

# What to Do When an Employee Defies Your Mandatory Vaccination Policy



Find out why the worker is refusing before deciding what to do.

Before the pandemic, mandatory vaccination policies were rare and limited to sensitive sectors like health care and travel. But as Delta variant cases surge, requiring employees to prove they've been fully vaccinated to keep their jobs is becoming increasingly common. And that begs a question of crucial importance, especially to OHS directors: What should you do when employees defy your organization's mandatory vaccination policy?

1. Terminate them immediately
2. Accommodate them immediately
3. None of the above

**The answer** is C, none of the above. It's not that termination and accommodation aren't valid options; it's the word 'immediately' that makes them the wrong choice.

## The 2 Things to Do When Employees Refuse Mandatory Vaccination

Here's what you **should do** if one of your employees refuses to comply with your mandatory vaccination policy.

### Step 1: Find Out Why They Won't Get Vaccinated

Although courts have yet to weigh in on the question, we know from pre-COVID 19 court cases and guidelines issued by human rights commissions during the pandemic that workplace mandatory vaccination policies are enforceable when a premises-specific hazard assessment shows that they serve a vital health and safety objective. At the same time, employers must make accommodations as required by human rights.

**Compliance Strategy:** When employees refuse to comply with a mandatory vaccination policy, the first thing you must do is ask them why they won't get vaccinated so you can determine whether you need to accommodate them. There are 2 possibilities:

- **Employees are entitled to accommodations** when they can't or won't get vaccinated due to a medical condition or other disability, a bona fide religious objection or some other personal characteristic or circumstance that the human rights laws protect from discrimination. If employees claim they have such a disability, religious belief, etc., you're allowed to ask them for written proof, like a doctor's note verifying that the employee has a medical issue that precludes vaccination.
- **Employees aren't entitled to accommodations** when they can take the vaccine but choose not to do so out of personal preferences or beliefs. According to the BC Human Rights Commissioner, 'a person who chooses not to get vaccinated as a matter of personal preference' especially where that choice is based on misinformation or misunderstandings of scientific information 'does not have grounds for a human rights complaint against [an employer] implementing a vaccination status policy.' New guidelines from the Ontario Human Rights Commission also stipulate that 'personal preferences and singular beliefs' about the vaccine aren't grounds for accommodation.

## **Step 2: Take Action Based on Employee's Reason for Refusing Vaccination**

Once you find out why refusing employees won't get vaccinated, take appropriate actions based on their reasons. The 2 basic options: accommodation or discipline.

### **Scenario 1: Accommodating Refusing Employees**

Your duty under human rights laws is to make reasonable accommodations up to the point of undue hardship. In the vaccination context, that basically means not making the employee get the vaccine. However, that doesn't necessarily mean letting the exempt employees just go about their business as normal. As an employer, you still have a duty to protect employees, customers, patients and others in your workplace from infection. Allowing unvaccinated employees into the workplace would be deemed undue hardship if it would put others at undue risk.

**Compliance Strategy:** You must perform a hazard assessment based on the type of workplace you have, the employee's job duties, with whom and for how long they have close contact and other risk factors specific to the work site. If, on the basis of that assessment, you determine that letting the employee come to work and go about her normal routine poses unacceptable infection risks, you must explore other accommodations, such as:

- Requiring the employee to undergo rigorous and regular COVID-19 testing;
- Requiring the employee to work from home; and/or
- Letting the employee come to work, provided that he keeps himself isolated, wears a mask at all times, self-monitors, carries out extra hygiene measures and follows other special health and safety protocols.

### **Scenario 2: Disciplining Refusing Employees**

People with disabilities, religious beliefs or other legitimate grounds for accommodations under human rights laws should be few and far between. Consequently, you should be in the position to enforce your mandatory

vaccination policy in the vast majority of cases. At that point, it becomes a matter of following your standard discipline policies and procedures (or any special procedures you include in the enforcement provisions of your mandatory vaccination policy) the way you would with any other employee who deliberately defies an essential HR or health and safety policy. In addition to endangering others, you can justify discipline on the basis of insubordination.

What we don't know, at least not yet, is whether a vaccine refusal rises to the level of just cause for termination even for a first offence, or requires the imposition of discipline on a progressive basis. But as companies enforce their mandatory vaccination policies, this issue is bound to wind up before courts and arbitrators before too long.