

Vaccination Requirements for Transportation Workers in International Commerce



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Background & Controversy

Public and private efforts to put in place mandatory vaccination requirements for citizens or employees have proven to be highly controversial throughout the world. In Western countries, including Canada, the United States, the United Kingdom and the European Union, the controversy over vaccination mandates specifically has been a topic of heated debate at all levels of government and in the boardrooms of employers across the commercial spectrum. Perhaps most importantly given the global spread of Covid-19, this has included the international transportation sector. Airlines, road transport companies, and marine shipping companies have been at the forefront of the pandemic response, ensuring necessary goods continue to move across borders, subject to varying degrees of Covid-19 restrictions.

However, the degree to which vaccine mandates have been considered and implemented has differed widely across various jurisdictions. Now that Covid-19 rates are decreasing across the world and Covid-19 restrictions are slowly being lifted, there is an opportunity to examine how Covid-19 vaccine mandates were proposed, challenged, and employed, to consider the current state of affairs, and to contemplate what the future of vaccine requirements might look like.

Steps Taken

Canada

Early in the pandemic, the Government of Canada restricted movement into the country and implemented a mandatory 14-day quarantine. Underscoring the importance of international trade to Canada's supply chain and economy, however, an exemption was immediately made for cross-border transportation works.¹ International transportation workers continued to be classified as essential workers,² although the rules began to evolve when vaccines became widely available.

In August 2021, the Government of Canada announced that employees in federally-regulated air, rail, and marine transportation sectors would be required to obtain Covid-19-vaccinations.³ This included employees of international air, rail, and marine carriers based in Canada. Subject to limited exceptions, those employees had to show proof of full vaccination (defined as a complete vaccine dosage regimen using a Covid-19 vaccine authorized for sale in Canada) by a certain date or they would no longer be able to work.

This vaccination requirement was implemented by directing employers in the air, rail, and marine sectors to establish mandatory vaccination policies. The formal requirements were established by a Ministerial Order pursuant to the *Railway Safety Act*⁴ and Interim Orders pursuant to the *Canada Shipping Act, 2001*⁵ and the *Aeronautics Act*.⁶ Employers were required to establish mandatory vaccine policies by late October 2021 for rail and air sectors and early November 2021 for the marine sector.

Initially, international air crew were exempt from requirements to provide proof of vaccination or to undergo quarantine. In January 2022, however, international air crew became subject to the general rules prohibiting unvaccinated foreign nationals from entering Canada.⁷

On November 19, 2021, the Government of Canada announced that truck drivers entering Canada from the United States would have to be vaccinated or face Covid-19 testing and quarantine requirements.⁸ This requirement, which applies to both Canadian and American truck drivers, was implemented through a revised Order in Council made under the *Quarantine Act*.⁹ The only initial exemption was for carriers delivering medically necessary supplies.

Understandably, Canada's vaccination rules applicable to international seafarers have been less stringent. Since they provide an essential service, international seafarers do not need to be fully vaccinated to enter Canada. For example, the Orders in Council made exceptions permitting unvaccinated international seafarers to board outgoing flights.

Shore leave for unvaccinated seafarers on foreign vessels was limited to six hours, whereas vaccinated seafarers could take longer shore leaves beginning on November 1, 2021.¹⁰ From late December 2021 to March 2022, however, unvaccinated seafarers could only take shore leave to obtain a vaccine.¹¹

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United States of America

In the United States, while some mandatory vaccination regimes for certain transport worker sectors were put in place on a state-by-state basis, there have also been some efforts to put in place similar vaccine mandates by federal regulation and executive order which would encompass workers across the various modes of international transport. As would be expected given the controversy surrounding vaccine mandates and the highly politicized culture in the United States, all of these efforts have been met with significant legal challenges.

