crucial items of significance. We sincerely believe that now is the time to take a hard line in the sand with our Unions and our employers. As individuals and as a collective.

## Directive #6 – Issued by the opinion of the Chief Medical Officer of Health under Section 77.7 of the *Health Protection and Promotion Act* (HPPA), 1990

Our Unions have advised health workers that Directive #6 is an "Order" which we must comply with.

This is not true. This is simply a Directive. And a Directive is **not** the law.

No Orders have been made by the Chief Medical Officer of Health under the HPPA section 29.2 Orders to deal with communicable disease outbreaks.

**Here is what our Unions should have done:** Demanded from the employer, on an urgent basis, to provide their **written confirmation than an Order** was issued by the Chief Medical Officer of Health (CMHO) for Directive #6 under section 77.7 of the HPPA.

- If our Unions did not do this, it is a huge **RED FLAG** – we will need to take legal action against our Unions for non-representation – duty of fair representation (explained below).
- If our Unions actually did this, and they received written confirmation that no Order exists, they should have filed an immediate grievance with our employers. We know they did not do this.

**Knowledge is Power!**

There are key components of **crucial information** to understand under section 77.7 of the HPPA, under which Directive #6 was issued.

It is important for everyone to understand that the Chief Medical Officer of Health for Ontario (and across Canada) including Canada's Chief Medical Officer of Health, have been using the "**Precautionary Principle**" to justify their Orders and Directives.

Under section 77.7(2) of the HPPA, the Chief Medical Officer of Health is using the "**Precautionary Principle**" to continue to justify the "*opinion of the Chief Medical Officer of Health there exists or may exist an outbreak of an infectious or communicable disease*".

**Q. What is the "Precautionary Principle"?**

**A.** In a February 25, 2021 Ontario Labour Relations Board court decision regarding the case *LCBO vs Ontario Public Service Employees Union*, Justice Archie Campbell ruled under section 32.37. that:

> *"the **precautionary principle** is to be put into action in order to prevent unnecessary illness and death. As explained by Justice Campbell, this **principle applies where health and safety are threatened even if it cannot be established with scientific certainty** that there is a cause and effect relationship between the activity and the harm. The entire point is to take precautions **against the as yet unknown**."*

Here is the **crucial information** to understand:

- This "**Precautionary Principle**" was rightfully used in the very beginning of the announcement of this pandemic in Canada, back in March 2020.
  - **Laymen Definition**: In light of a world-wide health pandemic where no one has YET established or has KNOWN scientific certainty over how dangerous this virus is, we need to take precautions now to protect the public – *better to be safe than sorry principle.* This principle is meant to be a **temporary course of action** while they are still figuring things out and waiting for scientific certainty on how to proceed.

- However, **after twenty (20) months, the "Precautionary Principle" no longer applies**.
  - **Laymen Explanation**: After twenty (20) months, the Chief Medical Officer of Health for Ontario (and throughout Canada), need to have established scientific evidence and proof **now**

in order to ***continue*** to impose the measures ordered and directed under section 77.7 of the HPP

- In other words, if no "known" scientific certainty has not yet been found after twenty (20) months, then simply put, there is none
- The CMOH can no longer use the "Precautionary Principle" after twenty (20) months and **now** the proof of burden rests with the CMOH to provide **KNOWN** scientific certainty that justifies and supports all of the measures issued under section 77.7 of the HPPA

Remember, all of the measures (social distancing, masks, tests, and now mandatory vaccinations) which have been imposed to all citizens for twenty (20) months, have been done so under this ***temporary principle***. These measures will continue for the rest of our lives IF NOT LEGALLY CHALLENGED. **No one has been paying attention to the limits of the "Precautionary Principle"! Until now.**

**Here is what our Unions should have done:** Demanded from the employer, on an urgent basis, that they demand from the Chief Medical Officer of Health for Ontario for their **written known scientific evidence and proof** that justifies the continued use of these health measures under the HPPA, with respect to Directive #6.

- If our Unions did not do this, it is a huge **RED FLAG** – we will need to take legal action against our Unions for non-representation – duty of fair representation (explained below).
- If our Unions actually did this, and they received written confirmation that there is no known scientific evidence or proof, they should have filed an immediate grievance with the employer and commenced immediate legal action against the Chief Medical Officer of Health for Ontario. But they did not do this.

## Unpaid Administrative Leave

This is a new "leave provision" that is not even part of our current Collective Agreements or employment contracts and employers across all sectors (health care, fire fighters, flight attendants, etc.) are creating and enforcing this new leave provision, **as if it already exists within our current Agreements/employment contracts**. This is illegal. This leave provision does not exist. It cannot exist in principle or as a policy.

**An employer "policy" is NOT a "condition" of employment that is found under our Collective Agreements or employment contracts** (our terms and conditions of employment). All "leave provisions" are "conditions" of employment and must be listed on our Agreements, and of course, our Unions must have negotiated this in good faith with the employer on our behalf – which they did not. This is simply a *policy*. The non-existent leave provision is for involuntary leave without pay under the following conditions:

1. Not disclosing your vaccination status.

- Union lawyers are saying that employers can ask for our disclosure as long as there is a secure way to store the information in a portal. That is ENTIRELY not the point.

