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## PRIVILEGED AND CONFIDENTIAL

### MEMORANDUM

TO: Jody Woods, Union of British Columbia Indian Chiefs

FROM: Katy Allen, Lawson Lundell LLP

DATE: September 16, 2021

RE: Workplace Policies – Mandatory COVID-19 Vaccination

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You have asked us to prepare and deliver a memorandum setting out the applicable legal principles to consider when considering the implementation of a workplace policy related to COVID-19 vaccination.

We have designed this opinion for your workplace: a non-unionized, federally regulated, office-type setting. We understand that you may wish to share this memorandum with your members, many of whom will have similar types of workplace settings.

In the last month, there has been a shift in sentiment regarding mandatory workplace vaccination and the legal opinions have evolved taking into account the contagious nature of the Delta variant and the growing scientific evidence that COVID-19 vaccinations are effective. Anecdotally, we are seeing a significant number of employers requiring employees to disclose vaccination status and making vaccination status a condition of returning to work. There are also a growing number of employers who are dismissing employees who refuse to be vaccinated unless the employee has a valid human rights basis.

We set out below a legal analysis of the various issues at play for your review and consideration.

### LEGAL ANALYSIS

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 federally or in British Columbia making vaccination mandatory for employees, outside of certain sectors (not applicable to your workplace) such as healthcare and long term care homes. The federal government has announced its intention to require federal government workers and federally regulated air, rail, and marine transportation sectors to be vaccinated.<sup>1</sup> Major banks, although not required by law,

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<sup>1</sup> Although UBCIC is a federally regulated employer, based on the news releases so far, the federal government is not making vaccines mandatory for all such employers; only federal public servants and certain sectors such as transportation.

have followed suit. Provinces are implementing vaccine passport systems, mostly aimed at reducing patrons' ability to access certain non-essential businesses, services, and events. To date, no government entity in Canada has enacted legislation requiring vaccination for employees in an office environment similar to yours (other than federal government workers). Our analysis is based on current information and as this information develops, our advice may change.

The adoption of mandatory vaccination policies for non-unionized employees engages a number of areas of employment law, the three key areas are:

- 1) Employment agreements;
- 2) Human rights legislation; and
- 3) Privacy legislation.

Occupational health and safety is another relevant area. To date, it is not a requirement under occupational health and safety law that employers such as UBCIC must require their workers to be vaccinated. Instead, the focus is on other measures to achieve communicable disease prevention in the workplace such as masking, social distancing, *etc.*

#### 1. Employment Agreements

In order to mandate vaccination in the workplace, it must be reasonable. In our view, mandatory vaccination may be reasonable for some workplaces, especially those 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. Examples of such workplaces may include "work close" settings such as restaurants, childcare, remote campsites, manufacturing plants, and film sets.

Many employers are implementing policies that prescribe alternate measures short of dismissal as the consequence for being unvaccinated; i.e. working from home, rapid testing, and/or mask-wearing (or, if those measures are not possible, a temporary layoff until COVID-19 numbers improve). These consequences are more reasonable than dismissal, especially in an office workplace. Overall, the less serious the employment consequence of being unvaccinated, the less likely liability will flow to the employer in respect of the policy.

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 *Canada Labour Code*, employment agreements and if an employee does not have an employment agreement with an enforceable termination provision, the common law. One way to minimize severance costs is to provide employees with working notice of termination. Some employers are providing unvaccinated employees with notice that their employment will terminate on X date unless they provide proof of vaccination prior to X date.

Dismissals may also arise if an employee claims that making vaccination mandatory is a constructive dismissal on the basis that mandatory vaccination represents a significant change to

the terms of their employment. These types of claims are possible, but unlikely, because the employee would need to quit to make this claim.

If a dismissed employee brings a wrongful dismissal claim or a constructive dismissal claim, 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. This risk may be mitigated if 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 may 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 B.C. business - <https://safescreenbc.ca/>

We note that, based on the information provided by Dr. Bonnie Henry, there are very few medical conditions that prevent a person 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.

