

Q & A

Vaccination policies for nonprofit employers

July 22, 2021



As more Albertans receive their COVID-19 vaccinations and return to the office, it is imperative that nonprofit employers understand their responsibilities and obligations and put policies in place to protect their organizations, employees, and volunteers.

This document addresses from a legal perspective the most common questions asked by nonprofit employers about vaccinations, taking into account the employment and privacy implications of various vaccination policies.

A more fullsome discussion of the legal obligations of nonprofit employers and COVID-19 vaccination policies can be found in the webinar [Vaccination Policies for Nonprofit Employers](#), held on June 16, 2021.

Please note that the information provided in this resource is intended to be of a general nature and is not legal advice. If you require legal advice, you should contact a lawyer. See the disclaimer at the end of this document.

CONTENT

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Contents

1. Occupational Health and Safety (OHS) Obligations for Nonprofit Employers page 4

- Do contractors count as “workers”?
- When can a worker refuse work?
- If we send workers to sites that are not under our control, how much responsibility do we have as an employer to dictate the work standards at those sites?
- Could vaccines be considered integral in maintaining a safe workplace?
- If a worker contracts COVID-19 at the workplace, what are the legal ramifications?

2. Paid Leave for Vaccinations page 8

- What about people who need to accompany dependents to appointments (eligible children, elderly or disabled persons)? Are they entitled to additional leave?

3. Implications of Mandatory Vaccination Policies page 9

- Is it reasonable, or legal, to require workers to be vaccinated in order to be employed at the organization?
- What if a worker is ideologically opposed to receiving a vaccine, or believes it to be hazardous to their health?
- If an employer implements a mandatory vaccination policy, could that employer be held liable if a worker has an adverse reaction to the vaccine?

4. Implications of Other COVID-19 Policies page 11

- Could we require masks and distancing indefinitely?
- When we gain access to rapid-test kits for COVID-19, can we make it mandatory for workers to take a test regularly to ensure a safe work environment?

5. Privacy Implications on Disclosure of Vaccination Status page 12

- Can we ask workers to disclose their vaccination status?
- Are there any privacy implications of asking workers to voluntarily share their vaccination status?
- Can we disclose the vaccination status of our workers to our clients?

6. Implications of Vaccination Policies for Clients/Participants/ Beneficiaries page 15

- Can we ask the clients we serve to disclose their vaccination status?
- Can we require vaccinations for individuals to participate in our programming?

7. Resources and Disclaimer page 17

Occupational Health and Safety (OHS) Obligations for Nonprofit Employers

1

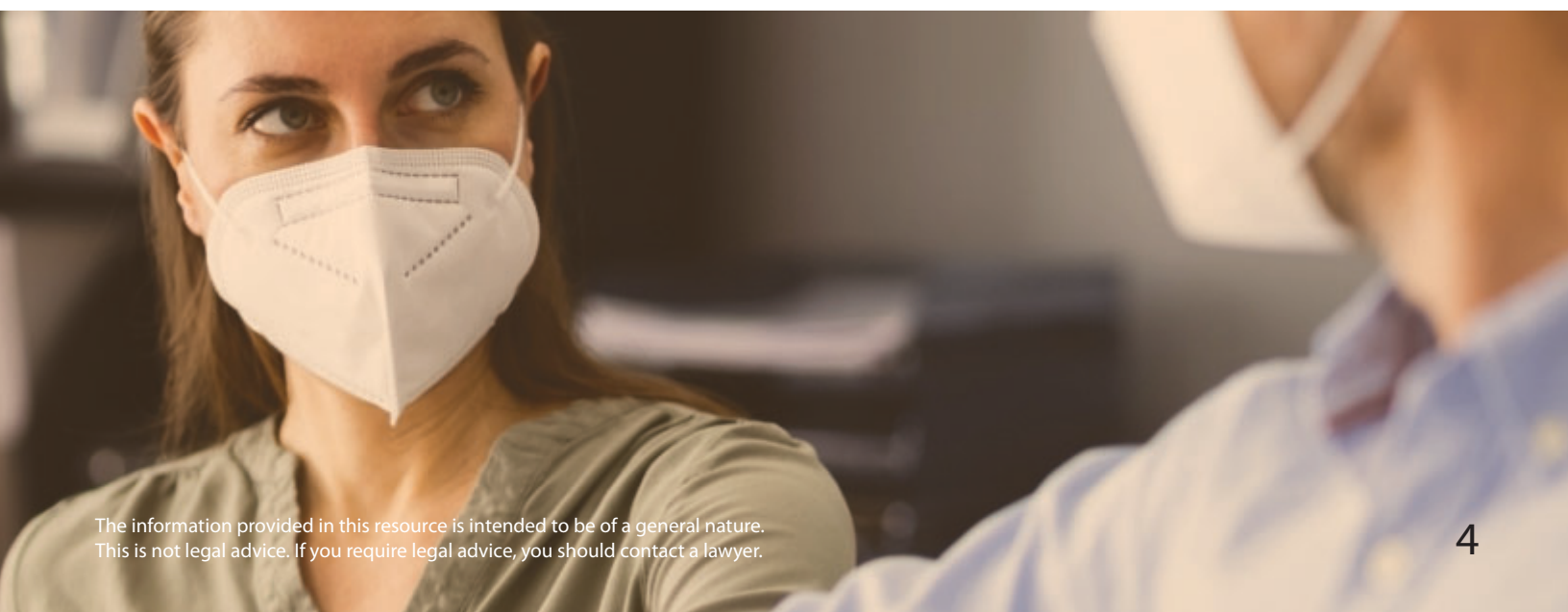
Nonprofit employers have an obligation to do everything they reasonably can to protect the health and safety of their workers, including taking measures to reduce the risk of contracting COVID-19 in the workplace. If you have 5 or more workers, you must have a number of policies and procedures in place to comply with the OHS Act – remember, volunteers count as workers too! A mix of administrative controls and personal protective equipment should be used to protect workers.

