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LEXPERT.CA > ISSUE 23.04

SPECIAL EDITION: LITIGATION 2022

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MANDATORY VACCINATION POLICIES: WHERE DO WE STAND?

MAJORITY OF MANDATORY VACCINATION POLICIES HAVE BEEN UPHELD, AS EFFECT OF PANDEMIC ON EMPLOYEES REMAINS FLUID

IN 2021, many employers implemented vaccination policies to encourage and, in some cases, require employees to be vaccinated against COVID-19. Since that time, with the arrival of the Omicron variant last winter, the elimination of most public restrictions this spring, and the in-person return to school and work for many this fall, the legality of COVID-19 vaccination policies has come under increased scrutiny. In Canada, the leading arbitral and court decisions signal that mandatory vaccination policies will continue to be enforceable in appropriate circumstances.

Vaccinate or unpaid leave

In the unionized context, 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. manufacturing¹) or there is a higher risk of transmission or a vulnerable population (e.g. retirement home² or school³), 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 dose and booster dose of the vaccine. The employer was an energy distribution company with some employees working indoors in an office and others working 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.

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.

Similarly, in *Alectra Utilities Corporation v. Power Workers' Union*,⁷ the arbitrator upheld a 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 still offer some protection against Omicron. As such, the vaccination policy was 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 for cause. The arbitrator found that termination for non-compliance was unreasonable because:

- it did not allow for an assessment of individual 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 decide 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.

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 Columbia¹² found that a healthcare employer's termination of a substance abuse counsellor who refused to be vaccinated was reasonable. The BC Public Health Authority had issued an order that only vaccinated employees 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.

A similar result was reached in another British Columbia arbitration decision.¹³ The healthcare employer (governed by the same order discussed above) terminated the employment of a casual healthcare assistant employed in a hospital. The arbitrator dismissed the grievance and concluded the employment relationship was frustrated due to the employee's failure to be vaccinated and the ineligibility to work that flowed from that decision.

Vaccination policies and constructive dismissal

A recent decision from the Supreme Court of British Columbia is the first to consider if placing an employee on unpaid leave for a refusal to be vaccinated constitutes constructive dismissal. In *Parmar v. Tribe Management Inc.*,¹⁴ a condominium management employer placed an employee on an unpaid leave of absence after she failed to comply with its mandatory vaccination policy. The employee claimed this act constituted a constructive dismissal. The court disagreed. It held the policy was a reasonable and lawful response to the COVID-19 pandemic. To this end, the court took judicial notice of the fact that the COVID-19 virus is potentially deadly and vaccines work. The court also found it was the employee's choice not to be vaccinated and she could return to work at any time by getting vaccinated.

All in all, the leading decisions indicate that mandatory vaccination policies will continue to be upheld if drafted and implemented in a reasonable manner, despite a lessening of government restrictions and mandates. We will undoubtedly see more decisions on this issue as cases wind their way through the judicial/arbitral system. To learn more and for assistance, 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) (Naim).

⁹ 2022 CanLII 83353 (ON LA) (Herman).

¹⁰ 2022 CanLII 78809 (ON LA) (Rogers).

¹¹ *Fraser Health Authority v. British Columbia General Employees' Union*, 2022 CanLII 25560 (BC LA) (Kandola).

¹² *Fraser Health Authority v. Hospital Employees' Union*, 2022 CanLII 91089 (BC LA) (Doyle).

¹³ 2022 BCSC 1675.

¹⁴ 2022 CanLII 6832 (ON LA) (Misra).

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