



British Columbia's
Office of the Human Rights
Commissioner

A human rights approach to proof of vaccination during the COVID-19 pandemic


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Policy guidance | July 2021

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POLICY GUIDANCE | JULY 2021 (UPDATED OCTOBER 2021)

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To the Indigenous peoples of this place we now call British Columbia:

Today we turn our minds to you and to your ancestors. You have kept your unceded homelands strong. We are grateful to live and work here.

Update: B.C.'s vaccine card program and proof-of-vaccination requirement

Starting September 13, 2021, proof of vaccination in the form of the BC Vaccine Card is required to access some events, services and businesses in British Columbia. By order of the Provincial Health Officer, the requirement is in place until January 31, 2022 and could be extended. Up-to-date information is available on the government's [proof of vaccination website](#), and the orders themselves can be accessed from the [Provincial Health Officer's website](#).

It is the position of B.C.'s Human Rights Commissioner that the proof-of-vaccination requirement is justified from a human rights perspective and will result in increased protection for those among us who are most vulnerable to the virus.

The order contains several accommodations related to Code-protected grounds:

- Children under 12 years of age are exempt from the proof-of-vaccination requirement.
- There is a process for evaluating individual requests for an exemption on medical grounds.

Medical exemptions are a vital accommodation to avoid potential discrimination on the basis of disability. However, demonstrating that discrimination has occurred under the Human Rights Code requires more than evidence of a disability and a decision not to be vaccinated. As stated in a recent screening decision of the B.C. Human Rights Tribunal, there must be an established connection between the two, such as the disability preventing the individual from being able to get vaccinated.¹ (For further information, the B.C. Human Rights Tribunal has [clarified](#) what a complaint about vaccine requirements must set out in order to be considered.)

It is reasonable, therefore, that the order of the Provincial Health Officer requires all requests for a medical exemption to be accompanied by evidence that establishes a connection between an individual's medical condition and their ability to be vaccinated.

The B.C. Centre for Disease Control has clarified that it is rare that a disability prevents an individual from being able to get vaccinated. They say: "In nearly all cases, vaccination is strongly recommended in order to protect against a higher likelihood of severe symptoms if COVID-19 is contracted. [...] Doctors and researchers have looked at the evidence. They agree that unless you have a very serious allergy to any of the vaccine ingredients, you should strongly consider getting the COVID-19 vaccine."

The guidance below offers general advice to all duty bearers – governments, employers, service providers, housing providers, etc. – who are considering implementing vaccination status policies (aside from the requirements mandated by existing orders).

¹ [Complainant v Dr Bonnie Henry 2021 BCHRT 119](#)

A human rights approach to proof of vaccination during the COVID-19 pandemic: Key takeaways

- As more and more people get vaccinated, **human rights principles** must continue to inform our response to the pandemic.
- Policies that treat people differently based on whether they have been vaccinated — “vaccination status policies” — can and must remain consistent with the obligations legislated under B.C.’s *Human Rights Code*. **Individuals must be protected from discrimination** based on their place of origin, religion, physical or mental disability, family status or other *Code*-protected ground.
- **Vaccination status policies can be implemented in limited circumstances** — but only if other less intrusive means of preventing COVID-19 transmission are inadequate for the setting and if due consideration is given to the human rights of everyone involved. This applies to vaccination requirements introduced by government through an order of the Provincial Health Officer, as well as to the vaccination status policies of employers, landlords and service providers (aside from the requirements mandated by existing orders).
- Vaccination status policies should be justified by scientific **evidence** relevant to the specific context, **time-limited** and regularly reviewed, **proportional** to the risks they seek to address, **necessary** due to a lack of less-intrusive alternatives and respectful of **privacy** to the extent required by law. In applying such a vaccination status policy, duty bearers must **accommodate** those who cannot receive a vaccine to the point of undue hardship.
- **No one’s safety should be put at risk** because of others’ personal choices not to receive a vaccine. Just as importantly, **no one should experience harassment or unjustifiable discrimination** when there are effective alternatives to vaccination status policies.
- If an employer or other duty bearer has an ongoing relationship with a person who is unvaccinated due to an access issue, they should do all they can to **help that person get vaccinated**.
- **Those who are marginalized in our society are most likely to experience harms associated with the pandemic.** Vaccination status policies may further perpetuate inequities that affect vaccine access and uptake. However, such policies may also protect people who are not vaccinated due to inequities. The details matter.

