

What Can an Employer do if Their Employee is Not Complying With Their COVID-19 Work Safety Protocols?



We previously advised you here that on May 14, 2020, Dr. Bonnie Henry required employers to develop workplace COVID-19 safety plans outlining the policies and procedures they had in place to reduce the risk of exposure to COVID-19. These plans must be posted and made available to the public and provided to health officers and WorkSafeBC upon request.

When preparing these safety plans, employers should follow the public health and occupational health and safety guidelines regarding the prevention of the spread of COVID-19, and revise their plans as the pandemic evolves. Whatever the plan may be, employers should monitor compliance and take appropriate action when an employee fails to comply.

When an employer obtains information that an employee is not complying with the safety protocols, employers should be careful to adequately investigate the reasons for non-compliance. It may be that an employee simply does not understand the protocol, or that they do not understand their responsibility under occupational health and safety legislation to assist in creating and maintaining a safe work environment. An employer should therefore take care to provide the appropriate education and information at the roll out of the plan so that employees understand why it is important to follow protocol and how to properly do so.

If the reason for non-compliance relates to a protected ground under human rights legislation, the duty to accommodate may arise. For example, an employee may have a disability, such as a hearing impairment or an illness causing breathing restrictions, which makes wearing a mask prohibitive. If the reason for non-compliance relates to a privacy issue, such as the employee having to submit to temperature checks or be monitored through a contact tracing app, the employer should ensure that the safety measure is, in the unique circumstances of its workplace, justifiable under privacy legislation.

Absent a lack of understanding or a human rights or legitimate privacy concern, an employee's blatant refusal to follow protocol may merit discipline. Though one course of disciplinary action may be termination of employment, an employer must use the "contextual approach" by first considering the employee's actions in light of all the surrounding circumstances and try to strike a balance

between the severity of the misconduct and the sanction imposed (see *McKinley v. BC Tel*, 2001 SCC 38).

At the end of the day, employers in BC have a legal obligation to provide employees with a safe work environment during this pandemic and not endanger the health and safety of other people these employees may interact with. An employer must therefore be prepared to respond to an employee who might not act in accordance with that effort.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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