

BUSINESS ALERT



Business Council of
British Columbia
Est. 1966

AUGUST 24, 2021

MANDATORY VACCINES IN THE WORKPLACE

This Business Alert was guest authored by [Keri Bennett](#), [Drew Demerse](#), and [Christopher Munroe](#) of Roper Greyell LLP.

With COVID-19 case counts rising faster in BC than at any other point in the pandemic companies are looking to protect employees while continuing to operate and avoid economic hardship. So far, the evidence indicates this fourth wave is the “wave of the unvaccinated”. Understandably, employers are grappling with legal matters and rights pertaining to mandatory vaccines.

In recent weeks we have detected a shift in sentiment regarding mandatory vaccines. Public statements from governments, universities, and other large employers have indicated they will require in-person employees to be vaccinated. For example, on August 12, 2021, Dr. Bonnie Henry, BC’s Provincial Health Officer, announced that workers in public and private long-term care facilities must be vaccinated by October 12 and that all care homes and assisted-living facilities must provide the BC Ministry of Health the vaccination status of all staff. Dr. Henry also advised, effective immediately, unvaccinated volunteers and personal service workers are not permitted into these facilities.



A day later, Omar Alghabra, Canada’s Transport Minister announced that all federal public servants and those working in federal Crown corporations and certain other federally regulated industries must be vaccinated by the end of October. Universities across Canada, including the University of Toronto, Queen’s University, Western University, the University of Ottawa, and the University of Saskatchewan have mandated vaccines for students, staff, and faculty. Major Canadian Banks also recently announced vaccinations are required for all in-person staff.

THE EMPLOYERS RIGHT TO IMPLEMENT VACCINATION POLICIES

Employers have a right to manage their workplace and to protect their business interests. This overarching power is not set out in any law; rather, it is an inherent right of every employer implied in every employment contract, including collective agreements. This does not mean “management rights” are unrestrained. Restrictions are found in several areas, including specific laws regarding employment standards and human rights,

contracts between employers and employees, and in the “common law” (judge made law). Along with the right to manage a workplace, employers also have obligations, one of which is providing a safe workplace for employees.

For unionized employers, any mandatory vaccination policy either needs to be implemented with the agreement of the union or would have to withstand the “KVP test” if a union subsequently filed a grievance about the policy. The KVP test essentially asks whether the unilateral action of management (the exercise of management rights) is reasonable and applied in good faith.

Over the past several weeks several unions with members working in the airline industry, the public sector, and post-secondary institutions have publicly urged employers to implement mandatory vaccination policies. Considering the rising number of cases of the more transmissible Delta variant, overwhelming evidence that vaccines are effective, the low risk of side effects, and the fact that a large majority of Canadians have already rolled up their sleeves, we believe it will be increasingly difficult for a union to argue mandatory vaccination policies are unreasonable, provided that the policy includes appropriate human rights safeguards.

Non-union employees do not have the legal means to collectively challenge the reasonableness of a vaccination policy. But if an employee felt strongly, they could claim that making vaccination mandatory represents a significant change to the terms of their employment and therefore constitutes constructive dismissal entitling them to resign and claim severance pay. As a

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practical matter, an employee is unlikely to make this claim because they would have to permanently end their employment arrangement. If the employee is unsuccessful, they will be deemed to have quit. Even if an employee is successful, damages may be limited by a termination clause in their employment contract. In this regard, non-union employers with employment contracts limiting severance pay may have more flexibility and less risk associated with implementing mandatory vaccination policies.

Some commentators conflate vaccination policies and human rights issues. In our view, provided vaccination policies include the usual exemptions and alternatives for those who are unable to be vaccinated for *bona fide* religious or medical reasons, vaccination policies do not violate human rights. To the contrary, the BC Human Rights Commissioner recently recognized that broad vaccination policies help to protect those who are marginalized or medically vulnerable and those who may face barriers to vaccination and therefore be at increased risk of COVID-19.

CONSEQUENCES OF FAILURE TO BE VACCINATED

Employers implementing mandatory vaccination policies should consider potential consequences for employees failing or refusing to get vaccinated. These could include being terminated, being held out of work without pay, being required to avoid contact with coworkers or customers, being required to work from home, or simply being required to always wear a mask. In the authors’ view, an employee’s failure or refusal to get vaccinated will seldom amount to “just cause” for termination without notice or severance.

PRIVACY ISSUES

Any policy requiring employees to prove or disclose their vaccination status means the employer will be collecting “personal information” regulated by privacy legislation.

Organizations implementing vaccination policies should ensure employees are informed in advance about the purposes of collecting the personal information, that the information is protected by appropriate security safeguards, and that the information is only accessed by individuals who “need to know” to fulfill their duties and responsibilities to the employer.

Employers also need to ensure vaccination information collected for one purpose is not subsequently used for a secondary purpose and that the information is retained only as long as necessary to meet business and legal requirements.

If the British Columbia Information and Privacy Commissioner finds an employer has collected personal information in contravention

applicable legislation, the Commissioner can order the employer to cease collecting the information and the employee may be able to commence action against the employer for damages. Privacy complaints, however, often take a long time to resolve and, at present, the Commissioner does not have jurisdiction to award monetary damages.

The Joint Federal Provincial, and Territorial Privacy Commissioners issued a statement on May 19, 2021 outlining their views on the principles government and business should adhere to when implementing vaccine passports. While the statement does not address the employment relationship, on August 23, 2021, the BC government announced that vaccination will be mandatory to access certain events, services, and business. In the press conference announcing this requirement, government advised it is working with the BC Commissioner on this issue. The complete statement from the Privacy Commissioners can be found [here](#).

WHAT NEXT?

Recent polls suggest that the majority of Canadians support mandatory vaccination policies. Still public debate on the issue will likely continue. With vaccines readily available for all Canadian residents we anticipate more employers will be contemplating vaccination policies. Employers are reminded that while the relevant legal issues are not new, the societal context against which

the reasonableness of vaccination policies will be judged are unprecedented. Employers should proceed cautiously. A mandatory vaccine policy deemed reasonable in one workplace may not be viewed in the same manner in another. Prior to implementing a vaccination policy, we recommend employers carefully consider their specific workplace circumstances and take all safety, business, and legal issues into account.

For questions, please contact any of the authors of this article: [Keri Bennett](#), [Drew Demerse](#), and [Christopher Munroe](#) at Roper Greyell LLP.

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