Vaccine mandates in the workplace: What B.C. employers need to know

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The pandemic landscape in British Columbia is constantly evolving. Governments of various levels in certain industries and sectors have started implementing vaccine mandates. While COVID-19 cases have recently started to fall, more transmissible variants that exist remain of concern.

The latest update on the BCCDC website indicates Delta is now the most common COVID-19 variant in the province and is easily transmitted between people. The Delta variant leads to more serious outcomes than other strains of the virus (particularly for those who are not vaccinated). There is overwhelming evidence that vaccines are effective (with low risk of side effects). A large majority of Canadians are now fully vaccinated, including approximately 87 per cent of the British Columbian population 12 years of age and older eligible for vaccination.

Although the B.C. Vaccine Passport does not apply to employees working in the non-essential businesses where customers must show it prior to entering the premises, the overall existence of these passports may support acceptance of mandatory vaccination policies in workplaces by most employees, particularly those already vaccinated and using B.C. Vaccine Passports to access non-essential businesses.

Within this context, we are observing a trend of more and more employers implementing mandatory vaccination policies in their workplaces, despite potential legal risks, such as human rights and privacy claims.

Pursuant to occupational health and safety legislation in British Columbia, employers have the obligation to ensure that they are maintaining safe and healthy workplaces, which now includes communicable disease prevention. However, occupational health and safety obligations must be balanced against privacy and human rights interests. Employers seeking to implement mandatory vaccination policies should seek legal advice to ensure their policies are compliant with legal obligations and mitigate legal risk in this uncertain legal environment.

Vaccination policy considerations for employers

Is it a unionized or non-unionized environment?

If the workplace is unionized, the policy implemented must be consistent with the collective agreement and it is advisable to work in cooperation with the union in creating and implementing the policy. Further, a certain amount of prior notice may need to be given pursuant to the British Columbia *Labour Relations Code*. There are fewer constraints with implementing a mandatory vaccine policy in a non-unionized workplace. Employers will want to be mindful of potential wrongful dismissal claims where employees are terminated with or without cause for failure to comply with the policy or claims of constructive dismissal where employees are placed on temporary leave without pay or are otherwise excluded from the workplace if not vaccinated. It is generally accepted that, except in rare circumstances, the common law doctrine of constructive dismissal has no application to unionized employees.

What is the consequence for breach of the policy?

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.

Nonetheless, disciplinary measures taken against employees who are not vaccinated may give rise to legal challenges, as discussed under the first bullet. Taking into account legal risk, businesses should consider what the consequence for non-compliance with a vaccination mandate would be – will the employee be fired with cause, fired without cause, or placed on a leave of absence? Are they able to continue working remotely? The risk of the policy changes depending on how the policy is enforced and the level of consequence. For example, termination with cause is more likely to be subject to legal challenge as compared to a leave without pay for a temporary period of time. Failure to comply with a vaccination policy is unlikely to amount to just cause for dismissal.

Where will the data collected from employees be kept?

Businesses in British Columbia must safeguard personal information that is collected from employees in compliance with the *Personal Information Protection Act*.

When will the effective date of the policy be?

Implementing a policy now with an effective date of Jan. 1, 2022 may be considered more reasonable than implementing a policy now that is effective in two weeks with the consequence of dismissal for cause for non-compliance with a vaccination mandate. Providing some notice enables unvaccinated employees time to consider their decision and comply with the policy.

Other considerations for employers

In developing a workplace vaccination policy, businesses will need to weigh the risks of their operational environment in addition to considering the current vaccination rate in the workplace (*i.e.* is there anonymized data on the vaccination rate of the workplace to date?). Businesses will also need to determine whether employees will be accommodated (*i.e.* will the business only accommodate for the human rights protected

grounds; *i.e.* medical and religious exemptions,) or if employees will also be accommodated based on personal preferences despite no legal requirement to do so.

Beyond legal considerations, there are business considerations when contemplating the appropriate consequences that flow from breach of a policy. For example, will implementation of the policy cause the business to lose good employees? Notably, some businesses are expressing concerns that if vaccination policies are too strict, they will encounter challenges with retaining employees and recruiting new talent when current employees leave. Losing employees – and even customers – may directly affect a business' bottom line.

Overall, we encourage businesses to consider the following steps to bolster the successful implementation of a mandatory vaccination policy.

- Draft the policy, with the help of legal advisors, well in advance of implementation of the policy.
- Ensure the policy includes sections addressing the following:
    - purpose of the policy;
    - scope of the policy;
    - length and nature of policy (*i.e.* when it will be reviewed, expected end date, temporary or permanent in nature, *etc.*);
    - accommodations;
    - privacy; and
    - potential consequences for breach of the policy (if any).
- Provide employees with plenty of notice of implementation of the policy.
- Provide a copy of the policy to employees for their review and encourage them to ask questions and seek clarification on sections of the policy that they do not understand.
- Work with employees to understand their concerns with the policy ahead of the effective date of the policy.

Conclusion

Are you considering adopting a mandatory COVID-19 vaccination policy for your business? A member of our Vancouver Labour and Employment Group can help you draft or revise a policy in order to establish the nuances that are necessary according to your work context. If you have any questions regarding mandatory vaccination policy issues, please contact your BLG lawyer, the author, or one of the contacts listed below.

This article is intended to provide general information, not legal advice. For specific direction regarding your situation, contact the author.

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