MANAGEMENT COUNSEL
Employment and Labour Law Update

SHERRARD KUZZ LLP
Employment & Labour Lawyers

Mandatory Vaccination Policies – Where do we stand?

Much has happened since our first article on mandatory vaccination policies, published in January 2022. At the time, the Omicron variant was sweeping across Canada and courts and arbitrators had begun to weigh in on the legality of policies requiring employees to be vaccinated against COVID-19. Since then, with the easing of public restrictions and people going back to school and the workplace, mandatory vaccination policies have come under renewed scrutiny.

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While courts have been relatively quiet on the issue, there are now several arbitration decisions where arbitrators have found as "reasonable" policies that hold unvaccinated employees out of work on an unpaid leave. By contrast, vaccination-or-termination policies have received a less consistent reception.

Let's look at some of the leading decisions.

Vaccinate-or-unpaid-leave

Arbitrators have generally found that a policy is reasonable if it requires an employee to be vaccinated, failing which they will be placed on an unpaid leave. When assessing reasonableness, the nature of the workplace and associated risk of exposure are key factors. For example, if the workplace is indoors and employees are required to work in-person (*e.g.,* manufacturing[1]), or there is a higher risk of transmission or a vulnerable population (*e.g.,* retirement home[2] or school[3]), a vaccinate-or-unpaid leave policy is more likely to be reasonable.

In *PWU v Elexicon Energy Inc,*[4] the policy required employees to receive both a primary course and booster dose of vaccine. The employer was an energy distribution company with employees working indoors in an office, in the field, at home or outdoors. The arbitrator found the policy was reasonable for employees who work indoors because the policy was consistent with the employer's obligation to take every precaution reasonable in the circumstances to protect workers, and rapid antigen testing was not a reasonable alternative. However, the arbitrator found the policy to be unreasonable for employees who work from home or exclusively outdoors.

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Is mandating only a primary vaccine series still reasonable?

With the emergence of the Omicron variants and evolving science regarding the efficacy of a primary series of vaccine, arbitrators are being asked to consider whether a vaccine policy mandating two doses remains reasonable.

In each of *Extendicare Lynde Creek Retirement Residence v UFCW, Local 175*[5] (retirement home) and *Maple Leaf Foods Inc v UFCW, Local 175*[6] (food manufacturing facility), the arbitrator held that a primary series vaccination-or-unpaid leave policy was reasonable as of April, 2022.

In *Alectra Utilities Corporation v Power Workers' Union*,[7] the arbitrator upheld a similar vaccination policy in June 2022, despite recognizing that protection from the vaccine waned over time. The arbitrator was satisfied that those who remained unvaccinated created an increased risk for those who were vaccinated.

By contrast, in *FCA Canada Inc v UNIFOR, Locals 1, 444, 1285*,[8] Arbitrator Nairn found that a vaccination-or-unpaid leave policy which was reasonable initially, was no longer reasonable as of June, 2022. Arbitrator Nairn relied on a study she interpreted as stating that a primary series of vaccine does not offer increased protection against Omicron.

However, in a subsequent arbitration, *Coca-Cola Canada Bottling Ltd v UFCW, Local 175*,[9] the arbitrator found that Arbitrator Nairn had misinterpreted the study, and that a two-dose series did offer some protection against Omicron. As such, that vaccination policy was still reasonable as of September, 2022.

Vaccination-or-termination policy

Arbitrators are less consistent when the policy mandates termination of employment rather than unpaid leave.

In *Chartwell Housing Reit v HOPE, Local 2220*,[10] the mandatory vaccination policy first placed employees who refused vaccination on unpaid leave and subsequently, if the refusal continued, terminated their employment. The arbitrator found that termination for non-compliance was unreasonable because:

- it did not allow for an individual assessment of mitigating factors
- there was no imminent health risk as unvaccinated employees were out of the workplace
- recognizing the fluidity of the pandemic, the policy did not give employees on leave enough time (two months) to make a decision about whether to become vaccinated to keep their job.