The points are:

- Just because you can do something, does not mean it is correct or necessary in this situation.

- This is still a breach of our privacy rights, no matter who is asking and where they are storing this information, unless this is our own medical doctor.
- But more importantly, even if we did disclose this private information, our employers are:
    - **DISCRIMINATING** against all employees who disclose that they are unvaccinated and/or who are not disclosing their vaccination status; and
    - Taking **PUNITIVE** action against us, with **involuntary leave without pay** (Unpaid Administrative Leave) and threat or actual termination of employment for cause.

2. Not submitting to testing.

3. Not submitting to mandatory vaccination.

**Here is what our Unions should have done – part 1:** Obtained at least two *non-biased* **written legal opinions regarding "Unpaid Administrative Leave".** One which support the employer policy, and one which does not. Studied them both and agreed on best course of action for their members.

- If our Unions did not do this, this is a huge **RED FLAG** – we will need to take legal action against our Unions for non-representation – duty of fair representation (explained below).
- If our Unions actually did this, they should have immediately informed our employers that they will not accept this new "condition" of employment until such time as they weighed both legal opinions and taken their findings to their members to vote on. Again, we know they did not do this.

This new leave provision **does not exist** in any of our current Collective Agreements. This is an absolute breach by our employers of our Agreements and failure by our Unions to point this out. Employers cannot change the terms and conditions of our employment without it having been negotiated and agreed upon first by our Unions.

**Here is what our Unions should have done – part 2:** Provided all members with **written proof of their negotiations with our employers for this new leave provision**.

- If our Unions did not do this, this is a huge **RED FLAG** – we will need to take legal action against our Unions for non-representation – duty of fair representation (explained below).
- If our Unions actually did this, they should have immediately provided an option for employees to go on strike if they felt strongly enough about the removal of their medical privacy rights and choices. This definitely did not happen.

Several, (if not all) of our Unions have stated that employees who have been put on "Unpaid Administrative Leave" **will be dismissed for cause**. If this is the case, not only will this be wrongful dismissal but also severance will not be paid. And, adding insult to injury, we will not be entitled to EI benefits from Service Canada. *This is an outrageous violation of our employment rights and human rights*, to say the least.

## Bona Fide Occupational Requirement

Our employers and unions have notified us that we must become vaccinated with the COVID-19 vaccinations or face disciplinary action, up to and including termination of employment for cause. This is a discriminatory requirement of our employment.

Employers may lawfully discriminate, based on an otherwise prohibited ground under the *Human Rights Code* in Ontario, if they can prove legitimate business reasons.

However, they must be able to demonstrate that the workplace rule, policy, standard or criteria relied upon is a "bona fide occupational requirement" and that the needs of the person cannot be accommodated without undue hardship.

Section 9. Reasonable bona fide requirements under the Ontario Human Rights Commission further informs that the Supreme Court of Canada has established a three-step test for determining that what seems like a discriminatory requirement is *reasonable* and *bona fide* (legitimate) in the circumstances. The employer must show a balance of probabilities (more likely than not) that the requirement:

1. Was adopted for a purpose or goal that is rationally connected to the function being performed.
2. Was adopted in good faith, in the belief that it is necessary to fulfill the purpose or goal
3. Is reasonably necessary to accomplish its purpose or goal, in the sense that it is impossible to accommodate the claimant without undue hardship.

Ultimately, our employer who wants to justify a discriminatory requirement, rule or standard must show that accommodation was incorporated into the standard to the point of undue hardship. This means the requirement was designed or changed to include as many people as possible, and that any remaining individual needs were accommodated, short of undue hardship.

**Here is what our Unions should have done:** Requested from our employer that they **conduct a well-documented and thorough *Job Analysis* for each employee who received this "notice"**. A Job Analysis requires our employer to break down every job task and assess the risk level. The risk must be "measurable" and "quantifiable". Simply saying that being unvaccinated is a risk to the public and patients/staff in the health care system, needs to be measured and quantified. Our employers would need to demonstrate this with hard scientific evidence and statistics. They would then need to show that the risk cannot be mitigated by other measures (masks, barriers, social distancing, working from home, etc.).

Further, if a Job Analysis is presented as requested, the Unions should have asked for clarification in writing on which aspects of our position are dangerous if we are not vaccinated. Then our Unions should have then asked our employer to explain in writing what accommodations were explored, and why they determined that those accommodations would be considered "undue hardship".

Since our employers have mitigated the risk for the last twenty (20) months by imposing mask wearing, social distancing, working from home, etc., then why is it suddenly a hardship? It isn't. And unlikely a Judge would say it is.

- If our Unions did not do this, this is a huge **RED FLAG** – we will need to take legal action against our Unions for non-representation – duty of fair representation (explained below).
- If our Unions actually did this, they should have immediately communicated all of the information to us so we would know our rights. Lastly, they did not do this.