On September 9, 2021, President Biden issued two directives aimed at ensuring the vaccinations of workers connected to the federal government as part the Administration's action plan to combat the ongoing pandemic generally. Both directives were met with judicial challenges. In the meantime, the federal government stated that it would take no action to enforce implementation of the directives in the jurisdictions and during the periods when court orders or injunctions would prevent it from doing so.

Executive Order 14043,¹² the Executive Order on Requiring Coronavirus Disease 2019 Vaccination for Federal Employees, instructed all federal agencies to implement a policy requiring that all federal employees be vaccinated against Covid-19. However, on January 21, 2022, the District Court for the Southern District of Texas stayed this directive in response to an application for a temporary injunction from plaintiffs led by a group of federal employees.¹³ Previously, a dozen other federal district courts in other states had rejected similar applications. On April 7, 2022, the stay was lifted by the US Court of Appeals for the Fifth Circuit.¹⁴

Executive Order 14042,¹⁵ Executive Order on Ensuring Adequate Covid Safety Protocols for Federal Contractors, mandated vaccinations for all contractors and subcontractors doing business with the federal government. This directive also led to a flood of litigation filed in multiple states. The Executive Order was stayed by the District Court for the Southern District of Georgia which issued a nationwide preliminary injunction on

the vaccine mandate.¹⁶ This initial stay was followed by similar injunctions issued by four other federal district courts: the Eastern District of Kentucky,¹⁷ the Eastern District of Missouri,¹⁸ the Western District of Louisiana¹⁹ and the Middle District of Florida.²⁰ An appeal of the Kentucky District Court's injunction, which prohibits enforcement of the contractor vaccine mandate in Ohio, Kentucky, and Tennessee, was denied by the United States Courts of Appeals for the Sixth Circuit on January 5, 2022.²¹ Appeals of the Louisiana, Missouri, and Georgia decisions are currently pending. As a result, federal contractors must wait and see how the court challenges pan out.

In addition to the two Executive Orders discussed above, the Biden Administration has taken further steps toward a fully vaccinated US workforce. On September 9, 2021, President Biden also ordered the Occupational Safety and Health Administration (OSHA) to issue an Emergency Temporary Standard (ETS)²² requiring all employers with 100 or more employees to pay time off to get vaccinated and recover from side effects and to require employees to provide proof of vaccination or submit to weekly testing, mask wearing, and other measures aimed at preventing the spread of Covid-19. This sweeping measure would necessarily pull within its remit companies from all transport sectors.

However, on January 13, 2022, the Supreme Court of the United States, in a 6-3 decision, re-imposed a stay of the ETS²³ issued by a federal district court and the Biden administration subsequently announced that it would be withdrawing the ETS.

Nevertheless, while the federal vaccine mandates await their fate in federal courts, transport sector employers and workers in jurisdictions with local vaccine mandates, such as New York City, must continue to meet vaccination requirements.

In addition to the efforts to put in place vaccine mandates at the public level, innovative employment terms requiring vaccination have been increasingly adopted by private employers, with many employing a carrot-and-stick approach, offering

bonuses to employees who opt to have the vaccine and imposing penalties on employees who do not.

For instance, Delta Airlines announced that it would charge employees on the company health plan \$200 for each month that they are not vaccinated against Covid-19 on the basis that the company reports an average hospital stay for the virus costing the airline \$40,000.²⁴

United Airlines announced in August 2021 that it would require all of its US-based employees to be vaccinated against Covid-19 or they would be required to leave their employment with the company.²⁵ It is reported that 200 employees lost their jobs immediately following implementation of the policy and those who requested religious or medical exemptions were largely put on unpaid leave or allowed to apply for non-customer-facing roles in the company. It is reported that over 2,000 employees qualified for an exemption.