Do contractors count as “workers”?

“Contractor” has a specific definition under the OHS Act as persons who are contracted to direct the activities of one or more employers at a worksite. But in the context of the question, it depends on what is meant by “contractor.”

The OHS Act defines a worker as “a person engaged in an occupation, including a person who performs or supplies services for no monetary compensation for an organization or employer and, for greater certainty, includes a self-employed person...” The Act defines a “self-employed person” as a “person who is engaged in an occupation but is not in the service of an employer for that occupation.” As such, individuals who are contracted by nonprofit organizations to perform certain work (but who are not employees) are generally considered to be workers.*

*This was confirmed via phone call with an OHS expert on June 23, 2021.

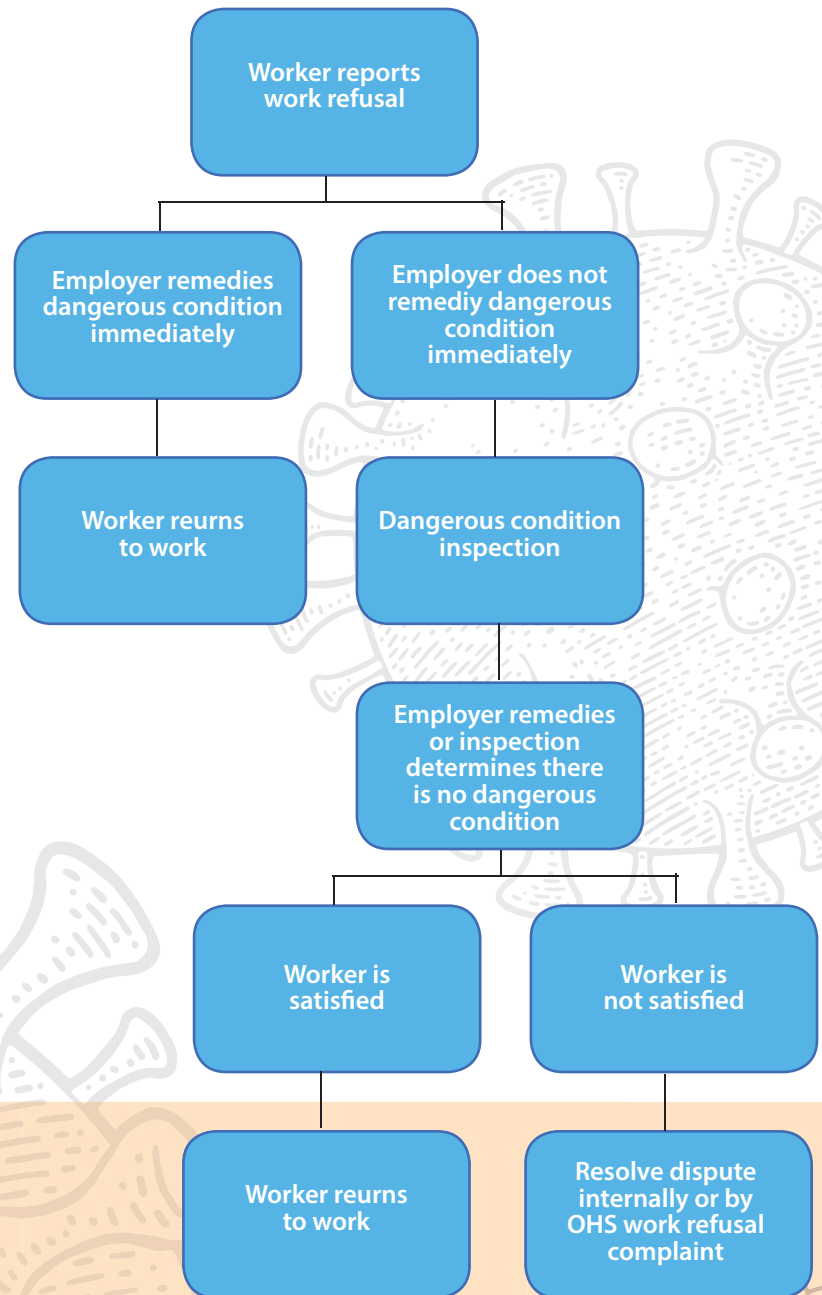


When can a worker refuse work?

A worker has the right to refuse work if they believe, on reasonable grounds, that the work conditions are a danger to themselves or others. For a refusal to be valid, the worker has to actually observe or experience a dangerous condition. Anticipated, potential, or hypothetical risks do not constitute reasonable grounds for a work refusal. Section 31 of the OHS Act outlines the work-refusal process.* (Illustrated at right.)

In the context of COVID-19, it is not clear if having unvaccinated individuals in the workplace would be considered a “dangerous condition.” However, if the employer has implemented other reasonable controls to address the risk of COVID-19 exposure such as sanitizing, masking, and distancing measures, any dangerous condition would likely be considered remedied. If possible, other accommodations may be considered, such as allowing the individual to work from home.

*Alberta, Right to Refuse Dangerous Work: OHS Information for Employers and Workers (Government of Alberta, June 2020, LI049)



If we send workers to sites that are not under our control, how much responsibility do we have as an employer to dictate the work standards at those sites?