Regarding the latter point, the arbitrator left open the possibility that termination could be appropriate at some point, but did not specify when that point might be.

When assessing reasonableness, the nature of the workplace and associated risk of exposure are key factors.

In *Toronto Professional Fire Fighters' Association, IAAF Local 3888 v Toronto (City)*,[11] the arbitrator found that keeping unvaccinated employees out of the workplace on unpaid leave was reasonable, but terminating them for refusing to be vaccinated was not. The arbitrator's primary reasoning was that terminating an employee offered no additional protection against COVID-19 than if they were put on unpaid leave.

By contrast, an arbitrator in British Columbia found that a healthcare employer's termination of a substance abuse counsellor who refused to be vaccinated was reasonable. The B.C. Public Health Authority had issued an order that no unvaccinated employee could work in a hospital, but did not specify the consequences for non-compliance (*i.e.*, unpaid leave or termination). The employer terminated the employee's employment and the union grieved the termination. The arbitrator found the employer acted reasonably because there was no reasonably foreseeable prospect the employee would return to work; the employee refused to be vaccinated; and there was no evidence as to when the order would be lifted.

We will continue to follow these developments and keep our readers apprised.

To learn more and for assistance with any COVID-19-related workplace issue, contact Sherrard Kuzz LLP.

[1] *UNIFOR, Local 973 v Coca-Cola Canada Bottling Ltd*, 2022 CanLII 25769 (ON LA) (Wright).
[2] *Revera Inc. (Brierwood Gardens et al.) v Christian Labour Association of Canada Award*, 2022 CanLII 28657 (ON LA) (White).
[3] *Toronto District School Board v CUPE, Local 4400*, 2022 CanLII 22110 (ON LA) (Kaplan).
[4] 2022 CanLII 7228 (ON LA) (Mitchell).
[5] 2022 CarswellOnt 4662 (Raymond).
[6] 2022 CanLII 28285 (ON LA) (Chauvin).
[7] 2022 CanLII 50548 (ON LA) (Stewart).
[8] 2022 CanLII 52913 (ON LA) (Nairn).
[9] 2022 CanLII 83353 (ON LA) (Herman).
[10] 2022 CanLII 6832 (ON LA) (Misra).
[11] 2022 CanLII 78809 (ON LA) (Rogers).
[12] *Fraser Health Authority v British Columbia General Employees' Union*, 2022 CanLII 25560 (BC LA) (Kandola).

DID YOU KNOW?

According to Statistics Canada, the proportion of workers in Canada aged 15 to 69 who work exclusively from home continues to drop, and has dropped 7.5% (to 18%) since the beginning of 2022. By contrast, the proportion of workers with a hybrid work arrangement - who usually work both at home and at locations other than home – increased slightly (0.7 percentage points) to 8.6% in August 2022.

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The Future of Remote Work: Practical Considerations for Employers

As employers navigate the future of remote work, there are many practical and legal considerations. To maintain sufficient flexibility to manage the workplace, comply with legal requirements and mitigate associated risks, it is important to consult with experienced employment counsel.

This article highlights some of the practical issues an employer might consider. To learn more and for assistance, contact your Sherrard Kuzz LLP lawyer or info@sherrardkuzz.com.

Written remote work policy

An often overlooked but important step is to create a written policy for remote work. A well written policy will set out and manage expectations and mitigate the risk an employee may later successfully claim that a change to their work arrangement constitutes a constructive dismissal.

Who can work remotely and when

A remote work arrangement may be suitable for some, but not all, employees depending on the nature of an employee's duties or even individual attributes, such as the ability to work independently and manage a workload efficiently.

In many cases, an employer should reserve the right to require an employee to attend the workplace as needed; for example, to attend a team meeting or to address the needs of a client or colleague.

An employer may also want to reserve its right to revoke the remote work arrangement altogether if there are concerns with an employee's performance or if the employer determines operational needs necessitate an employee return to the physical workplace.

