



CITY OF HAMILTON
CITY MANAGER'S OFFICE
Human Resources Division

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| TO: | Mayor and Members General Issues Committee |
| COMMITTEE DATE: | April 20, 2022 |
| SUBJECT/REPORT NO: | Amendment to the Mandatory COVID-19 Vaccination Verification Policy (HUR21008(b)) (City Wide) |
| WARD(S) AFFECTED: | City Wide |
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| SUBMITTED BY: | Lora Fontana Executive Director Human Resources |
| SIGNATURE: | |

RECOMMENDATIONS

- (a) That the City suspend its Mandatory COVID-19 Vaccination Verification Policy requiring proof of full vaccination in the workplace, and that the following provisions in the current policy, be amended by:
- (i) removing the general requirement to provide proof of vaccination or participate in rapid antigen testing program as an ongoing condition of employment, thereby eliminating the termination of employment for those employees failing to provide evidence of vaccination by May 31, 2022;
 - (ii) discontinuing the requirements for employees who have not disclosed their vaccination status (or who are subject to an accommodation) to participate in rapid antigen testing, effective May 2, 2022; and,
 - (iii) removing citizen appointees from the application of the Policy.
- (b) That the conditions put into place to support provincial Directives in three specific areas be maintained as follows:

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- (i) That the City Lodges maintain the requirement to be fully vaccinated, and those employees not disclosing proof of vaccination will remain on an unpaid leave of absence;
 - (ii) That the City Lodges maintain the daily Rapid Antigen Testing program that was put in place under the provincial Directives; and,
 - (iii) That the Hamilton Paramedic Services maintain the Rapid Antigen Testing program in place for unvaccinated employees put in place under provincial Directives;
- (c) That the Red Hill Childcare Centre maintain the Rapid Antigen Testing program that was put in place for unvaccinated employees under provincial Directives;
- (d) That all new hires continue to be required to provide proof of full vaccination as a condition of employment with the City; and
- (e) That staff continue to monitor the COVID related environment with respect to any changes and/or necessary increased measures that may require further amendments or reinstatement of policy, and report back to the General Issues Committee, as required.

EXECUTIVE SUMMARY

Throughout the Pandemic, the City of Hamilton has been committed to providing a safe working environment for all our employees as well as the community we serve. Ensuring high rates of vaccination remains one of the most important ways we can protect our employees and community. Equally important is that the City retains the flexibility to respond to changes in the environment and scientific literature to continue to provide a measured and reasonable response in the circumstances.

Given the changes in the current environment, including the evolution of COVID-19, it is recommended that the City suspend the Mandatory COVID-19 Vaccination Verification Policy, including changes to the following provisions of the existing Policy:

- Eliminate the condition that “full vaccination” as a condition of continued active employment at the City of Hamilton, including that those not fully vaccinated by May 31, 2022 will be subject to disciplinary action, up to and including termination on June 1, 2022;
- Remove “citizen appointees” from the application of this Policy

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- The City Lodges will maintain the provision of proof of “full vaccination” as a condition of employment and amend the Policy to place non-compliant employees on an unpaid leave of absence until further notice;
- Suspend Rapid Antigen Testing of unvaccinated City of Hamilton employees, effective May 2, 2022, with the following exceptions:
 - The City Lodges will maintain its Rapid Antigen Testing Program for all employees, requiring daily Rapid Antigen Testing
 - The Hamilton Paramedic Services will maintain its Rapid Antigen Testing program of unvaccinated employees prior to the start of each shift;
 - The Red Hill Child Care Centre will maintain its Rapid Antigen Testing program of unvaccinated employees, requiring testing of employees three times per week;
- Maintain the requirement for provision of proof of “full vaccination” for new hires as a condition of employment with the City
- Provide the flexibility to return to seek Council direction regarding elements of the Policy if the environment changes and increased measures are again justified and/or required by circumstance or as a result of legislation/Public Health direction

Currently there are 441 employees participating in the Rapid Antigen Testing along with another 64 employees that have been placed on an unpaid leave of absence for non-compliance with the Policy (ie. non-disclosure of vaccination status and non-participation in the rapid antigen testing program). These recommended changes would see these non-disclosure employees returned to the workplace from an unpaid leave, and the ongoing employment (i.e. no termination of employment) of those unvaccinated employees that have been complying with the Policy through rapid antigen testing since November 4, 2021. It is anticipated that employees who have remained noncompliant with the Policy from the outset will return to work effective May 2 (subject to operational considerations).