Employers are responsible for any health and safety issues arising from work being conducted at a work site. The OHS Act defines a work site as “a location where a worker is, or is likely to be, engaged in any occupations and includes any vehicle or mobile equipment used by a worker in an occupation.” Therefore, employers are required to ensure the health and safety of workers at any site where they are likely to be working, as far as it is reasonably practicable to do so. Depending on the specific circumstances, if there is a third-party employer subject to the OHS Act at the site where your workers will be working, that employer would also have a responsibility to keep your workers reasonably safe. As such, the work standards and conditions would likely be considered a joint responsibility under the OHS regime. A reasonable step may be to ask the third-party whether they have OHS policies and procedures in place and whether you can review those policies prior to sending your workers to that site.

Could vaccines be considered integral in maintaining a safe workplace?

Vaccination policies are one form of administrative control that employers have in their toolbox to help address the dangerous work conditions associated with the virus. If employers are concerned about the legal implications of mandating vaccinations, they have other administrative controls and personal protective equipment at their disposal to address the risks, including:

- Rearranging floor plans and work stations to ensure proper distancing;
- Installing physical barriers;
- Staggered or adjusted shifts;
- Procedures around cleaning and sanitizing;
- Workplace screening and testing;
- Policies around wearing masks;
- Work from home policies.

If a worker contracts COVID-19 at the workplace, what are the legal ramifications?

Employers could be subject to penalties under the OHS Act, as well as WCB claims and/or tort liability.

If an OHS officer is of the opinion that a person has contravened the Act, Regulations, or Code, the officer may require the person for pay an administrative penalty of up to \$10,000 per incident. An employer could also be found to be guilty of an offence under the Act, and could be liable for a fine of up to \$500,000 for a first offence.