Set parameters around where an employee can work

Legal standards differ across Canadian jurisdictions (and outside Canada), exposing an employer to unexpected risk if an employee relocates outside the 'home' jurisdiction. If an employee moves to another jurisdiction, whether at the employer's request or on their own, the employer may find itself bound to the laws of the jurisdiction where the employee now resides and works. There may also be circumstances in which the laws of *both* jurisdictions apply. As these laws relate to employment standards, human rights, health and safety, tax, and workers' compensation (to name a few), the implications can be significant.

To protect your business, consider including a provision to address each of the following:

- Permitted work jurisdiction(s)
- The right of the employer to unilaterally change an employee's jurisdiction of work (including, any remote work arrangement)
- The type and frequency of work that can be done off-site

For additional information on jurisdictional issues related to remote work, see this article in our January 2021 Management Counsel newsletter and/or contact our office.

Monitoring employee performance

An employee working remotely may be out of sight, but they need not be out of mind. An employer is entitled to monitor and manage an employee's performance while they work remotely. Some employers may use software to monitor compliance with workplace policies and keep track of efficiency and productivity.

In Ontario, an employer with 25 or more employees in the province as of January 1, 2022 must have a written policy by October 11, 2022.[1] Among other things, this policy must include a description of how, and in what circumstances, the employer may electronically monitor an employee, and the purposes for which the information obtained through electronic monitoring may be used.

Even if an employer is not required to have a policy on electronic monitoring, an employer may still want to inform an employee about how they are being electronically monitored and if the employer is collecting information through its monitoring processes. This is particularly true in jurisdictions where private sector privacy legislation exists. For example, in British Columbia and Québec, privacy legislation addresses the collection of an employee's personal information, and monitoring employees through surveillance is limited to what is reasonably necessary in the context.

Compliance with minimum employment standards

Whether an employee is working on-site or remotely, an employer must comply with applicable employment standards legislation. This includes standards related to rates of pay, hours of work, meal breaks, rest periods and overtime, among others.

Ensure safe work

In Ontario, an employer has a duty under the *Occupational Health and Safety Act* (the "OHSA") to "take every precaution reasonable in the circumstance for the protection of the worker". However, the OHSA explicitly states it does not apply to work performed in a private residence. Given that 'workplace' is broadly defined in the OHSA and not all remote work is performed in a private residence, some, but not all, work performed remotely may be excluded from the scope of the OHSA.

By contrast, in Ontario, Québec and British Columbia, the respective workers' compensation regimes apply even if an employee is working remotely.

In any event, an employer should ensure an employee working remotely is aware of their obligation to comply with the employer's health and safety policies during working hours, including reporting a workplace injury.

To learn more and for assistance, contact your Sherrard Kuzz LLP lawyer, or our firm at info@sherrardkuzz.com.

[1] Section 41.1.1 of the *Employment Standards Act* (Ontario).

Please join us at our next HReview Breakfast Seminar:

HReview
Seminar Series

Current Trends in Unionization and Collective Bargaining

Inflation, labour shortages and workplaces returning to a "new normal" have increased interest in unionization in some private sector industries and brought new challenges to the collective bargaining table.

Join us as we discuss:

1. **Current Unionization and Wage Trends**
   - The impact of the current economy on unionization rates in the private sector.
   - The impact of the labour shortage and inflation on wage demands.
   - Creative solutions to increase wages and manage expectations.
2. **COVID Clauses**
   - Recent trends related to sick leave and other COVID-19 inspired provisions.
   - Remote work and the collective agreement.
3. **Legislative and Case Law Update**
   - Recent interest arbitration case law.
   - Update on wage restraint legislation across Canada.
4. **Practical Tips for the Bargaining Table**
   - Virtual vs. in-person bargaining (and when there may be an opportunity for both).
   - What to do when employees don't ratify a collective agreement.
   - When to use (or avoid) a final offer vote.

DATE: **Wednesday, December 7, 2022, 9:00 a.m. – 10:30 a.m.**
WEBINAR: **Via Zoom** (registrants will receive a link the day before the webinar)
COST: Complimentary
REGISTER: **Here by Monday, November 28, 2022**

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