More specifically, employees who have not disclosed their “fully vaccinated” status would no longer face termination of their employment on June 1, 2022, as the Policy currently provides. Those employees currently on an unpaid leave of absence would return to work the week of May 2 (except for those employees in the Lodges who remain non-compliant with the Policy) and the rapid antigen testing of unvaccinated employees would also end at that time, save and except those unvaccinated employees in the City Lodges, Hamilton Paramedic Services and Red Hill Child Care Services.

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Moving forward, all employees will continue to be expected to comply with all health and safety measures put into place to protect employees and our community.

Alternatives for Consideration – See Page 10

FINANCIAL – STAFFING – LEGAL IMPLICATIONS

Financial: To date, the City has received the majority of Rapid Antigen Tests from the Province free of charge. In early 2022, the Province advised that there would be an inability to meet certain orders, and a third-party vendor was engaged to provide a quantity of rapid antigen tests to enable the Rapid Antigen Testing Program to continue without pause at an expense of approximately \$80,000. Employees have received the tests from the City free of charge.

Staffing: N/A

Legal: Refer to Confidential Report HUR21008(c)- Amendments to the Mandatory COVID-19 Vaccination Verification Policy – Legal Assessment

HISTORICAL BACKGROUND

On August 26, 2021, Council approved the COVID-19 Mandatory Vaccination Verification Policy ('the Policy') requiring proof of full vaccination in the workplace for all employees, that included a component for a comprehensive testing program, education and communication plan for unvaccinated staff, including those staff choosing not to disclose their vaccination status. This mandatory COVID-19 Mandatory Vaccination Verification Policy applies to all City employees, including permanent, temporary, full-time, part-time, casual, volunteers, students, members of Council, and members of Council appointed committees.

On January 7, 2022, Council amended the Policy to include termination of employment for those employees who fail to disclose their status as fully vaccinated by May 31, 2022. In doing so, Council additionally clarified that the Policy would also be applied to both Members of Council and citizen appointees to boards and committees. For clarity, it was determined that while "termination" could not apply in the case of an elected representative, the Policy (i.e. mandatory vaccination) would apply to members of Council and citizen appointees. In other words, the policy would clearly apply to Members of Council and citizen appointees, however, the outcome would be reached through a different mechanism (i.e. because they cannot be "terminated," a different approach is required to remove noncompliant elected representatives or citizen appointees).

The following provides an overview of the 441 employees who would be directly impacted by the January amendment to the policy implementing termination provisions, and the 64 Employees already on Unpaid Leave of Absence that would be terminated as a result of that amendment to the Policy:

Employee Status:

7149 Vaccinated Active Employees
505 Undisclosed Active Employees
441 Rapid Antigen Testing Active Employees
64 Noncompliant Employees (on Unpaid Leave)

In response to the COVID-19 climate, on February 17, 2022, the Ontario Government, in consultation with the Chief Medical Officer of Health, moved to the next phase of its plan to reopen the province, easing a number of restrictions related to capacity limits (among other elements). The Government of Ontario made this decision in light of improving public health and health system indicators, such as decreased positivity rates and a decline in admissions to hospitals and ICUs.