## Our Unions Have Failed Us!

Do you see a running theme here regarding how our Unions have not fulfilled their duty to represent us?

It is our **Unions duty and complete obligation** to protect employee rights at all costs. We pay union dues for their legal representation of our legal and human rights.

It is not the Unions duty and obligation to represent the employer's "policy", *even* if they obtained a legal opinion which supports these illegal policies. These are not simple "policies". They are a complete violation of our employment and human rights.

## Good Faith Letter to our Hospital Unions (Unionized workers) and Hospital Employers (Non-Unionized Workers)

We have written two (2) Good Faith Letters, identical in nature except the distinction between unionized and non-unionized rights:

1. To send to our Hospital Unions (ONA, CUPE, UNIFOR, COPE, CLAC, SEIU, PARO, etc.) – on behalf of **unionized** health care workers under the UHCWO.

2. To send to our Hospitals as Employers – on behalf of **non-unionized** health care workers under the UHCWO.

We will send them as soon as possible with our position and good faith requests, as paying union members and in support of those health care workers who are not unionized.

Our demands are crystal clear. We advise of our position and respectfully demand that:

1. Our Unions inform our employers to change their policies immediately, while the Unions are waiting for written known scientific evidence and proof from the Chief Medical Officer of Health for Ontario that will justify these mandatory policies under Directive #6, issued under section 77.7 of the Health Protection and Promotion Act.

2. Hospitals as employers remove these policies immediately, while the Hospitals are waiting for written known scientific evidence and proof from the Chief Medical Officer of Health for Ontario that will justify these mandatory policies under Directive #6, issued under section 77.7 of the Health Protection and Promotion Act.

Each individual needs to send this Good Faith Letter to their union or employer if they are non-unionized. These Good Faith Letters will represent everyone under the UHCWO collective who pays dues to a union, and those who do not.

## Our Position – Medical Privacy and Choice

As the collective of the UHCWO, our position is simple. We will not at any time consent to revealing our personal health information, including our vaccination status, to our employers. And we will fight any discrimination levied upon us based on our decision to keep our personal health information private.

- If our employers do not know our private medical information, they cannot test us – they cannot recommend any vaccinations.

- If we declare we are **asymptomatic**, we will not test; this is supported by known science.
- If we declare we are **symptomatic**, we will self-isolate at home – this is how our human existence has done things for thousands of years. *If we are sick, we will stay home.*

Our position to not disclose our medical status will mean no more testing and no vaccination.

This is how we hold the line.

Unionized and non-unionized, we stand united.

## We Have Drawn a Hard Line Drawn in the Sand

Some of us may not have disclosed our vaccination status while others may have done so. Some are submitting to testing while others are refusing, or may refuse any further testing. Some may have submitted to mandatory vaccination while others will simply refuse. In the cases where we will not submit and will not comply, our employers will not only discipline us by putting us on involuntary leave without pay (Unpaid Administrative Leave), but they will also try and terminate our employment for cause.

- As advised above, we will not be entitled to any severance or EI benefits.

In addition, in light of the September 22, 2021 new policy statement from the Ontario Human Rights Commission on COVID-19 vaccine mandates and proof of vaccine certificates, we can no longer hope or depend on *Creed* as a protected ground under the Human Rights Code.

Our employers have drawn a hard line in the sand.

Our Unions have completely abdicated their duty and obligation to protect our rights at all costs.

We have no choice now but to draw an equal hard line in the sand with our employers and our Unions. We have everything to gain by taking this position of UNITED NON-COMPLIANCE, and *everything to lose if we do not.*

## Next Course of Action - Duty of Fair Representation / Legal Action

Unionized employees do not have the liberty to sue employers because the Union is our legal representative. Therefore, our next course of action for unionized employees will be to file a **Duty of Fair Representation** (DFR) complaint with the Ontario Labour Relations Board (OLRB), if the Unions do not comply with our demands. Given that all employees who did not disclose their vaccination status, were issued a notice from our employers threatening disciplinary measures for non-compliance, our union's Duty of Fair Representation on these matters should have commenced immediately.

For all non-unionized employees, legal representation will be the next course of action against the Hospitals as employers, if they do not comply with your demands.

The goal of this DFR is to have our case against our employer's mandatory vaccination policies heard before an arbitrator.

If our Unions had filed grievances on their habitual commitment to protect our employee rights, rather than paying for legal opinions designed to argue how arbitrators would likely rule against the Union, both the Union and the membership would be in a much better place right now. Including non-unionized workers.

## Moving Forward

The time to release fear is now. The time to stand UNITED together is now. The only question you need to ask yourself if this – ***do you personally believe in medical privacy and medical choice?***

If so, stand firm in your belief.

This is our God-given right and ultimate truth. We need to let our Unions and employers know exactly where we stand and the fact that what they are doing is a violation of our rights.

This personal belief, which is actually a deeply held belief of what is *absolutely true for us as an individual*, will create an internal shift in each of us, **if we personally believe in medical privacy and medical choice**.

It will not matter what our employer does to us or which political party is power. If we hold this belief, we will be immovable as a collective, no matter what consequences may come our way.