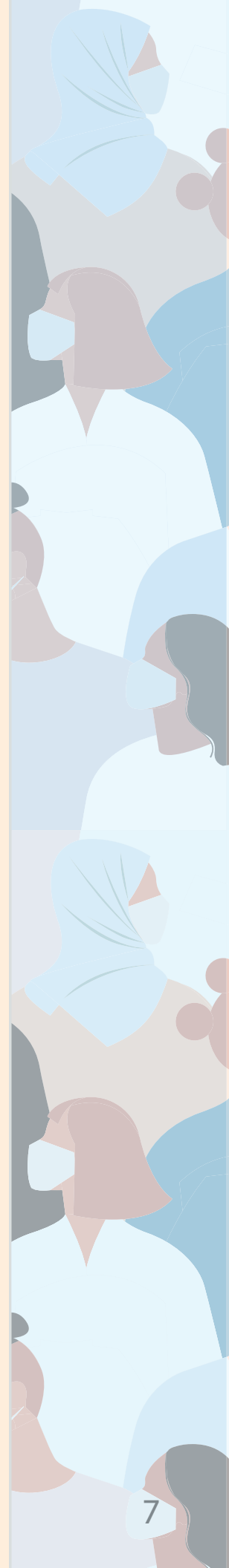
The *Worker's Compensation Act* applies to all workers and employers in Alberta, except those that are exempted under the regulations. Most nonprofit organizations fall within the exemptions, including: charitable institutions, churches, community recreation centres, counselling services, private clubs, and museums. To verify if your industry is exempt, refer to schedule "A" of the Worker's Compensation Regulation. If not exempt, an employer will be required to maintain worker's compensation coverage and pay premiums. Workers exposed to COVID-19 in the workplace may be eligible for WCB benefits. As of June 30, 2021, there were 12,819 WCB claims related to COVID-19, with 10,802 of those claims being accepted by WCB.*

Employers could be sued civilly by a worker for any damages suffered as a result of their contracting COVID-19 in the workplace, and the employer could be held liable if they are found to have been negligent in their duties. This would also apply to anyone invited onto the employer's premises, such as clients.

OHS penalties and liability in negligence will only be rendered when an employer has not taken reasonable steps to address dangerous work conditions and reduce the risk of contracting COVID-19. The standard to meet is not perfection. Employers must only do what is reasonably practicable to maintain a safe work environment.

An employer who has policies and procedures in place in accordance with the OHS Act, Regulations, and Code, and ensures that those procedures are followed and implemented effectively will be better prepared to defend against legal ramifications if a worker contracts COVID-19.

*Alberta, COVID-19 Claim Data: January 1, 2020 – June 30, 2021 (Workers' Compensation Board – Alberta, 2021)



The *Employment Standards Code* was amended in April 21, 2021, to specify that employees are entitled to 3-hour paid leaves to get their COVID-19 vaccination per vaccine dose. Employees are required to give as much notice as is reasonable and practicable, and employers can request reasonably sufficient proof that the employee is taking the time to go and get vaccinated.

What about people who need to accompany dependents to appointments (eligible children, elderly or disabled persons)? Are they entitled to additional leave?

The amendments to the *Employment Standards Code* do not require employers to provide paid leave to employees to accompany dependents to vaccination appointments. In other words, employers have no legal requirement to provide time off for this purpose, but employers, of course, have the option of accommodating these requests.



It is unlikely that Canadian governments will legally mandate vaccinations. As such, vaccination policies in the workplace are left to the discretion of employers. While vaccination policies may be an important part of ensuring worker safety in the workplace, they are not without risk. Employers need to pay close attention to human rights and privacy considerations, and weigh the risks and benefits of implementing such policies.

Is it reasonable, or legal, to require workers to be vaccinated in order to be employed at the organization?

In certain industries or organizations, mandating vaccinations may be considered a bona fide occupation requirement. This might include work environments in which workers are required to work in close proximity to vulnerable populations, such as in senior care. Mandatory vaccination policies should only be implemented in the following circumstances:

- The policy is adopted for a purpose that is rationally connected to the performance of the job;
- There is an honest and good faith belief that the policy is necessary to fulfil that purpose; and,
- The policy is reasonably necessary to accomplish that purpose.

If a vaccination policy is tied to future hiring or continued employment, there is a significant likelihood that it will contravene the *Alberta Human Rights Act* if certain accommodations are not made. The *Human Rights Act* specifies the grounds that are protected from discriminatory employment practices: race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status, and sexual orientation ("Protected Grounds"). In the case of COVID-19 vaccination policies, the most likely Protected Grounds that may be violated are those associated with a medical contra-indication linked to age or disability, or those associated with religious beliefs.

