



≡ BC RESTAURANT AND FOODSERVICES ASSOCIATION UNDERSTANDING EMPLOYEES AND VACCINATIONS



The British Columbia Restaurant and Foodservices Association is a dedicated resource to help restaurateurs grow and succeed in business in our province.

UNDERSTANDING EMPLOYEES AND VACCINATIONS

I OWN OR MANAGE A RESTAURANT; CAN I REQUIRE MY EMPLOYEES BE VACCINATED?

You may require new employees be vaccinated. It is more complicated to require existing employees to be vaccinated as it is a change in the terms of their employment. However, as a private employer, it is not a violation of the Canadian Charter of Rights and Freedoms.

WHY MUST I ASK CUSTOMERS FOR THEIR VACCINE CARD AND NOT MY STAFF?

Customers and staff are different under the law. If you fall under the business categories listed in the current Public Health Orders, you are required to check customers' vaccine cards (12+) and photo ID (19+). The Provincial Health Officer has determined that in locations where restaurants have table service, OR where alcohol is served, and people are eating and drinking without masks, there are higher risks of spread of COVID-19. These situations have been determined to need the vaccine card checks.

Staff are not covered under the Public Health Order mandating the Vaccine Card program. Staff are currently covered under Public Health Orders which require them to wear masks while working. This measure is designed to keep them and their guests and colleagues safe.

At this time, there are no Public Health Orders requiring workers in foodservice be vaccinated in order to work. To date, only certain health care workers and federally regulated workers (airlines, banks, the postal workers etc.) have been ordered to be vaccinated.

COULD THE FEDERAL OR PROVINCIAL GOVERNMENT MANDATE THAT MY STAFF BE VACCINATED?

Yes - if either the Federal or Provincial Government mandated employee vaccinations through a change of legislation, you could be required to have your staff be vaccinated and, if your company was required to follow new legislation, there would be no legal avenue for recourse against your business for requiring your staff to be vaccinated.

WHAT'S THE REASON I CAN'T DEMAND THEY BE VACCINATED?

Unvaccinated people have choices. From a consumer perspective, they can get vaccinated, they can order delivery or they can get take-out, they can exercise at home, they can watch the game on TV. The Vaccine Card Program limits access to discretionary activities not required activities.

It's a little more complex with employees: people need their jobs to earn a living. Most people in restaurant and foodservice don't have an option to work at home. They must be present and connect in person with the customers and guests. As a result, if you wanted to change the terms of employment to require vaccination, you would have to do a thorough evaluation of why vaccination would be needed. You would need to be able to establish the COVID protocols you currently follow are not sufficient to prevent transmission of COVID in your workplace.

The Provincial Health Officer has currently determined that masks in the restaurant workplace reduce the risk enough for no mandatory vaccination to be required in our sector at this time. An employer does have the option to be more stringent and set workplace policy that requires vaccination. However, if you terminate an employee for not getting vaccinated, your workplace could be subject to possible litigation.

WHAT ARE THE LEGAL PRECEDENTS FOR REQUIRING STAFF BE VACCINATED?

The case law is evolving around vaccinations in the workplace. COVID-19 is a unique and challenging communicable disease. Determining the response to cases and outbreaks has been dynamic, and is different as the strains of COVID change.

A number of lawyers have put forward opinions that an absolute requirement to be vaccinated won't stand legally in hospitality/restaurant work. However, there have been no legal tests of COVID-19 vaccination requirements at this time so ultimately it will be up to the courts to decide.

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WHAT REASONS COULD PEOPLE USE TO OBJECT TO VACCINATION IN MY WORKPLACE?

A very small number of people could object being vaccinated for religious or medical reasons. The BC Human Rights Code protects the rights of these people. The BC Human Rights Code only protects the public from discrimination based on a “protected characteristic” such as race, religion, sex, gender identity or disability.

The chance of a person with a medical condition or a religious belief that prevents them being vaccinated actually being a part of your team is extremely small.

The BC Human Rights Code does not protect people's personal choice or personal preference. The BC Human Rights Commission was recently in the news because they are overrun with claims from people who cannot show a legitimate medical or religious reason for refusing to be vaccinated. The Human Rights Tribunal process cannot be used in these cases and the Commission will dismiss these complaints.

WHAT IF I WANT TO TERMINATE SOMEONE FOR NOT BEING VACCINATED?

Be aware of the potential consequences of terminating an employee because they aren't vaccinated. Unless there is a new provincial requirement that all restaurant/hospitality/food and beverage workers be vaccinated, such terminations could be subject to legal challenges.

An employee can be terminated for any reason. Employment Standards doesn't care about the reason a person is terminated. They are concerned about whether the employee receives the appropriate compensation or written notice under BC Law.

That said, if an ex-employee takes the matter of their termination to court, court process will consider the reason, no matter how much notice or severance is given. A court has many avenues for restitution that Employment Standards does not have. Among those, they can order compensation, reinstatement and require either side to pay legal costs.

Note: If the Provincial Government passes a Public Health Order compelling employees to be vaccinated, the government will be the primary respondent, not any individual employer.

I AM WORRIED ABOUT THE SPREAD OF COVID-19 IN MY BUSINESS, CAN I ASK ABOUT VACCINATION STATUS?

Yes - employers may ask employees for information about their vaccination status.

If you have had an outbreak in your facility, asking about vaccination status is medically relevant. This is because if there are 3 or more cases of COVID in the restaurant, the Health Department will shut down your operation for 10-14 days. If you have vaccinated staff that can operate the facility at reduced risk, there may be some ability to file for an exemption from mandatory closures. Note: Interior Health is testing this currently.