A human rights approach to proof of vaccination during the COVID-19 pandemic

In early 2020, I issued a [policy statement on human rights during the COVID-19 pandemic](#), which offered guidance to duty bearers—such as employers, landlords and service providers—and individuals about how to ensure human rights are protected and balanced against urgent public health priorities. As I wrote in that statement and re-affirmed in my [guidance on mask-wearing during the pandemic](#), the promotion of human rights must be at the core of our response to COVID-19, particularly as the damaging effects of the pandemic have fallen disproportionately on already marginalized groups in our society.

This document echoes the call for a human rights-based response to the pandemic. It offers general advice on how duty bearers can respect human rights when developing policies that treat people differently based on whether or not they have been vaccinated against COVID-19. In this document, we refer to such policies as “vaccination status policies.”

Despite high levels of vaccination in British Columbia, the pandemic is not over, and we must prepare to live with COVID-19 risks over the longer term. Many duty bearers, including the provincial and federal governments, are implementing vaccination status policies as a means of safely allowing for limited indoor gatherings. For example, employers may consider requiring employees in some workplaces to prove they have been vaccinated or may be required to do so through an order of the Provincial Health Officer. Similarly, service providers may consider or be required to restrict unvaccinated individuals from entering their facilities.

Upholding individual rights while acting collectively to protect one another has been a challenge throughout the pandemic. We must maintain a careful balance between the rights of people who have not received the COVID-19 vaccine due to a personal characteristic protected in [B.C.’s Human Rights Code](#) (see page 10) and individual and collective rights to health and safety.

Ultimately, it is the position of B.C.’s Human Rights Commissioner that vaccination status policies can be implemented in limited circumstances— but only if other less intrusive means of preventing COVID-19 transmission are inadequate for the setting and if due consideration is given to the human rights of everyone involved. This applies to vaccination requirements introduced by government through an order of the Provincial Health Officer, as well as to the vaccination status policies of employers, landlords and service providers (aside from the requirements mandated by existing orders).

Principles for protecting human rights when developing vaccination status policies

Below are some of the principles that duty bearers should take into account as they determine whether vaccination status policies (such as proof-of-vaccination requirements) could be justified under B.C.'s *Human Rights Code* in their specific circumstances.

- **Equitable access** — If a duty bearer has an ongoing relationship with a person who is unvaccinated due to an access issue, they should do all they can to help that person get vaccinated. Access issues include: having competing responsibilities such as multiple jobs or caregiving duties, facing a language barrier, having limited access to technology needed to book appointments or being impacted by a disability ([see page 9 for more detailed examples](#)).

Every person's circumstances are different, which means different people may need to be treated differently in order to have equal access. Applying a vaccination requirement in the same way to every person may not be an equitable approach.

- **Evidence-based** — Evidence (of the risk of transmission in the specific setting) is required to justify policies that restrict individual rights for the purpose of protecting collective public health or workplace safety. Such policies must be aligned with up-to-date public health recommendations and reflect current medical and epidemiological understanding of the specific risks the policy aims to address.²
- **Time-limited** — Vaccination status policies should be used for the shortest possible length of time. Such policies should be regularly reviewed and updated to match the most recent conditions of the COVID-19 pandemic and to reflect [up-to-date public health recommendations](#).

Duty bearers are those who have a legal obligation or responsibility to respect, protect and fulfil human rights. This includes governments, employers, housing providers and other service providers.

Duty bearers have multiple overlapping and intersecting legal, ethical and social obligations, and must proceed carefully when developing policies that have human rights implications.