However, United's exemption policy was challenged in a federal lawsuit brought by a cohort of United employees. In March, United announced that all exempted employees would be able to return to their previous jobs from unpaid leave or alternate roles, citing the decreasing amount of Covid-19 cases in the US and the rapid increases in the lifting of Covid-19 restrictions across the country.²⁶

In addition, other US airlines took a variety of approaches to requiring vaccines for their employees, including American Airlines, which backed off from an initial proposed vaccine mandate to instead require that all unvaccinated employees, including those with religious or medical exemptions, complete weekly health declarations, wear masks and maintain social distancing whilst undertaking their employment duties.²⁷

Many trucking companies have been very opposed to the concept of mandatory vaccination of their operators, including those that travel back and forth across international borders and are required by those countries into which they travel (including Canada) to be vaccinated. However, many companies have adopted policies whereby bonuses are offered to employees.

United Kingdom

To date, unlike Canada and the United States, there have been no efforts to put in place vaccine mandates by the Government of the United Kingdom, or the devolved governments of Scotland, Wales and Northern Ireland, in response to the Covid-19 pandemic which would affect workers engaged in the various modes of international transport. Instead, commercial road, air and marine transport workers have been subject to the same various testing rules and requirements in place over the course of the pandemic as any other individual seeking to enter the United Kingdom.

As in other jurisdictions, the concept of vaccine mandates has been met with significant disagreement, with influential Conservative backbenchers and others in Parliament arguing against widespread vaccine mandate schemes. In addition, the United Kingdom has seen high levels of vaccine confidence and uptake when compared to other countries, leading many to argue that any vaccine mandate would be unnecessary.

However, as has been seen in the United States and in other jurisdictions, the lack of any public vaccination requirements has not prevented companies in certain sectors, including transport sectors, from implementing their own private employee vaccination schemes.

During the first stages of the vaccine rollout in the United Kingdom, most airlines and shipping companies indicated that vaccination would remain optional for their employees, but that they would encourage their employees to be vaccinated through educational and incentive schemes. For example, British Airways²⁸ has maintained that vaccination is an individual choice for their pilots and cabin crew and EasyJet has adopted a programme encouraging its employees to be vaccinated but stopped short of ordering them to do so.

However, as certain transport sectors continue to lag behind in recovering from the pandemic and as vaccination rates began to level off, many transport employers began to put in place increasingly mandatory vaccine requirements for their employees, particularly those employers

with significant public engagement such as airlines and those with employees required to be in close contact such as offshore transport. For instance, in September 2021, Virgin Atlantic announced that it would not be hiring any new staff members that were not vaccinated.²⁹

On February 24, 2022, all Covid-19 restrictions, including testing requirements for individuals entering the United Kingdom from abroad, in the United Kingdom were lifted, with the Government indicating that its strategy going forward is for the United Kingdom to adapt to living with Covid-19.³⁰ This shift will likely decrease the amount of private employer vaccine mandates in place.

European Union

While there have been no vaccine mandates put in place by the European Union as a whole, there have been significant and contrasting efforts amongst the various EU member countries. For instance, Hungary adopted very few restrictions, including vaccination and testing requirements, during the entire course of the pandemic, whilst neighbouring Austria put in place some of the most severe restrictions seen in any country, including a mandatory vaccination scheme for its citizens.

Early in the pandemic the European Commission (EC) urged EU member states to consider mandatory vaccinations; since then, however, the EC has published Recommendation (EU) 2022/107,³¹ which proposes an approach to facilitate and encourage safe free movement throughout the EU through the coordination of member countries. This includes the implementation and bloc-wide adoption of an "EU Covid Certificate" as a requirement for travelling within the EU, together with additional entry requirements in the absence of vaccination.³² The Certificate is digital proof of Covid-19 vaccination, a recent negative test result or recent recovery from Covid-19. In respect of the proof of vaccination, the Certificate is valid for 9 months from the most recent administration of the Covid-19 vaccine. This Certificate, or its equivalent from another jurisdiction, is required of all individuals traveling through the EU, including those engaged in commercial

transport such as lorry drivers, commercial aviation workers, inland waterway workers and seafarers.