If you determine a need to ask the question, for example if you have had exposures or cases in your business, you need to treat this with sensitivity. If you choose to ask the question, it should be asked in a private setting and note should be made of the response in the employee file.

THE LAST TIME THE MASK ORDER WAS RESCINDED, THE DEBATE BETWEEN OUR STAFF WAS INTENSE. WHAT DO I DO TO AVOID THIS IN THE FUTURE?

At this time, the Provincial Health Officer has a mask mandate for workers. We know that when the last mask order was repealed, there were many difficult staff conversations. If this was the case in your business, you may want to prepare.

If you are concerned that when this order is removed you may have more difficult conversations, talk to your staff about divisive conversations and opinions not being appropriate for the workplace if they cause distress and tempers to flare.

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CAN I OFFER INCENTIVES TO MY STAFF TO GET VACCINATED?

Yes, you can offer incentives to staff to get vaccinated. This has been used with success. A restaurant in Victoria that has made a deal with a local spa for staff to get free pedicures in exchange for free meals for the spa staff, provided they are all vaccinated. Some places are offering a cash bonus on production of a vaccination passport. Never underestimate the power of peer pressure.

You can remind all employees they will receive time off, with pay, to go get their vaccinations and employees who are vaccinated can apply gentle pressure to their unvaccinated coworkers by expressing concerns about their job security and their own health in the event of a COVID outbreak.

If you decide to use an incentive, be prepared to offer it to all vaccinated staff, even if they were vaccinated months ago.

WHAT IF MY STAFF SAY THEIR VACCINATION STATUS IS NONE OF MY BUSINESS?

Some employees may say that vaccination status is none of your business. At this time, the Provincial Health Officer has not determined that vaccination is required for foodservice and restaurant workers so they can reasonably refuse to answer.

Vaccinated people are not usually reticent to share their vaccination status. If an employee refuses to disclose their vaccine status, you can likely assume they aren't vaccinated.

We do know that in some areas of the province this discussion is more charged than in others and some operators are facing very difficult workplace situations. If an employee refuses to tell you their status, it is better for you to let it go, and pick a less contentious battle.

I HAVE A PROBLEM EMPLOYEE WHO ISN'T VACCINATED, WHAT DO I DO?

OR

I HAVE EMPLOYEE(S) WHO AREN'T VACCINATED DISRUPTING THE WORKPLACE WITH THEIR OPINIONS, WHAT DO I DO?

Start by documenting the problem. The problem may not actually be COVID-specific: Is the employee doing their job? Are they participating in the team aspects of the job? Are they working well with others? Ours is a collaborative, team-based industry. Someone who does not work well with others can be toxic to your workplace.

Take notes, document and speak to the employee about disruptive nature of their vaccination opinions, not their vaccination status. This is a very divisive issue. The driving force for your decisions/actions should be having a safe and productive work environment for all your workers.

You can tell any employee not to bring their opinions or politics to work if the person's opinions are impacting their ability to work with co-workers respectfully. When speaking to an employee, have the discussion from the perspective of maintaining a respectful and tolerant workplace, not from the perspective of vaccinated versus non-vaccinated.

If a person is unwilling to stop disrupting the workplace with their opinions and you document this, talk to Gillian at the BCRFA office about termination options.

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I THINK I HAVE UNVACCINATED EMPLOYEES WHO ARE NOT DISRUPTIVE, BUT THEY ARE MAKING ME WORRIED. WHAT CAN I DO?

Be diligent about assessing your workplace using COVID-19 best practices. We may not be required to have COVID-19 safety plans at this time, but we do now have a robust set of COVID protocols we can rely on from earlier in the pandemic. Make sure you train staff to clean deeply, hand wash thoroughly and wear masks.

Creating physical distance between workers may reassure you. If there is a way of having the employee work without contact with other employees or guests, assign them to that work.

If staff meals and staff drinks are provided, you may want to stagger meals to ensure that unvaccinated and vaccinated employees do not eat or drink together in your restaurant. You may choose to offer the unvaccinated employee a staff meal to go at the end of the shift.

Post all the COVID protocols and do staff reminders regularly. Teamwork is key to our ability to stay the course in COVID-times.

I KEEP HEARING ABOUT VACCINE PASSPORTS AND MANDATORY VACCINATIONS BEING A VIOLATION OF CHARTER PROTECTED HUMAN RIGHTS. COULD THESE VIOLATE ANY CHARTER OR HUMAN RIGHTS?

No, neither the vaccine card nor workplace vaccine mandates violate the Charter of Rights. The Charter of Rights and Freedoms was added to the Canadian Constitution in 1982 as a means to protect many rights and civil liberties. It was designed to apply to governments, their agents and their laws – it does not apply to relationships between customers and private businesses, or private businesses and their staff.

As a result, if a private business required employees to get vaccinated because it was following a government rule, the employees wouldn't be able to challenge the company — they'd have to file against the government to file as a Charter violation. Likewise, if a private employer were to independently decide to require its employees to be vaccinated, rights guaranteed under the charter would not be applicable.

It will be up to the courts to decide if it is legal to terminate an employee for not wanting to be vaccinated.

IT SEEMS VERY UNCERTAIN, WHY ISN'T THIS BLACK AND WHITE?

Until the courts decide this issue, or the Federal or Provincial governments make vaccines mandatory in our industry, there will continue to be some uncertainty. The protocols required of restaurants to respond to COVID-19 are evolving. Changing protocols are becoming the norm and we know this is very frustrating.

We will continue to strive for relevant and up-to-date information for our members so we can share it with you in a timely manner.

If you have questions or concerns, please don't hesitate to contact Gillian at the BCRFA. gmacgregor@bcdfa.com or 604 505 2374