Another relevant protected human rights ground is “political belief”; this ground exists in the *BC Human Rights Code*, but not the *Canadian Human Rights Act*, the latter being the applicable legislation for UBCIC and other federally regulated workplaces. If one of your employees says they are unvaccinated due to the human rights reason of political belief, you can inform them that this ground does not apply to their employment (of course, stated in a gentler way).

Various human rights commissions and tribunals have stated that a personal preference to not be vaccinated is not protected under human rights legislation. The BC Human Rights Commission recently recognized that broad vaccination policies actually help the medically vulnerable and marginalized.

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 federally regulated employers' 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 allows 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 the Federal, Provincial and Territorial Privacy Commissioners issued a joint press release on vaccine passports ([https://priv.gc.ca/en/opc-news/speeches/2021/s-d\\_20210519/](https://priv.gc.ca/en/opc-news/speeches/2021/s-d_20210519/)) which stated, in part, as follows:

“In light of the significant privacy risks involved, the necessity, effectiveness and proportionality of vaccine passports must be established for each specific context in which they will be used.

- **Necessity:** vaccine passports must be necessary to achieve each intended public health purpose. Their necessity must be evidence-based and there must be no other less privacy-intrusive measures available and equally effective in achieving the specified purposes.
- **Effectiveness:** vaccine passports must be likely to be effective at achieving each of their defined purposes at the outset and must continue to be effective throughout their lifecycle.
- **Proportionality:** the privacy risks associated with vaccine passports must be proportionate to each of the public health purposes they are intended to address. Data minimization should be applied so that the least amount of personal health information is collected, used or disclosed.”

The above test for analyzing vaccine passports can be applied to requesting employees to disclose that they have been vaccinated in order to return to the office. While there is still no case law applying the “necessity” test to an office environment, there is a stronger argument that the necessity test may be met in light of current high rates of COVID-19 due to the contagious nature of the Delta variant in conjunction with the increasing body of scientific evidence that the vaccines are effective and have minimal side effects.

If an employer collects 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 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 an employer wants to collect proof instead of relying on employees' self-disclosure, one option is for employees to bring physical proof of vaccination status for review and verification by a designated employee, without the employer retaining a copy.

If an employer wishes to implement a mandatory vaccination policy, here are some recommendations:

- Consider voluntary disclosure first. To address privacy concerns, consider asking employees to volunteer to disclose their vaccination status rather than making disclosure mandatory as a first step. Then, depending on the response rate and the percentage of employees who are vaccinated, consider carefully whether a mandatory vaccine policy is necessary, or whether continuing with less intrusive measures such as working from home and mask wearing is sufficient to achieve safety.
- Make safety the focus of your mandatory vaccination policy as that will always be easier to justify. Some employers are falling outside the scope of employment by stating that the purpose of their vaccine policy is to stop the spread in our society; that is the role of a government, not an employer (recognizing that for your members, their role is both government and employer, so they may be taking broader societal impacts into account).
- Ensure that an individual assessment is conducted for any employee who is not vaccinated or refuses to disclose their vaccination status, prior to any adverse consequences being implemented for that employee. This will allow the employer to ensure that it accommodates all employees who are unable to be vaccinated due to a protected ground in human rights legislation.
- After employees have disclosed their status, meet individually with employees who are unvaccinated and be clear in what consequences will occur if they continue to be unvaccinated by choice. If dismissal is the outcome, this should be clearly set out.
- Provide time for employees who are not already vaccinated to be vaccinated.
- Safeguard personal information. Ensure that information on vaccination status is safeguarded.
- Update any vaccine policy as the pandemic evolves. Continue to keep apprised of legal developments; this is an area where legislation and case law is developing rapidly. If local numbers significantly decrease, or laws change, consider amending or terminating your vaccine policy accordingly.

These are very difficult issues and we look forward to some case law to provide a more clear cut answer and will keep updating you as new information is received.