If workers have legitimate religious beliefs, medical conditions, or disabilities (or some other condition under Protected Grounds) that prevent them from being vaccinated, the duty to accommodate would be triggered. The duty to accommodate is an obligation

placed on employers to adjust rules, policies, or practices to ensure that they do not have a negative effect on a person because of a Protected Ground. Employers are required to provide accommodation to the point of “undue hardship.” This means that employers are expected to provide any and all accommodations necessary to eliminate discrimination up until the point that providing the accommodation would create onerous conditions for the employer, such as intolerable financial costs. “Undue hardship” is very fact specific and what may be undue hardship for one employer may not be for another.

A mandatory vaccination policy could contain exceptions for workers who cannot comply with the policy for a legitimate reason associated with a Protected Ground. The policy could require some other form of protection such as masks, distancing, or working from home. However, these accommodations could create issues in and of themselves. For example, if only individuals who are exempted from the vaccination policy for medical or religious reasons are required to wear masks, this could create a two-tiered system and make these workers targets of discrimination, harassment, or bullying in the workplace. All of these risks must be considered, and each worker’s situation should be handled and assessed on an individual basis in consultation with that worker. Privacy implications must also be considered. *Refer to questions on page 13 and 14.*

If an employer implements a mandatory vaccination policy, could that employer be held liable if a worker has an adverse reaction to the vaccine?

It is very unlikely that an employer would be held liable in these circumstances. To sue an employer civilly, the worker would need to demonstrate negligence on the part of the employer, which would be very difficult considering that COVID-19 vaccines are Health Canada approved and considered to be low-risk. However, the law in this area is still developing. If you are concerned about specific liability risks, you should contact a lawyer to find out how you can mitigate those risks.

What if a worker is ideologically opposed to receiving a vaccine, or believes it to be hazardous to their health?

The duty to accommodate would only be triggered when the condition preventing a worker from getting vaccinated is a “Protected Ground” under the Human Rights Act; most commonly, if the belief stems from the practice of a recognized religion. The courts have distinguished between accepted system of thought/belief and personal views on a subject. Since personal views are not a protected ground, there is no legal reason why workers with oppositions of this nature would need to be accommodated. However, you may want to consider alternatives to maintain positive employment relationships and safeguard against reputational issues. Privacy implications must also be considered. *Refer to questions on page 13 and 14.*



Could we require masks and distancing indefinitely? and When we gain access to rapid-test kits for COVID-19, can we make it mandatory for workers to take a test regularly to ensure a safe work environment?

So long as the risk of contracting the virus has been identified as a dangerous work condition, through an OHS hazard assessment for example, employers must put reasonable controls in place. Note that if an employer has more than 5 workers, workers must be involved in the hazard assessment process. An ongoing masking and distancing policy and/or a mandatory testing policy could very well be reasonable, so long as the risk of contracting the virus without such measures remains significant.

The same human rights considerations would apply to policies of this nature, and employers should make efforts to accommodate those who have legitimate conditions associated with Protected Grounds under the *Alberta Human Rights Act*, which prevent them from wearing a mask, getting tested, or following similar policies.

