



November 2, 2021

Can employers make COVID-19 vaccination a condition of employment?

The BC Craft Brewers Guild has been consulting with Lawyer Ryan Anderson, from [Mathews, Dinsdale & Clark LLP](#), concerning the topic of mandatory workplace vaccination policies. Some of you met Ryan, in early October, when he presented some guidance to Guild members who were wondering whether they could mandate that their employees take the vaccine. As the matter of vaccination in workplaces has evolved considerably since then, we asked Ryan to provide the following update.

Ryan has also provided the attached **Sample Vaccination Policy**, and he invites you to contact him directly, at randerson@mathewsdinsdale.com, for more information about how a policy like this might be useful in your workplace.

Mandatory Workplace Vaccination Policies

- Support for mandatory workplace vaccination policies has grown very significantly over the past several months. Obviously, there is also some vocal opposition to such policies. Nevertheless, our advice remains unchanged – implementing a properly designed vaccination policy is both a legal and effective way to address workplace safety in the context of the ongoing pandemic.
- Each industry and workplace are unique, and the legality of a vaccination policy will depend on the specific circumstances of each case. The British Columbia Government has mandated vaccination in some settings, particularly in the health care sector. However, we have not seen and do not currently anticipate the introduction of any legislation or public health orders mandating employee vaccination in private sector workplaces. Therefore, the decision continues to remain up to employers in most settings.
- An employer considering a vaccination policy should carefully assess whether making vaccination a condition of continued employment is reasonably necessary and connected to legitimate workplace safety concerns.
- Liquor service environments have implemented a variety of safety precautions that have generally proven to be effective in reducing transmission of the virus. However, as the pandemic's fourth wave and concerns regarding COVID-19 variants persist, there is a reasonable argument that these precautions alone are insufficient. This argument is strengthened by the recent authorization to a return to full capacity in liquor service environments and the fact that Vaccination Cards are now required for patrons to enter such environments.
- In short, in the current circumstances of the pandemic, we are of the view that it is reasonable and lawful for employers in these environments to add mandatory vaccination to their workplace safety protocols.
- That said, in every case, employers must ensure that their vaccination policy takes into account important privacy and human rights considerations.

Human Rights Considerations

- A properly designed vaccination policy will expressly address the employer's obligation to *consider* potential exceptions or accommodations for those who cannot comply with a vaccination policy for reasons associated with certain protected grounds.
- Employers might see requests from employees seeking to be excepted from compliance with a vaccination policy on the basis of a disability or religious concerns that prevents them from becoming vaccinated. Such exemptions should be very rare.
- The BC College of Physicians and Surgeons states, "According to the provincial health officer, the reasons outlined in the [deferrals to COVID-19 vaccination table](#) are the only valid reasons for a COVID-19 exemption or deferral. Legitimate exemption or deferral letters must state one of these valid reasons."
- Legitimate religious objections should also be uncommon, as one must establish that their objection is experientially religious in nature and that vaccination is essentially prohibited by their religion. In some circumstances, it will be appropriate to require the employee to produce documentation from their local religious leader to establish the legitimacy of their exemption request.
- Importantly, where an employee refuses to follow a policy because of *personal concerns or beliefs* about the safety or effectiveness of the vaccine, those concerns do *not* trigger protection under human rights legislation and do *not* require accommodation.
- Even when an exemption request is legitimately associated with a protected ground, there is no guarantee that an unvaccinated employee must be accommodated. Rather, each case must be considered on its own merits, in light of ethical and legal obligations to provide a safe work environment consistent with public health requirements and guidelines and the specific circumstances of the workplace.

Privacy Considerations

- At minimum, a mandatory vaccination policy should emphasize the importance of privacy and confidentiality, and expressly confirm the type of information being collected, how it will be stored, and the purpose of its use and potential disclosure.
- Safeguards should be put in place to secure this information and limit the number of people that will have access to it.

Current Recommendations

An ever growing number of employers have decided to implement mandatory vaccination policies and have done so with confidence that the vast majority or all of their workforce is likely to be supportive of a mandatory policy.

When considering the potential implementation of a vaccination policy, [Mathews, Dinsdale & Clark](#) recommends the following:

- First consider whether a mandatory vaccination policy is necessary in your workplace. In some instances, employers may find that a voluntary policy will yield nearly identical vaccination rates, without the potential controversy that might accompany a mandatory policy.

- When an employer is aware that 90-95% of their workforce has voluntarily vaccinated, the employer should carefully consider whether a formal mandatory vaccination policy is the best tool to address those who have not yet become vaccinated. A case-by-case approach designed to encourage cooperation from those not yet vaccinated might be preferable.
- If a mandatory policy is deemed necessary, consider providing employees with a reasonable, non-disciplinary alternative to vaccination. For example, consider:
 - requiring mask usage and/or enhanced health and safety measures, including physical distancing, barriers, sanitization and hygiene practices, virtual meetings, etc.
 - mandatory regular rapid testing or rapid testing prior to workplace entry
 - mandatory COVID-19 health checklists prior to attendance at work
 - work-from-home arrangements
 - permitting use of vacation or banked time off, followed by an unpaid leave of absence
- If termination of employment might be a necessary response to non-compliance with a vaccination policy, this possibility should be clearly stated in the policy. Employers should consider, in advance, whether non-compliance (without reasonable justification) will lead to dismissal “for cause” or “without cause”. It would be wise to obtain legal advice before dismissing an employee for non-compliance with a vaccination policy.
- In a unionized setting, it is important to ensure that the policy is consistent with applicable collective agreements provisions. Union consultation might also be required or advisable in any event.
- The policy should be consistently enforced. This means that there must be sufficient resources and procedures in place to monitor for compliance and address issues that may arise.
- Ensure that the policy is consistently reviewed and updated as necessary. The circumstances of the pandemic are constantly in flux and (hopefully) there will be a time when the policy is no longer required.

At the end of the day...

Ryan Anderson says: *“This is a rapidly developing area, and the tide is certainly turning in favour of mandatory vaccination policies. Employers are obligated, by law, to ensure the health, safety, and welfare of the employees in the workplace, and a mandatory vaccination policy is one of several effective mechanisms to meet that obligation. However, at the same time, employers must also be mindful of an employee’s privacy rights and be cognizant of the potential human rights implications that might arise as a result of the policy.*

A good policy will take all of these factors into account and be flexible enough to address and adapt to these types of concerns, while achieving its intended purpose.”

If you have any questions or concerns or would like assistance with the implementation of a policy for your workplace, we encourage you to contact Ryan: randerson@mathewsdinsdale.com or 604-638-2042.