



BACK TO THE OFFICE PROTOCOLS

WHAT CAN I ASK OF MY EMPLOYEES DURING THE PANDEMIC?

Employee Health and Safety, Privacy and Workspace Protocols

Throughout the COVID-19 pandemic, employers have been faced with difficult and unprecedented choices swirl around the need to maintain productivity, accommodate employee needs, protect employee privacy, and safeguard the health of employees and the public at large. With the risks involved and government responses to the pandemic still changing, many organizations are unclear what kind of protocols they can put in place at work that will meet both health and safety and privacy standards. Before they return to a common workspace, can I require employees to prove they have been vaccinated or even if they have a negative test result or a medical exemption? Can I even ask the questions? How do I accommodate the choice not to disclose or get vaccinated or tested? The answers to these questions are varied and situational, but there are some foundational facts and principles that can be established.

What do the Public Health Orders say?

In Alberta, a new series of public health orders were issued to come into effect September 20, 2021. There are two specific requirements/allowances that are directly relevant to the collection and use of health information about employees by employers:

1. Work from home is mandatory for all places of employment “unless the employer has determined a physical presence is required for operational effectiveness.” If employees are working from home, there is no need to require employees to declare and prove vaccination. Having said that, many businesses are still requiring presence at a common workspace, hanging their hat on their opinion that it is required for operational effectiveness. It is these employers that need to consider collecting and using vaccination or negative testing information about employees.
2. Many event, social and hospitality organizations may (or, in Calgary, must) require from patrons, customers or attendees a proof of vaccination, a negative test with the past 72 hours, or a medical exemption. However, this does not apply to their employees.
3. Employees are still required to wear masks in all indoor work settings, regardless of whether the restrictions exemptions program is in effect for customers or patrons in the workspace.

What do the privacy laws say?

There are a whole series of laws that govern how and why both government and private sectors collect, use and disclose employee health information in Canada is regulated through various pieces of privacy legislation. Basically, employers can only request, access, use and release information about an employee’s health if it is limited to and effective for, in most cases, establishing fitness to work. Another allowable but more general purpose is to protect employee and public safety. This has normally been focused on, for instance, dangerous jobs, employees operating dangerous machinery, or security measures to mitigate identified threats. The COVID-19 pandemic fits in here as a clear and imminent danger to employee and public safety.

For any of this collection, use and disclosure of employee health information, consent is not required. Of course, the employee can refuse but this could legitimately result in anywhere from a restrictive accommodation to loss of employment.

The real question then is: what employee health information is needed by an employer to establish fitness to work and/or mitigate employee and public safety? As you can imagine, to answer this question, you need to look at the particular health and safety issue you're dealing with. In this case, it is the threat of contracting and spreading COVID-19 to other employees and the public in a particular work setting – what employee health information is truly limited enough but still effective enough to reasonably guard against this? Information that an employee has been vaccinated would certainly be effective, but can the same goal be achieved by using other, perhaps less sensitive, health information. An alternative question would be, do you currently carry the COVID-19 virus and can you verify this with a test result? The problem is that this is still health information, so it doesn't get you that much further. Keep in mind that mask-wearing indoors is still required in shared workspaces anyway, so does this decrease the need to know about vaccination status? These questions must be addressed for each workspace situation and the kinds of physical interactions with clients, customers, and other employees involved.

In any case, all the privacy laws require employers to provide full notification of the direct purpose for collecting the health information about vaccination status or test results, along with a contact within the organization who can answer further questions about the purposes and the authority for collection. This would be a statement on a form, poster or information sheet either on paper or online.

The privacy laws require that personal health information must be accessed and used on a need-to-know basis within an organization. Since an employee allowed entry to a common workspace could have provided either a proof of vaccination or a negative test result, only the designated official confirming the verification of health status should be shown the actual health information. Once seen, the information should not be disclosed to other employees or even managers within the organization.

What do the privacy regulators say?

The Alberta Information and Privacy Commissioner, along with the federal and other jurisdictional privacy regulators, have issued statements throughout the pandemic restating that privacy rights must still be maintained during the pandemic even if extraordinary collection measures are authorized to deal with the crisis. They have emphasized a number of important points:

- All extraordinary collections must be transparent to individuals and the purposes for collection and use made clear.
- The collection of health information must be limited, proportional to the immediate purpose, and end when the immediate purposes ends.
- Documentation proving vaccination shouldn't be copied and retained by the employer if it is only used for validation – just viewed and perhaps recorded as validated.
- Consent is not a sufficient authority to collect this information for public sector employers. It is not required to collect personal employee information for private sector organizations, but if

consent is given, it is only valid if the collection can be justified as required, not simply as a condition of service.