Notwithstanding the lack of any EU vaccine mandates, as we have seen in the United States and the United Kingdom, many employers engaged in transportation have put in place their own vaccination requirements. For example, as discussed above Hungary has had one of the least restrictive responses to the Covid-19 pandemic in the EU; however the Hungarian airline Wizz Air announced that it would require all of its pilots and cabin crew members to be fully vaccinated by the end of 2021, with testing requirements accepted in only very limited cases.³³

As elsewhere, as Covid-19 cases, hospitalisations and deaths decrease and more and more countries relax their Covid-19 restrictions, it is likely that we will see a decrease in the number of vaccine requirements affecting the EU transportation sector.

Current Situation

Canada

The Government of Canada has reiterated and reinforced its vaccine requirement for domestic and foreign workers in the international trade sector since it introduced those rules in late 2021 and early 2022. Canadian employers in the rail, air, and marine sectors are still required to have mandatory vaccination policies.³⁴ At the time of writing, Orders in Council containing the requirement that truckers and air crew be vaccinated to enter Canada are being renewed on a monthly basis.³⁵ While international seafarers are heavily encouraged to be vaccinated, they are not currently required to be vaccinated to transit through Canada for repatriation or for the purpose of limited shore leave.

Most provinces in Canada have relaxed Covid-19 precautions, including many vaccine requirements. However, the Government of Canada has not signaled an upcoming policy shift regarding vaccinations. Unless the pandemic eases considerably or Canada begins to face external political or economic pressure to ease its rules for international transportation

workers, Canada's vaccination policies applicable to transportation workers in international commerce are unlikely to change in the coming months.

United States of America

As discussed above, the present situation in the United States remains subject to the current judicial environment.

Meanwhile, as the Covid-19 situation improves generally and more and more states lift the associated public health restrictions in place, it is unlikely that further efforts to put in place vaccine mandates at both the state and federal levels will be undertaken. Therefore, absent the emergence of a significantly more dangerous and/or infectious variant of Covid-19, it is likely that the current vaccine mandates in place will slowly be lifted over time.

Nevertheless, private employers may continue to require that their workers be vaccinated against Covid-19 as a requirement of their employment. This likely would be particularly true of workers crossing international borders and interacting with other people in close quarters, such as airline crew members.

United Kingdom

In lifting all remaining Covid-19 restrictions in February 2022, the Government

of the United Kingdom clearly indicated that it intends for the United Kingdom to adjust to living as normal with Covid-19. The devolved governments accordingly have also been lifting most or all restrictions. It is widely anticipated that the Covid-19 vaccination will evolve into an annual jab similar to (and perhaps together with) the annual flu jab offered through the NHS and by many private employers.

European Union


The various member states of the EU also have begun to lift restrictions to widely varying degrees; however, the trend is the same as that seen elsewhere, that restrictions will be increasingly eliminated as Covid-19 rates decrease. Nevertheless, it is likely that the EU Covid Certificate or similar proof of vaccination, a recent negative test, or recent recovery from Covid-19 will remain a requirement for movement into and through the EU for some considerable time.

Implications for Future Pandemics and International Transportation

Over two years after the emergence of Covid-19, its associated lockdowns and restrictions, and the remarkable rollout of highly innovative vaccines, it is clear that

even the most sophisticated nations were woefully unprepared to respond to the scope of the pandemic.

The international transportation sector was vital to the response to the pandemic, such as by delivering vital medical equipment and vaccines, and it continues to be essential to the recovery of countries across the world.

Now that the number of Covid-19 cases, hospitalisations, and deaths are decreasing for the most part across the globe, the question should be asked if the world is prepared for similar or greater challenges in the future. What might the response to the emergence of a more dangerous and infectious virus or bacteria look like? In the event that vaccines are developed as rapidly and effectively as those for Covid-19, will vaccine mandates be more uniformly implemented internationally? Further, how will governments and carriers balance the need for a robust public health response without interrupting the necessary transportation of goods internationally? 

Endnotes

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