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August 26, 2021

**BULLETIN**

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### **MANDATORY VACCINES: GUIDANCE FOR EMPLOYERS**

The provincial and federal governments, as well as several private corporations, have recently announced new requirements for masks, vaccines, and COVID testing in certain circumstances. The media's coverage of these changes has not always accurately reflected what is required under these new orders and policies. The term "mandatory vaccines" is often used, but what does this mean? Can employees or members of the public be forced to get vaccinated?

The answer is most likely no. The issues that must be determined are more complex and include the following:

- When can someone be required to disclose their vaccination status?
- What are the consequences of refusing to disclose one's status?
- What are the consequences of not getting vaccinated?
- What exceptions exist?

We strongly advise seeking legal advice before imposing any requirements on staff or the public that they become vaccinated or disclose vaccine status. In general, following the lead of public health, the Privacy Commissioner, and the Human Rights Commission is safest. It is important to look carefully at what these bodies are saying and not rely on news reports alone. Orders sometimes lag behind announcements for several days, and there can be differences between what is announced and what is enacted.

For example: the media has reported that vaccines are now mandatory for long term care workers in BC. This is perhaps the highest risk workplace, and collective agreements in that sector do allow management to require vaccinations as a condition of employment. However, the order published on August 20, 2021 (the *COVID-19 Vaccination Status Information and Preventive Measures Order* (the "Order")) imposes a vaccine requirement on outside workers only. The Order states that persons who are employed by long term care facilities ("Staff Members") must provide their employers with their vaccine status. As of September 8, 2021, Staff Members must, if unvaccinated, wear a medical mask at work, except when eating or drinking, and get a rapid test at every shift. Only if the unvaccinated Staff Member tests positive for COVID-19, or fails to wear a mask, will that person be required to leave the facility. There may be future orders that change the requirements, but it is likely that the details of how to impose a vaccine mandate on long term care staff are still being negotiated. It is necessary to balance competing concerns, such as the retention of staff in a sector challenged by shortages.

Considering that under the current Order, long term care staff can continue to work unvaccinated, it will be difficult for other employers to justify sending unvaccinated employees home without taking further steps.

With respect to COVID testing, on July 31, 2021 the PHO issued a letter stating that any company charging clients for testing is required to be accredited through a program administered by the College of Physicians and Surgeons of BC. We strongly recommend seeking legal advice before implementing in house COVID testing.

Public health has publicly stated that some employers can impose vaccine mandates. These statements are not a legal basis for doing so. It is very important to seek legal advice before making decisions in this area. While BC has issued statements regarding vaccine passports and mask mandates, those orders have not been issued and the details are unclear. Once the orders are published, we will provide an update to our clients through our bulletins. The Provincial Health Officer has stated that the following orders are in effect:

- A general mask mandate applies to all indoor public spaces as of August 25, 2021;
- Proof of one dose of vaccine will be required to access certain non-essential services, events and businesses as of September 13, 2021; and
- Proof of full vaccination (7 days after dose 2) will be required to access certain non-essential services, events and business as of October 24, 2021.

In the meantime, here are some principles and guidelines to consider:

- The BC Human Rights Commission has published “A human rights approach to proof of vaccination during the COVID-19 pandemic” (the “Report”). The Report says employers may only implement mandatory vaccine policies where no other less intrusive means of preventing COVID transmission is possible, and due consideration is given to human rights. For more details, please see our July 21, 2021 client bulletin [here](#) or the Report [here](#).
- The federal, provincial and territorial Privacy Commissioners have issued a joint statement on vaccine passports [here](#) (the “Statement”). The statement says that proof of vaccination in exchange for access to certain services or locations should only be required where it is necessary (as established by evidence); effective at achieving its stated purpose; and proportional to the privacy risk. Public bodies must ensure they have legal authority to require the information; consent is necessary, but does not provide the authority. Like the Report, the Statement says proof of vaccine should only be required where there are no other less-intrusive means available.
- Worksafe BC no longer requires employers to have a COVID-19 safety plan. Worksafe BC advises employers to seek legal advice before requiring vaccines as a condition of

employment. They also state that adverse reactions to mandatory vaccines could be a compensable work-related injury. Further details can be reviewed [here](#).

Employers must be prepared to show why they are imposing any vaccine requirements, what the risks are that the vaccine will address, and what other measures have been implemented. For example, BC Hydro has announced that in order to work, Site C workers will have to show proof of vaccination, an approved exemption, or a negative test. This follows a large outbreak at the Site, which is located in an area with low vaccination rates. A large number of employees live together in work camps; they cannot leave Site C during the declared outbreak. There is an onsite medical clinic offering vaccines. There are mask mandates and onsite health screening. The requirements will not apply to other BC Hydro worksites, which are less at risk. These are examples of a circumstance that likely meets the principles outlined above.

***Pam Costanzo & Amy O'Connor***