In May 2021, in relation to the use of vaccination passports or proofs of vaccination in particular, the Alberta Commissioner has once again promulgated three key factors to consider before collection of this kind of employee health information:

- *Necessity: vaccine passports must be necessary to achieve each intended public health purpose. Their necessity must be evidence-based and there must be no other less privacy-intrusive measures available and equally effective in achieving the specified purposes.*
- *Effectiveness: vaccine passports must be likely to be effective at achieving each of their defined purposes at the outset and must continue to be effective throughout their lifecycle.*
- *Proportionality: the privacy risks associated with vaccine passports must be proportionate to each of the public health purposes they are intended to address. Data minimization should be applied so that the least amount of personal health information is collected, used or disclosed.*

(Office of the information and Privacy Commissioner of Alberta, *Joint Statement on Privacy and COVID-19 Vaccine Passports*, May 19, 2021. <https://www.oipc.ab.ca/resources/joint-statement-on-privacy-and-covid-19-vaccine-passports.aspx>)

These three factors provide an important framework for employers in developing their own workspace protocols for employees.

Other Employment Laws

There is a whole body of jurisprudence around occupational health and safety and human rights legislation that is important to decision-making about whether an employer has the authority to collect and use vaccination and other health information in compliance with these laws. Many legal and HR policy experts have put forward positions in online forums and opinion pieces about the applicability and extent to which these laws require or allow, for instance, a mandatory vaccination policy for employees in various settings. For the purpose of identifying authority for collection of vaccine validation information under privacy laws, a requirement under this or any other legislation would support collection of vaccination validations. For the most part, though, occupational health and safety and human rights legislation rely just as much on specific workplace and operational situations to determine whether or not something like a vaccine mandate and/or accommodation is appropriate or allowable. Therefore, the key determinants of necessity, effectiveness and proportionality based on workplace functions and accommodation alternatives apply for these laws as well.

Best policy?

Considering all of these privacy regulations and workplace requirements for employee and public health and safety, what would be a good protocol and practice for an employer on collecting their employee's health information to either confirm their vaccination status or ensure a negative test? In the end, in the current conditions, it is not unreasonable to request your employee to provide proof of vaccination to assure an adequate level of employee and public safety in an indoor workspace, even if masks are still

required in shared spaces. This measure should meet the prerequisites of necessity and effectiveness. However, employees should be allowed to provide, as an alternative, effective evidence that they do not carry the COVID-19 virus, which means that vaccination is not necessarily a requirement for entry into a common workspace, and especially not if, for medical reasons, an employee cannot receive the vaccine. The negative test is more cumbersome and costly since it would require continuing available resources to administer these tests. The condition of proportionality must be met by ensuring that the extent of information required and how it is used and maintained is closely limited and controlled.

So, here is what a protocol for collecting health information of employees entering a shared workspace might look like:

1. Keep as many employees at home as their work requirements allow. So long as they are not in a shared workspace, there is no need to collect any vaccination or test result information.
2. For employees attending at a common indoor workspace, request that either of the following information be shown to a designated individual before entry:
 - a. Verification documentation that the employee has received at least two doses of a recognized COVID-19 vaccine.
 - b. Verification documentation that, as of 72 hours prior to entry, the employee has tested negative for COVID-19.
 - c. Any cost incurred by negative test results or vaccine verification must be supplied by the employee, except in the case of an employee whose medical status prohibits them from being vaccinated, if this status can be verified by documentation.
 - d. In the case of an indoor workspace with a large number of employees, a second piece of identification to authenticate that the employee requesting entry is the same individual identified in the verification documentation.
3. Provide a notification that the health information is required to verify that the employee is not a significant risk of infection for employees and others within the shared indoor workspace and that this information will be used only for this purpose. Provide the name and contact information of an officer within the organization who can answer any questions about the purposes of the collection and how the information will be used and maintained.
4. Only an organization official designated to confirm verification of health status should be shown this health information, which should not be disclosed to other employees or managers.
5. Do not copy and/or retain the verification documentation. At most, record only that the employee attending had been verified for entry. In the case of a vaccination verification, this is valid for as long as the vaccine or negative test is effective, so the employee's status only needs to be verified once so long as the officer controlling entry has a record of the verification along with the date the vaccine or test was administered.

6. If an employee requesting access to a common internal workspace:
 - a. cannot verify that they have received the required vaccinations or
 - b. provide a negative test result, or
 - c. refuses to provide the information required,

they will not be allowed entry to the workspace. Notify these employees that they may choose to have their case reviewed by designated officials.

7. A case review will consider whether an employee refused entry can be accommodated by alternate workplace conditions that do not place other employees, clients or patrons at undue risk. This must take into account the requirements of their position and the costs and feasibility of the alternate arrangement. If the decision is made not to provide this accommodation, a timeframe for meeting entry requirements will be set along with process to meet this timeframe.
8. Only designated officials who have the capacity to make an assessment should be accessing the applicant's information. Applications for exceptions to policy for medical reasons, for instance, should only be reviewed by a medical expert. Only the final confirmation from the medical expert is provided to the employer.
9. If the employee refuses to participate either in the accommodation process or the timeframe established for meeting entry requirements, the employment relationship can be terminated.

These kinds of employee and client processes are without a doubt unprecedented, time-consuming and require at points a great deal of circumstantial decision-making. Based on the analysis of relevant privacy and other laws, they do present a viable pathway through a confusing minefield of sometimes conflicting employer obligations and employee interests. Most importantly, the processes and criteria provide a measure of transparency, accountability and consistency needed to maintain the dignity and autonomy of employees in a challenging public health crisis situation.