This move came ahead of the Government of Ontario's plan to lift the proof of vaccination requirements in many public facing businesses, as well as the plan to lift all remaining capacity limits for indoor public settings on March 1, 2022 (excluding hospitals, congregate care and public transit). Furthermore, the Ontario government continued to move forward to lift additional mitigation measures, such as requirements to wear masks. Many of these legislated restrictions came to an end as of March 21, 2022, although it remains available to businesses to continue to take precautions such as still requiring proof of vaccination and mandatory mask use. As an example, the City of Hamilton has extended its requirement for staff to wear masks at work until April 30, 2022, which may be subject to change as a result of continued monitoring of the environment.

The policy has had a significant positive impact upon the vaccination rates, with an almost 94% vaccination rate amongst City staff. In being flexible and responsive to the continually changing landscape, it is recommended that the time has come for an additional series of policy changes to best reflect the circumstances and the environment. Not all employers will take identical measures in response to changes in circumstances.

Finally, the Medical Officer of Health (MOH) for the City of Hamilton continues to endorse the benefits of vaccinations and the value of a Mandatory COVID-19 Vaccination Verification Policy in the workplace. Understanding the current

circumstances and legal challenges, the MOH is supportive of the recommended changes to the Policy.

POLICY IMPLICATIONS AND LEGISLATED REQUIREMENTS

Arbitrators and/or the Courts would look to ensure that an employee's rights are balanced against the interests of the Employer in ensuring the health and safety of employees and the public. Adjudicators will also critically evaluate the reasonableness of the policy in relation to these rights to ensure that they are respected, and that other reasonable, less intrusive options were not available. Our approach within the workplace must take into consideration this balance between an employer's rights and the employees' rights.

RELEVANT CONSULTATION

External legal counsel was consulted in relation to the suggested amendments to the policy, and a legal opinion has been included as Appendix "A" of Report HUR22005.

A communication was sent to all Union Leaders advising them of the City's intention to make changes to the Mandatory COVID-19 Vaccination Verification Policy as a result of changes in the environment. All bargaining agents were invited to meet to discuss options for moving forward given recent resource challenges and the impact upon the rapid antigen testing program. Meetings have been scheduled/were held with groups across several days. Each of these meetings provided an opportunity for the unions to ask questions, raise concerns, seek clarity on options for consideration, as well as any additional consultation required. The City remains committed to continuing to work with the union leaders to support them and our employees in moving forward with any proposed changes, as appropriate.

ANALYSIS AND RATIONALE FOR RECOMMENDATION

In the current context, the reasonableness of the Policy's objectives in protecting the health and safety of employees and the community are subject to mounting challenges. As is commonly known, COVID-19 can be acquired and transmitted by vaccinated individuals (in "breakthrough" cases), so the rationale of providing protection from transmission carries significantly less weight than in the past. This is particularly true when balanced against the strongest measure that an employer can take: the ending of the employment relationship.

Vaccines do prevent the worst outcomes of COVID-19, and vaccination should continue to be encouraged, given that the likelihood of becoming hospitalized, admitted to an ICU and/or dying as a result of COVID is significantly higher for unvaccinated individuals (based upon current, publicly available COVID reporting). The continued encouraging trends, however, mitigate against the strongest response available from an employment perspective.

Finally, there are practical matters that have been discussed that should be highlighted in this report. The termination of several hundred employees will require substantial efforts to hire and train a large number of new employees across the organization. The other practical consideration, regardless of the likelihood of success, are the costs associated with litigation of grievances at arbitration, and in litigation before the courts in cases involving non-unionized employees. While it is difficult to provide an estimate as to the entire cost associated with retaining appropriate counsel for these matters, it would be a substantial outlay of City resources.

Of course, should trends emerge that indicate that stronger measures are required, all elements of this policy can be brought back to Council for further consideration to re-introduce policy measures. As the COVID-19 pandemic continues to evolve across the world, the City will continue to follow the situation and if the Province and/or public health leaders advise on a need for more measures, including a return to mandating vaccination/proof of vaccination, then the City would further propose changes to the policy to protect the health and safety of employees and the community that the City serves. Such considerations would be brought back to Council for further consideration and approval.

