

Proof of Vaccination Requirements for Brokerage Employees Get Shot ... or Get Fired???

1. The COVID-19 Workplace Problem

The uncertain COVID-19 employment environment sometimes involves competing or conflicting rights and duties of mortgage brokerages and its employees. What are they to do when the obligation of a brokerage to provide a healthy and safe workplace conflicts with the employee's right to privacy and to not be discriminated against? What is to happen when the brokerage puts a health and safety policy into place that requires employees to prove they are vaccinated and an employee refuses to provide such proof? Do the brokerage and, effectively, the compliant employees have to accept the compromised environment, or can the non-compliant employee be terminated?

The answers to these matters are not straightforward. They involve a process, considerations, and weighing of factors. This bulletin will assist brokerages and employees to more fully identify factors and considerations in that weighing process.

2. Limitations

This bulletin is intended to provide suggestions regarding the topic covered. It is not intended as legal advice or to be authoritative. In a specific instance, the reader should:

- consult legislation, regulations, materials published by the regulator, case law, and other available related material; and
- obtain legal, financial, and other advice.

These comments are based on the application of existing general principles. Guidance, at the time of writing, is not available from Court or regulatory decisions concerning claims of wrongful dismissal from employees who were terminated for not having met an employer's requirement to prove they had received COVID-19 vaccinations.

The analysis contained in this bulletin is subject to the contents of any applicable employment contract or collective agreement.

3. Brokerage's Right to Terminate

A brokerage is entitled to terminate an employee at any time, without reason, so long as the termination does not amount to a violation of human rights.

If the brokerage terminates the employee for just cause, the employee is entitled to neither reasonable notice nor severance pay in lieu of reasonable notice.

If the brokerage terminates the employee without cause, the employee is entitled to either reasonable notice or severance pay in lieu of reasonable notice.

4. What Amounts to Just Cause?

Just cause exists when the employee has engaged in serious misconduct that goes to the heart of the employment contract such that the employment relationship cannot continue or be repaired.

Common reasons for just cause include theft, insubordination, and incompetence. They also include violating a brokerage's policy, where the policy is reasonable in the circumstances.

5. Brokerage's Duty to Provide a Healthy and Safe Workplace

Brokerages, as employers, are responsible to maintain safe and healthy workplaces. A brokerage taking steps to protect its employees and other attendees from being infected by the COVID-19 virus makes for a healthier and safer workplace.

Mortgage brokerages should review their existing health and safety policies and practices to ensure COVID-19 related risks are appropriately addressed.

At the time of writing, no law requires employees in the mortgage brokering industry, or in business offices generally, to become vaccinated. If legislation in the future does require them to become vaccinated, an employee breaching that law could be subject to being terminated with cause.

In the absence of such a law, the key consideration in determining whether a proof of vaccination policy is reasonable is whether it goes no further than is reasonably necessary in the circumstances to achieve the bona fide workplace objective of controlling the spread of COVID-19.

What is reasonable in a particular instance depends on the facts and circumstances of that scenario, including medical guidance and the nature of the brokerage's operations. For example, requiring workers on a construction site to wear hardhats would be a reasonable policy; requiring mortgage brokers to do so in the brokerage's office would be an unreasonable policy.

The question for a mortgage brokerage is whether a policy requiring proof of vaccination for employees who attend the workplace is reasonable in the circumstances of that brokerage. Requiring brokerage office staff who work in a congested area to prove they are vaccinated might be a reasonable policy; requiring mortgage brokerage staff who can work with great distances between them to prove they are vaccinated might not be a reasonable policy. That said, if and when a law requires office staff to become vaccinated regardless of other circumstances, requiring proof of vaccinations in any office environment becomes reasonable.

Further, where a brokerage's business model requires physical attendance of employees in the workplace, requiring those employees to provide proof of vaccinations can be reasonable. Where a brokerage's business model allows at least some employees to work from home, practice social distancing within the office, sanitization, temperature checks, and mandatory mask-wearing, a policy requiring proof of vaccinations would be less reasonable.

As a practical matter, it could be difficult for a brokerage to claim that an employee who has been successfully working from home for a lengthy time needs now to get vaccinated and return to working in person at the office. Of note is that during the pandemic, many brokerage models have allowed for virtual meetings, including between brokers and clients, making in person attendance sometimes less essential.

Whether a workplace is safe is ultimately determined by the Workers' Compensation Board of British Columbia (WorkSafeBC). This determination is generally made after the Board receives a complaint and it has performed a health and safety inspection. One would think determinations concerning COVID-19 would follow the same process.

In addition to health and safety in the workplace concerns, a brokerage can enforce a proof of vaccination policy where there is a legitimate business need for such a policy. For example, a brokerage can require an employee to provide proof of vaccination where air travel is needed to perform their function (such as some business development managers) and airlines do not allow boarding of unvaccinated travellers.