²See, for example, the guidance documents provided by the [BC Centre for Disease Control](#).

- **Proportional** — Vaccination status policies, if implemented, must be proportional to the health and safety risks they seek to address. As more and more people in B.C. are vaccinated and these risks decrease, duty bearers should relax their rules about vaccination status as well.
- **Necessary** — Vaccination status policies (particularly proof-of-vaccination requirements) should achieve an outcome that no other, less intrusive measures could achieve. Public health and [WorkSafeBC guidance](#) is available to assist duty bearers in implementing the least intrusive options for managing risks to health and safety. If less intrusive measures don't work well enough to prevent transmission in a given setting, vaccination status policies may be implemented as long as duty bearers also take into account their duty to accommodate³ under the *Human Rights Code*.
- **Privacy** — Vaccination status is highly sensitive personal health information and any collection, use or disclosure must be authorized by applicable privacy laws. The [Federal, Provincial and Territorial Privacy Commissioners](#) have released guidance on this matter.

These are the principles required to establish a reasonable vaccination status policy. In applying that policy to individual rights holders (such as employees), duty bearers must accommodate those who cannot receive a vaccine to the point of undue hardship. These concepts are further explained in the following sections.

Key considerations: The principles in action

COVID-19 vaccines are a critical tool

The COVID-19 vaccines approved by Health Canada have [proven highly effective](#) at protecting individuals from COVID-19 infection and serious illness.

Although vaccination is not mandatory in British Columbia, getting vaccinated against COVID-19 is an important way we can all help keep each other—especially the most marginalized and medically vulnerable people among us—as safe as possible .

Barriers to vaccine access remain

Unlike other provinces, B.C. currently does not collect disaggregated demographic data on COVID-19 transmission, outcomes or vaccination rates. The exception is in relation to First Nations and Métis identity, where the data show more effort is needed to bring vaccination rates up to match those in the general population.⁴ In many peer jurisdictions where more disaggregated demographic data is available—e.g., Ontario, the U.K. and the U.S.—researchers continue to find

³ When rules, policies, practices, physical space and systems have a negative impact on an individual or group protected under the B.C. *Human Rights Code* they could be seen as discriminatory. Persons or organizations are responsible to modify (duty to accommodate) these rules, practices, systems, etc. unless it would create undue hardship to do so.

⁴ See for example: [COVID-19: Low vaccination rates among BC First Nations a concern | Vancouver Sun \(August 22, 2021\)](#)

further inequities in vaccine access.⁵ It is reasonable to assume that disaggregated data in B.C. would reveal similar disparities.

Disaggregated data is data that provides sub-categories of information, for example by ethnic group, gender, occupation or educational status. Sometimes this is called **demographic data**. Unlike aggregated data, which groups information together, disaggregated data can reveal inequalities and relationships between categories.

For more information please see our September 2020 report, [Disaggregated data collection in British Columbia: The grandmother perspective](#).

The increased supply of COVID-19 vaccines in B.C. has addressed many of the early equity concerns regarding access to vaccination but barriers remain. For example:

- Language barriers or a lack of access to a phone or internet connection make it more difficult for some to find information about vaccination.
- Migrant and undocumented workers, many of whom do not have a Personal Health Number, may be unaware they are eligible for the vaccine or concerned about revealing their immigration status.
- Those with physical or mental disabilities or chronic health conditions may have difficulty booking or going to their vaccine appointment.
- Precarious or low-wage workers with multiple jobs and caregiving responsibilities may lack the time or resources to prioritize visiting a vaccination site, even when provided leave from work.

