

LEGAL RISKS

The issue of mandatory workplace vaccinations is, like most issues related to COVID-19, in a state of flux and constantly changing. There is currently no case law with respect to mandatory COVID-19 vaccinations nor is there any legislation in BC requiring mandatory COVID-19 vaccinations in any work setting, outside of long term care which was announced last week. Our analysis is based on current information and as this information develops, our advice may change.

The adoption of mandatory vaccination policies for employees engages a number of areas of employment law, including:

- 1) Risk of violating employment agreements;
- 2) Risk of violating human rights legislation; and
- 3) Risk of violating privacy legislation.

1. Risk of violating employment agreements if Dismissal occurs

In order to mandate vaccination in the workplace, it must be reasonable. In our view, mandatory vaccination may be reasonable for workplaces where employees work closely with each other and/or a vulnerable population and other less intrusive measures (mask mandates, physical distancing) are less likely to be effective. Such workplaces include hospitals, retirement homes and potentially “work close” settings such as food processing plants.

If an employer enacts a mandatory vaccination policy and employees do not comply, the failure to comply is unlikely (without legislation) to constitute just cause to terminate an employee’s employment. This means that if the employer dismisses employees who are not vaccinated, they will be required to provide these employees with notice or pay in lieu of notice in accordance with the *Employment Standards Act* (the “ESA”), employment agreements and if an employee does not have an employment agreement with an enforceable termination provision, the common law.

If the employer implements a vaccination policy and a court deems the vaccination policy to be unreasonable, there is a risk that a court may award additional damages for the manner of dismissal. We view this as unlikely provided that the employer accommodates all employees who are unable to be vaccinated due to a protected ground in human rights legislation and provides time for employees to be vaccinated prior to terminating their employment. Also, there is a growing social acceptance of mandatory vaccination which, in our opinion, will make it less likely for a court to award additional damages to an employee who is dismissed on the basis of their personal preference to not be vaccinated.

Note also that the general consensus is that while not without risk (see human rights and privacy analysis), an employer may make vaccination a condition of employment for new employees with minimal employment law consequences.

2. Risk of violating human rights legislation

Certain employees may be unable to obtain vaccinations due to circumstances that are protected by the *Canadian Human Rights Act* – most notably, disability and religion. Human rights legislation requires that employees who are unable to be vaccinated due to a protected ground in human rights legislation be accommodated to the point of undue hardship. The duty to accommodate applies throughout the employment relationship, including during the hiring process. This will require the employer to offer alternative measures to employees who are unable to be vaccinated due to a protected ground in human rights legislation. Alternate measures can include rapid testing, working from home, masking and not allowing unvaccinated employees to perform certain duties. If you are interested in rapid tests, the following link has information on rapid antigen tests for BC business - <https://safescreenbc.ca/>

We note that, based on the information provided by Dr. Bonnie Henry, there are very few medical conditions that prevent an employee from receiving the COVID-19 vaccination. If the employer enacts a mandatory vaccination policy and an employee objects on the basis that they are medically unable to be vaccinated, the employer is entitled to request medical evidence to substantiate the claim that the employee is unable to be vaccinated for COVID-19.

If an employer fails to accommodate properly such employees to the point of undue hardship, it may be liable to damages under human rights legislation, including potential damages for injury to dignity, wage loss, and other expenses incurred by the employee as a result of the breach of human rights legislation.

3. Risk of violating privacy legislation

Federal private sector privacy legislation, the *Personal Information Protection and Electronic Documents Act* (PIPEDA), applies to the employer's ability to collect vaccination information since vaccination information is personal health information, which is considered sensitive personal information. PIPEDA governs the collection, use and disclosure of employees' personal information. It also includes an exception to consent that allow employers to collect, use and disclose employee personal information without consent, if the employer can establish that such information is necessary to establish, manage or terminate an employment relationship between the employer and the employee (section 7.3 of PIPEDA). Whether this information is necessary will depend on the circumstances of the employee's employment i.e. it is more likely to be reasonable where physical distancing, mask wearing and other safety measures are not practicable.

On May 19, 2021, federal, provincial, and territorial privacy commissioners issued a joint statement (https://www.priv.gc.ca/en/opc-news/speeches/2021/s-d_20210519) in respect of privacy and COVID-19 vaccine passports, which effectively would require individuals to disclose their vaccination status in order to access certain publicly available services. The May 2021 joint statement from Canada's privacy commissioners said that: "So far we have not been presented with evidence of vaccine effectiveness to prevent transmission, although members of the scientific community have indicated that this may be forthcoming." Since then, research has proven that vaccinated individuals are much less likely to transmit the virus. The current science on the effectiveness of vaccination will be key to a privacy decision maker's view on reasonableness. Because the evidence on vaccinated people transmitting the virus is still developing, on the basis of current evidence, it is difficult to say how a privacy commissioner or adjudicator may weigh the effectiveness requirement. This view may change over time, but for now, there remains a risk that a mandatory vaccination policy that coerces employees to reveal vaccination status (and attached consequences to being unvaccinated) may violate privacy legislation, depending on the circumstances.

However, even though there is a risk that an employee could make a privacy complaint, there is currently relatively low risk of significant monetary liability arising from a breach of privacy legislation. While the federal Privacy Commissioner has the power to award monetary damages they rarely do so and damage awards tend to be quite low. A more likely remedy is that the Federal Privacy Commissioner will find that a mandatory vaccination policy is unenforceable and order the employer to stop enforcing it.

If the employer elects to collect vaccination information, it needs to ensure that it has sufficient security measures in place to protect the information given that vaccination status is confidential medical information. In addition, PIPEDA prohibits organizations from retaining personal information longer than it is necessary to fulfil the purpose it is collected for. We recommend that vaccination information only be provided to one designated individual and that the information is securely stored and kept separate i.e. not placed on the employee's personnel file. Ideally, vaccine status information will not be transmitted electronically. If the employer wants to collect proof instead of relying on employee's self-disclosure, one option is for employees to bring physical proof of vaccination status for review and verification by a designated employee but that the employer not retain a copy.