6. Contents of a Vaccination Policy

If a brokerage decides a mandatory proof of vaccination policy is warranted, the policy should include the following:

- the authority for collecting the proof of vaccination (for example, to maintain a healthy and safe workplace as required by WorkSafeBC)
- why the information is being collected (such as to identify those who are not vaccinated so as to better protect against spread of the virus in the office)
- possible consequences to the employee if proof of vaccination is not provided
- the safety precautions being taken concerning storage of the information (such as in an encrypted computer file)
- if and how the information will be shared (note that the information should be shared with only those people who need to know it to implement the health and safety policy)
- if and how the information will be destroyed (note that the collected information should be destroyed when it is no longer needed)

7. What Can a Brokerage Do If an Employee Refuses to Provide Proof?

If the brokerage has instituted a valid policy and the employee, without a valid reason, refuses to provide proof of vaccination, the brokerage can treat the refusal as a breach of an employer policy and:

- put the employee on an unpaid leave of absence,
- discipline the employee, or
- terminate the employee.

If the brokerage is thinking of these steps, it would assist the brokerage to give the employee a written:

- confirmation of the request (particularly if the request was not made in writing in the first place),
- confirmation that proof of vaccination has not been provided by the employee,
- deadline for providing the proof, and
- statement of the consequences to the employee if proof is not received by the deadline.

The brokerage, while waiting for the employee to provide the proof of vaccination, might want to put the employee on unpaid leave. This could protect the workplace while allowing the employee an opportunity to rectify the situation.

8. Valid Reasons for Refusing to Provide Proof

Section 13 of the British Columbia Human Rights Code prohibits an employer from refusing to continue to employ a person because of the person's:

- religion or
- physical disability.

These protections provide reasons for an employee to be excused from being vaccinated and hence from providing the brokerage with proof of vaccination.

a. Physical Disability

An employee might be excused from providing proof of vaccination if a medical condition prevents them from receiving the vaccination. For example, the employee may have a severe allergy to an ingredient in available vaccines or may be taking medication that negatively interacts with vaccines.

Note that being excused from being vaccinated and from providing proof of being vaccinated would not necessarily excuse the employee from a valid occupational requirement. For example, being excused would not entitle a flight attendant to board the employer's planes. We need not cover this type of possibility in any detail as it is unlikely to arise in the context of mortgage brokers.

b. Religion

Although most religions do not provide objections to vaccines, some groups or individuals may be opposed to vaccination for religious reasons. In such a case, the same considerations as apply to a disability would arise.

c. Proving the Claimed Exemption

If an employee claims an exemption based on physical disability or religious grounds, the brokerage is entitled to ask for proof of the exemption applying. The proof should establish a connection between the employee's medical condition or religious beliefs and their inability to be vaccinated. This could entail the employee providing a letter from a doctor in the case of a disability claim or a letter from the religious leader in the case of a religious claim. In serious disputes, the validity of the content of the doctor's or religious leader's letter could be examined, but that discussion is well beyond the scope of this bulletin. The British Columbia Centre for Disease Control has indicated it is rare that a disability prevents an individual from being vaccinated.

9. Duty to Accommodate

Even if a proof of vaccination policy is necessary to address COVID-19 concerns in a particular brokerage office, the brokerage must try to accommodate people who are exempted from providing such proof. The accommodation can include the employee working from home or being regularly tested. For example, a brokerage may exempt an employee from the proof of vaccination policy on religious grounds and allow them to work a modified shift or work in circumstances that are less likely to pose a risk of transmission of the virus.

The brokerage's duty would be to accommodate the employee's needs, not their preferences. Where there is a legitimate need for accommodation, the brokerage should collaborate with the employee to consider possible accommodations.

Where the need for accommodation arises from a physical disability to receive the vaccine, the brokerage should obtain sufficient information from the employee's physician and/or possibly an independent medical examination to understand the medical-related restrictions and limitations the employee may have (if any) and the possible accommodations that can be considered.

Employees have a duty to participate in the accommodation process. This means that an employee must be responsive to a brokerage's request for information and the employee must work with the brokerage to explore and implement accommodations.

10. Terminate for Just Cause

A brokerage can terminate an employee for just cause, if:

- the brokerage has a reasonable proof of vaccination policy,
- the employee is not exempt from providing proof of being vaccinated, and
- the employee does not comply with the policy.

11. Conclusions

The health and safety of the workplace is a shared responsibility of a brokerage and its employees. COVID-19 presents new circumstances and challenges for each group to consider. Protecting each other by acting reasonably and developing solutions collaboratively appears to be the cornerstone for identifying and meeting the challenges.