In all these cases, **it is the marginalized in our society who are most likely to experience harms associated with the pandemic.**

⁵ See for example:

- Ontario's experience: [An-uneven-recovery-Measuring-COVID-19-vaccine-equity-in-Ontario.pdf \(wellesleyinstitute.com\)](#) and [Ontario's wealthiest zones get head start on second doses as vulnerable communities play catch-up, data shows | CTV News](#) (June 15, 2021)
- U.S. data on vaccination rates by race/ethnicity: [Disparities in Reaching COVID-19 Vaccination Benchmarks: Projected Vaccination Rates by Race/Ethnicity as of July 4 | KFF](#) (June 14, 2021)
- U.K. data showing vaccination rates are lower among elderly black people: [One in four elderly black people in England still not vaccinated | Vaccines and immunisation | The Guardian](#) (June 5, 2021)

In addition, the [Chief Science Advisor of Canada notes](#):

“...special attention needs to be directed to certain racialized, Indigenous and disadvantaged communities. These communities may lack trust in established medical institutions and/or their governments due to historical harms, such as experimentation without consent in residential schools and persistent inequitable care experienced in the medical system.”

This is an important reminder that, for some, the choice to opt out of vaccination may be linked to historic and ongoing oppression.

Unvaccinated individuals are a diverse group with a wide range of life circumstances; each person may have a different reason why they have not accessed a vaccine. Before duty bearers draft policies that treat people differently based on vaccination status, every measure must be taken to eliminate barriers to access for people who would like to receive a vaccination against COVID-19.

For example, as governments introduce new requirements to show proof of vaccination, they have a responsibility to implement significant vaccine outreach and support efforts of all kinds, particularly culturally appropriate outreach to communities with lower vaccination rates.

Human rights implications of vaccination status policies

It is easy to see why people are drawn to the idea of vaccination status policies. Many hope these policies can help us safely resume the in-person activities we have missed so much since the start of the pandemic.

However, vaccination status policies must remain consistent with the obligations legislated under B.C.'s *Human Rights Code*.

B.C.'s Human Rights Code prohibits discrimination based on certain personal characteristics known as **protected grounds**. Sometimes these are called protected characteristics or grounds of discrimination. The personal characteristics protected in the *Code* may be someone's actual characteristic or they may be how they are seen.

Our website offers a list of [current Code-protected grounds](#) and their definitions.

Code-protected grounds

The *Code* requires duty bearers to protect individuals (rights holders) from unreasonable discrimination in employment, services, housing and other named areas and when the discrimination is related to a protected ground.⁶ In this case, relevant protected grounds may include physical or mental disability, place of origin, religion and family status. For example, family status may be applicable in situations where parents are discriminated against because their children are too young to be vaccinated.

In my view, 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 a duty bearer implementing a vaccination status policy.

This is consistent with recent decisions of the B.C. Human Rights Tribunal (BCHRT). In a September 9, 2021 screening decision, the BCHRT dismissed a complaint that alleged the provincial government's proof-of-vaccination requirements discriminate on the basis of political belief. In her decision, the Chair of the BCHRT wrote: "I accept that a genuinely held belief opposing government rules regarding vaccination could be a political belief within the meaning of the Code. In saying this, however, I stress that protection from discrimination based on political belief does not exempt a person from following provincial health orders or rules. Rather, it protects a person from adverse impacts in their employment based on their beliefs."⁷

Potential human rights benefits

Vaccination status policies may further perpetuate inequities that affect vaccine access and uptake. However, such policies may also protect people who are not vaccinated due to inequities. Those who provide services, housing or employment to unvaccinated or otherwise vulnerable people face an increased burden to ensure they have policies in place to decrease risk of COVID-19 transmission.

Evidence-based, timely and tailored

When designing vaccination status policies, duty bearers should proactively address potential human rights implications rather than waiting to see whether issues arise after the policies are implemented. Key in doing so is ensuring policies are **evidence-based and aligned with current public health guidance, subject to regular review and tailored to the specific context in which the duty bearer operates.**

For example, safety measures that may be necessary during a time of high transmission may not be justifiable at a time when transmission rates are low. Likewise, the risk of transmission changes depending on whether people can easily maintain physical distance or if close proximity is required given the nature of a job or service.

⁶ Thus sections 7(1)(a), 8, 9, 10, 11, 13 and 14 of B.C.'s *Human Rights Code* may apply.