As many employees of the City plan for returns to office environments in April, the City will continue to take every precaution reasonable in the circumstances to protect the health and safety of employees. This is the general duty owed by employers to employees at law, and the City will continue to meet its obligations in that regard. In brief, the environment has shifted, and it is recommended that the City shift with the environment.

Prior to March 14, 2022, the City's Long-Term Care Homes ("the Lodges") were not subject to the Policy directly as a result of specific legislated Directives applying to Long-Term Care Homes, which required vaccination and rapid antigen testing. As of March 14, 2022, those Directives have been revoked. As a result of the specific COVID-vulnerable client population at the Lodges, the amendments sought would provide that vaccination would continue to be a term and condition of employment, with those failing to comply to remain on unpaid personal leave (and not subject to termination) until some future date. Rapid antigen testing of all staff would also

continue as described below. These measures are solely directed to maximize the protection afforded to the residents of the Lodges.

Two other operational areas of the City were also subject to provincial Directives providing measures to manage employees in specific circumstances: Hamilton Paramedic Services and Red Hill Child Care. These Directives are no longer in force (as with the Lodges). Staff recommend the continuation of the mitigation requirements endorsed under the provincial Directives for the foreseeable future, namely, the continuation of the Rapid Antigen Testing Programs in effect in each of those operational areas. This would require the ongoing testing of unvaccinated employees in Paramedic Services and Red Hill Child Care.

Rapid Antigen Testing

Rapid antigen testing, previously a second option for employees to pursue to maintain compliance with the Policy, is recommended to be discontinued (with exceptions for the Lodges, Paramedic Services, and Red Hill Child Care). Continuing to provide the testing procedures that were in place under provincial Directives is recommended until further notice, as the targeted Directive measures (particularly in relation to Rapid Antigen Testing) are manageable within current resources and provide a greater level of protection in designated areas serving more vulnerable populations. While there may be some utility in continuing Rapid Antigen Testing, its effectiveness requires continuous adaptation of the of the frequency of testing and testing methods in relation to the rates of disease locally and emergent variants. Currently, there is no internal capacity to support a rapid testing program any larger than the current population, or with increased frequency of testing, and given the changes in the environment, rapid antigen testing is recommended to be discontinued for all employees, subject to the exceptions noted.

For clarity, this recommendation would not apply to the Lodges, Hamilton Paramedic Services, or Red Hill Child Care, as their rapid antigen testing programs that existed under the provincial Directives remains an effective measure to monitor the status of the City's employees in these three areas.

The Lodges

With respect to the recommended amendments that deal specifically with the Lodges, it is clear that Long-Term Care Home residents are a particularly vulnerable population. The province has seen the impact of COVID-19 upon several Long-Term Care Homes, and City staff believe that these residents should be provided additional safeguards for the foreseeable future. Requirements to be vaccinated and the provision of daily rapid antigen testing and active screening provides an additional level of protection for this

specific group of citizens (and those employees who provide their care), by allowing more reliable information regarding potential staff infections.

Hamilton Paramedic Services

Hamilton Paramedic Services was also subject to provincial Directives to address COVID. These Directives were revoked effective March 14, 2022. As with the Lodges and the continued application of mitigation strategies that align with the previous provincial Directives, it is recommended that Hamilton Paramedic Services also maintain its Directive measures to test unvaccinated employees at the start of their shifts. Hamilton Paramedic Services management has confidence in the levels of protection that this approach provided in relation to both staff and patient safety and believes that continued application of their testing process will continue to do so. Accordingly, it is recommended that this approach be continued for the foreseeable future.

Red Hill Child Care Centre

As with the Lodges and Hamilton Paramedic Services, Red Hill Child Care was also subject to provincial Directives with respect to the workplace until March 14, 2022. Similar to Hamilton Paramedic Service, management has confidence in the levels of protection that this approach provided in relation to both staff and child safety. Accordingly, it is recommended that rapid testing continue (with a frequency of three times per week) for those unvaccinated employees in Red Hill Child Care in order to maintain the levels of risk mitigation that occurred under the provincial Directive. This would continue for the foreseeable future.

