

The Employer's Vaccination Dilemma

Many B.C. employers are asking the question, "Can we compel unwilling employees to become fully vaccinated?" With rapidly-rising COVID-19 case counts among the unvaccinated, it's no wonder employers want to compel their employees to get their two shots.

But this is no easy question to answer. My own observation is that even amongst B.C. employment lawyers there isn't anything even remotely resembling a consensus. The responses I've seen to that question range from "Absolutely!" to "Definitely not!"

Can You Compel A Person To Become Vaccinated?

Perhaps it makes sense to start by clarifying what it means to "compel and employee to become fully vaccinated". It (almost) goes without saying that an employer cannot physically force an unwilling employee to submit to a vaccination... you cannot roust them out of their home, escort them to a clinic, and restrain them while they are shot up with vaccine.

Well then, if an employee refuses to receive the COVID-19 vaccination, what *can* an employer do?

The most obvious thing to do is to place the employee on an unpaid leave of absence pending his/her demonstration of compliance. That leave might be characterized as an unpaid leave or a layoff or a suspension but it all adds up to the same thing; the employer is preventing the employee from performing his/her duties (and being paid). Or, the employer might go all the way and terminate the relationship. Either way, the words "constructive dismissal" and "wrongful dismissal" and "discrimination" are probably bouncing around in your head at this moment.

Some employees placed in this situation will capitulate and accept the vaccination, some will do nothing at all, and some will commence a civil claim for wrongful dismissal damages or file a human rights complaint of discrimination. In that event, will his/her refusal to become vaccinated serve as an effective defence for the employer? Not likely, in my view, at least not yet.

Vaccination Mandates

In my view, a business can ask anyone (customers, employees) it chooses about their vaccination status but, practically speaking, there is little it can do (at the moment) if they refuse to answer or if they answer in the negative. But, it depends on how aggressive the employer wants to be.

Being aggressive probably means demanding that staff answer questions relating to their vaccination status, refusing to schedule them for work (or allow them into the workplace) until they answer, and (likely) refusing to schedule them for work or allow them on the premises until they confirm they've received both shots. Knowing the possibility (or likelihood) of resulting legal claims and complaints, are those steps that your business is willing to take?

If a person is willing to answer, and the answer is "yes, I'm fully vaccinated", there is of course no issue.

If the person is unwilling to answer at all, or answers “no, and I don’t plan to”, that’s when the challenge exists in terms of how the employer will react. There are no public health orders or WorkSafeBC requirements in place – *nor will there likely ever be in B.C.* – requiring the population *at large* to receive the vaccination, so there is really no clear “legal” basis upon which you could impose mandatory vaccinations.

The notable exception will (soon) be in COVID-vulnerable settings like long-term care and assisted living facilities. As of mid-October, staff in those specific settings will be required – by B.C. law – to demonstrate they have been fully vaccinated. Perhaps this is just the tip of the iceberg, only time will tell.

In any other employment setting, even if a business does impose a mandatory vaccination rule, there is likely no effective method of enforcing it aside from removing the individual from the workplace. Again, that’s a risky endeavour and, before marching down that path, business owners are well-advised to assess how prepared they are for the legal consequences. We should also talk about the background work necessary to give your business the best possible opportunity to defend against resulting legal claims.

It’s also worth considering whether a business is prepared for the possible staffing shortages which would result from refusing to schedule staff who either won’t get the vaccination or who won’t disclose whether they’ve received it. It’s one thing to impose a mandatory vaccination rule; it’s quite another to figure out how to staff your operation when 20% of your staff refuse to comply.

I’m also not sure if most businesses are prepared for the publicity blow-back they might experience if news of their mandatory vaccination policies is made public (as, inevitably, it will, because the affected employees will be all over Facebook and Twitter, etc., about it). Of course, a sizeable percentage of the population would likely side with any company for taking this stand, but without a doubt there will be some media attention and companies might find themselves dealing with protesters outside their door, etc.

Some Official Guidance

The B.C. Human Rights Commission recently issued a bulletin dealing with these topics. Perhaps not surprisingly, it didn’t offer any definitive advice, but it did have the following to say.

“In my view, a person who chooses not to get vaccinated as a matter of personal preference—especially where that choice is based on misinformation or misunderstandings of scientific information—does not have grounds for a human rights complaint against a duty bearer implementing a vaccination status policy.”

Now, it is well worth noting that the Commission is not the Human Rights *Tribunal*, it is not an adjudicative body, and it will not dictate how the Tribunal decides pending cases relating to COVID-related claims of discrimination. But, it is significant that the Commission has taken this stand.

It’s also more than a little confusing. For reference, the ongoing prohibition against imposing mandatory workplace drug testing regimes in this province is heavily based on the legal premise that forcing employees to undergo drug testing is discrimination on the basis of a *perceived* disability (ie. by forcing employees to be

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tested for drug use, the employer is perceiving them to have the disability of addiction).

That same premise would, presumably, form the underpinning of any future determination by the Tribunal that forcing employees to receive a vaccination or undergo regular COVID testing amounts to discrimination (ie. by forcing employees to receive a vaccination, the employer is perceiving them to be likely to contract COVID-19). So, it is unclear to me how it is that the Commission felt comfortable in issuing the above statement.

My advice in this respect is to wait and see what the Human Rights Tribunal has to say on this topic – and don't make your company's policy the test case.

For now – until and unless there is further government action to compel individuals to become vaccinated – what your business does is a matter of your level of risk tolerance. Forcing non-compliant employees out of your workforce is *sure* to generate legal complaints. Are you prepared for that?

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