Privacy Implications of Disclosure of Vaccination Status

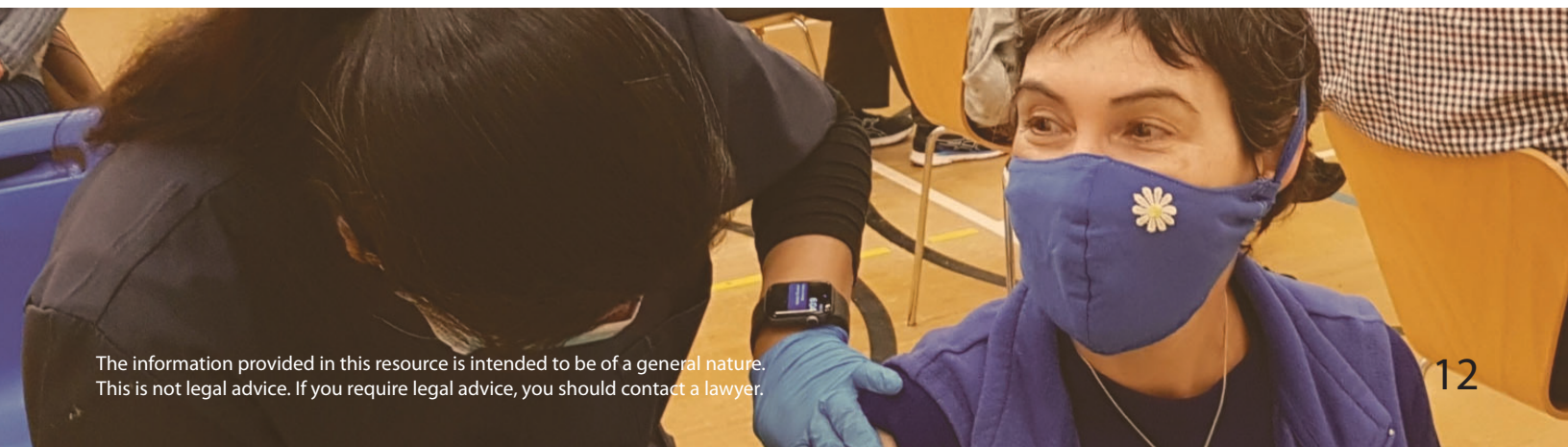
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An individual's vaccination status is treated by the law as both personal information and sensitive medical information.

The *Personal Information Protection Act* (PIPA) applies broadly to nonprofits operating in Alberta that are incorporated under the *Canada Not-for-Profit Corporations Act*. PIPA only applies to nonprofit organizations incorporated under the Societies Act, the Companies Act, and the Agricultural Societies Act to the extent that these organizations engage in "commercial activities." PIPA defines a commercial activity as any transaction, act, or conduct that is commercial in character, and includes activities like selling products and services, and selling, bartering or leasing membership lists or donor or fundraising lists.

The federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) applies to matters of federal jurisdiction, such as telecommunication and aviation.

The *Health Information Act* applies to an individual's health records. Hospitals, nursing homes, and other health services providers that are considered to be "custodians" of health information must comply with the Act. Custodians must collect, use, and disclose only the amount of health information essential to enable the recipient to carry out the intended purpose.



Can we ask workers to disclose their vaccination status?

Assuming the nonprofit organization does not work in an industry that is subject to federal jurisdiction, the organization is not incorporated under the *Canada Not-for-Profit Corporations Act*, and the worker's vaccination status is not being collected for a commercial purpose, PIPEDA and PIPA will not apply (this would be the case for many nonprofits in Alberta that are incorporated under the *Societies Act*). As such, employers would be entitled to request this information from workers and would not be subject to any specific laws and regulations pertaining to the collection, use, and disposal of that information. However, as a best practice, all employee information should be kept as confidential as possible.

Any employment related decisions to be made based on an individual's vaccination status (i.e. whether their employment will be continued) would be subject to human rights laws. (Refer to question "Is it reasonable, or legal, to require workers to be vaccinated in order to be employed at the organization?" on page 9.) If a worker refuses to disclose their vaccination status, employers should obtain as much information as possible about the reason for the refusal, and should tread carefully about making any employment related decisions regarding the failure to disclose. Seeking specific legal advice is highly recommended.



Are there any privacy implications of asking workers to voluntarily share their vaccination status?

If privacy legislation does not apply, there are no legal ramifications associated with simply asking workers to voluntarily disclose their vaccination status, so long as no employment related decisions are made based on an individual's refusal to disclose, or based on their vaccination status itself. Many organizations follow PIPA requirements as best practices even if the legislation does not apply in the circumstances; this is recommended.

Any employment related decisions to be made (i.e. whether their employment will be continued) would be subject to human rights laws. (Refer to question "Is it reasonable, or legal, to require workers to be vaccinated in order to be employed at the organization?" on page 9.)

Can we disclose the vaccination status of our workers to our clients?

If clients are requesting the vaccination of workers to be disclosed in connection with a commercial transaction, PIPA will likely apply.

PIPA stipulates that organizations are only entitled to collect, use, and disclose personal information for a reasonable purpose. Organizations should consider whether it is truly necessary to disclose this information to clients. For example, if a client is a vulnerable to COVID-19 and was not able to get vaccinated themselves for medical reasons, the vaccination status of a staff member they will be in close contact with may be important information for them to know.