New Hires

In all cases, because vaccination remains encouraged as a “cornerstone” of COVID management, it is recommended that the full vaccination requirement remain a condition of employment for new hires. New hires would have the knowledge that they are required to be “fully vaccinated” in advance of becoming employees with the City, and would not be subject to such notice requirements, being made aware prior to hire of the conditions required by the City. It should be noted that one area of significant (almost complete) agreement across municipalities is the application of the vaccination requirement for new hires.

This condition can also be applied to “new” members of boards (citizen appointees) and “new” volunteers. This would provide advanced notice of the expectations of the City

regarding these positions moving forward, and not interrupt work that is currently occurring. Further, representation from City citizens may be disadvantaged as a result of removing members who do not comply with the policy requirements. For example, at least one local committee has noted that reaching quorum is sometimes a challenge on its own, and that additional challenges arising from the inability of some members to participate as a result of their personal health decisions may result in an inability for such groups to contribute, or to “be heard,” as a result. Equity considerations may also mitigate against this policy applying to citizen volunteer committee members: marginalized groups have been disadvantaged by medical mandates historically, and hesitancy arising from this history may reduce participation disproportionately among such groups.

ALTERNATIVES FOR CONSIDERATION

1. Suspend the Policy, with no exceptions for specific operational areas

While the recommended approach allows for the three operational areas above to continue with the approaches taken under various provincial Directives, a corporation-wide policy with no variations could be implemented. This is not a recommended course of action, as it disregards elevated measures that were put into place through the force of legislation designed to protect specific populations.

2. Indefinite Unpaid Leave of Absence (instead of termination) pending a decision as to employment status (at a date to be determined)

An alternative for consideration could be a slight variation of the recommended termination option, but without an effective date of termination. Rather than implement this change with a “hard stop” date, this would accomplish a number of objectives:

- The City would continue to meet its obligations to protect the health and safety of its employees, by continuing to prevent unvaccinated employees from attending at work
- The City would reduce the likelihood of potential litigation associated with any challenges to the policy and outcomes resulting from an unpaid leave of absence.
- The City would have the additional benefit of witnessing the legal outcomes of similar policy-based approaches in other municipalities, and adjust the City policy to continue to align with the jurisprudence and avoid potential costly missteps
- This approach would more appropriately align with the collective agreement obligations found in several of the City’s collective agreements

By avoiding the specified date at this time, this preserves the flexibility of the City of Hamilton to respond to continuing changes in the landscape, particularly those arising in the context of related jurisprudence. However, such an approach (as with termination) would result in significant staffing challenges, including the need to hire new employees on a temporary basis, in order to maintain service levels. Given the potential legal exposures associated as a result of this approach, and the potential impact upon service delivery, this option is not recommended.

3. Maintaining the current Policy, and proceeding with terminations

The COVID 19 Vaccine Verification Policy, including its provision for the termination of the employment relationship, could remain as currently drafted, with an effective date to provide evidence of vaccination of May 31, 2022, including a termination date of June 1st, 2022. However, given the potential risk associated with this approach, this option is not recommended.

ALIGNMENT TO THE 2016 – 2025 STRATEGIC PLAN

Community Engagement and Participation

Hamilton has an open, transparent and accessible approach to City government that engages with and empowers all citizens to be involved in their community

Economic Prosperity and Growth

Hamilton has a prosperous and diverse local economy where people have opportunities to grow and develop.

Healthy and Safe Communities

Hamilton is a safe and supportive City where people are active, healthy, and have a high quality of life.

Our People and Performance

Hamiltonians have a high level of trust and confidence in their City government.

APPENDICES AND SCHEDULES ATTACHED

Appendix “A” to Report HUR21008(b) - Mandatory COVID-19 Vaccination Verification Policy