⁷ [Complainant obo Class of Persons v John Horgan, 2021 BCHRT 120, at para. 11](#)

Scientific knowledge about the virus is advancing quickly, which affects our understanding of, for example, how the spread of the disease will change as more people are fully vaccinated. Just as public health recommendations will shift in the face of new information, what is considered reasonable for duty bearers to do to protect and accommodate human rights might also change.⁸

Accommodation and undue hardship

Under the *Human Rights Code*, people who cannot be vaccinated because of a *Code*-protected ground must be accommodated to the point of undue hardship. This means that duty bearers have to take every step possible to address the needs of those who require accommodation, unless taking those steps would amount to “undue hardship” for the duty bearer — if, for example, the accommodation would create health and safety risks for others or would be inordinately expensive. There is no universal definition for “point of undue hardship;” it is different in different circumstances, highly fact-dependent and requires objective evidence to determine.

Simply put, however, duty bearers must accommodate the diverse needs of their employees and the public to the greatest extent possible—appreciating the difficulty of designing policy in the midst of shifting pandemic conditions.

Duty bearers should implement current public health and WorkSafeBC recommendations for decreasing the risk of COVID-19 transmission. This increases the safety of those most at risk from COVID-19 while reducing the need for more prescriptive vaccination status policies.

If vaccination status policies are necessary to address specific safety concerns in a particular setting, duty bearers must seek to accommodate people unable to get vaccinated. Those accommodations should be based on the individual needs of those involved and should be as easy and unburdensome as possible. For example, employers may exempt an employee from the vaccination status policy, create a requirement for staff to wear a face mask, work at a physical distance from others, work a modified shift, get periodic tests for COVID-19, work remotely or accept a reassignment to a setting that poses less risk of transmission.

Limits to seeking vaccine information

There will be limited circumstances in which a duty bearer may be justified in seeking proof of vaccination.

In circumstances where determining individuals’ vaccination status is necessary to address a specific safety risk, it is critical that this confidential health information is collected in the least intrusive means possible and only to the extent necessary to protect safety and facilitate accommodations.

⁸ For example, as described in the [Canadian Council of Parliamentary Ombudsman’s statement](#) on the use of vaccine passports, “There should be a continuous assessment of whether there continues to be risk of transmission by those who have been vaccinated — and if so, an explanation of the rationale for continued use of such vaccine certificates or passports.”

Appropriate safeguards must be in place to ensure the information is stored securely and only held for as long as directly needed in accordance with applicable privacy law.

Although government's introduction of a BC Vaccine Card has made it easier for duty bearers to request vaccination information and for rights holders to provide it, the availability of this information should not be interpreted as permission for duty bearers to ask for proof of vaccination when it is not warranted. For more on privacy and the BC Vaccine Card, see the Office of the Information and Privacy Commissioner's list of [frequently asked questions](#).

Duty bearers must also consider that some vaccinated individuals still face barriers accessing proof of their vaccination status, such as those without internet or telephone service and those without a mailing address. In addition, requiring that people present government-issued photo ID is a further barrier for those who do not have ID or for two-spirit, trans, and non-binary people whose government ID and legal documents may contain incorrect names and inaccurate gender markers. I recommend compassion and flexibility when applying vaccination status policies to people from marginalized groups.

Conclusion

It is in challenging times that it is most critical to place human rights at the centre of our decision making. **No one's safety should be put at risk because of other people's personal choices not to receive a vaccine, and no one should experience harassment or unjustified discrimination when there are effective alternatives to vaccination status policies.**


We must all guard against the impulse to react out of fear, speculation and stereotyping. Restrictions imposed in the name of safety must be justified based on the most current public health recommendations reflecting the best available medical and scientific evidence, relevant to a specific setting.

Our actions as a society are essential to uphold human rights for all. Each of us has a responsibility to treat others with dignity and respect, to lead with empathy and kindness and to do what we can to keep each other safe.



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