Under PIPA, organizations are permitted to collect, use, and disclose employee and volunteer information without consent if the purpose is related to their work, or if employees and volunteers are informed about the purpose of the collection, use, or disclosure. In this case, it is unlikely that disclosing personal information about workers would be considered to be reasonably required for work purposes. As such, employees and volunteers would need to be informed about the disclosure and the purpose of making it.

Organizations should only keep personal information for as long as it is needed for legal or business purposes. After the risk of contracting or transmitting COVID-19 in the workplace is no longer significant (for example, when the pandemic is declared “over” by public health officials), any information the organization holds about worker vaccination status should be securely destroyed.



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Implications of Vaccination Policies for Clients/Participants/Beneficiaries

6

Can we ask the clients we serve to disclose their vaccination status?

If clients are being asked to disclose their vaccination status in connection with a commercial transaction, PIPA will likely apply. Again, organizations should consider the purposes of collecting this personal information about clients and whether its collection is truly necessary. If there are reasonable means of protecting staff and clients without collecting the information, its collection may not be considered necessary. The Office of the Privacy Commissioner of Canada (“OPIC”) has published a [Joint Statement](#) by Federal, Provincial and Territorial Privacy Commissioners on the privacy implications of COVID-19 Vaccine Passports. The statement suggests that the necessity, effectiveness, and proportionality of vaccine passports must be established for each specific context in which they will be used.

The OPIC statement suggests that for private sector actors, consent may provide sufficient authority for collecting vaccination information if it meets all of the following conditions:

- Consent must be voluntary and meaningful, based on clear and plain language describing the specific purpose to be achieved;
- The information must be necessary to achieve the purpose;
- The purpose must be one that a reasonable person would consider appropriate in the circumstances;
- Individuals must have true choice: consent must not be required as a condition of service.



If the foregoing conditions are met, clients must also be given the name and contact information of your organization’s privacy contact person. Clients should be informed about the collection, use, disclosure, retention, and disposal of the information.

Organizations should only keep personal information for as long as it is needed for legal or business purposes. After the risk associated with contracting or transmitting COVID-19 in connection with your organization is no longer significant (for example, when the pandemic is declared “over” by public health officials), any information the organization holds about a client’s vaccination status should be securely destroyed.

The Privacy Commissioner should be consulted throughout the development and implementation of any vaccination status disclosure policies. Any decisions related to access to your organization’s programming that will be made based on a client’s vaccination status (i.e. whether access will be denied, or whether they will be subject to different treatment upon obtaining access) would also be subject to human rights laws. (Refer to question “*Can we require vaccinations for individuals to participate in our programming?*” on page 16.)

Can we require vaccinations for individuals to participate in our programming?

The *Alberta Human Rights Act* prohibits discrimination regarding access to goods, services, accommodations, or facilities that are customarily made available to the public. No person may be discriminated against or denied access to goods, services, accommodations, or facilities on the basis of race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status, or sexual orientation ("Protected Grounds"). In this situation, the most likely Protected Grounds that may prevent a person from being vaccinated would be those associated with a medical contra-indication linked to age or disability, or those associated with religious beliefs. In these cases, the duty to accommodate would be triggered, and the same considerations outlined in *"Is it reasonable, or legal, to require workers to be vaccinated in order to be employed at the organization?"* on page 7 would apply.

Note that the *Canadian Charter of Rights and Freedoms* also has application in circumstances involving legislation and government decision makers and, sometimes, non-government bodies exercising statutory authority or implementing government objectives. For instance, in certain circumstances the Charter has been found to apply to universities. As such, it is possible that the Charter could apply to a mandatory vaccination policy put in place by a university.

Resources

COVID-19 and OHS for Nonprofit Employers

[OHS COVID-19 Publications](#)

[COVID-19 General Operational Guidance \(alberta.ca\)](#)

[CCOHS COVID-19 Health and Safety Resources](#)

[Right to refuse dangerous work: OHS Information for Employers and Workers](#)

[IntegralOrg's Alberta Occupational Health and Safety Toolkit](#)

Human Rights for Nonprofit Employers

[Information for Employers](#)

Privacy for Nonprofit Employers

[Protecting Personal Information: A Workbook for Non-Profit Organizations](#)

[Privacy and COVID-19 Vaccine Passports - Office of the Privacy Commissioner of Canada](#)

[Health Information Act Guidelines and Practices Manual, 2011 \(alberta.ca\)](#)

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