

Can You Make Unvaccinated Workers Pay for Their Own COVID Tests?



Although vaccine mandates are coming down, the litigation battle continues. There have now been about a dozen cases challenging the legality of a workplace mandatory vaccination policy, all but two of which have been decided in the employer's favour. But now a new issue has arisen: COVID-19 testing policies. Ironically, the litigation focuses on employers that tried to give workers a breaking by allowing them to undergo testing as an alternative to being vaccinated. **The question:** Can the employer require unvaccinated workers to pay for their own testing? To date, there have been 2 reported rulings on this issue, with split results:

Employer Wins

In response to a general contractor's demands, a construction subcontractor required employees who wanted to work at the site either to get vaccinated or submit to rapid antigen COVID-19 testing. While not objecting to mandatory testing, the union objected to the part of the policy requiring employees to pay for being tested. The Alberta arbitrator tossed the grievance. Under the OHS laws, 'workers have an important role to play' in their own safety. It's 'fair and reasonable' that workers who choose not to get vaccinated but still want to work on the site pay for their own testing and not impose those costs on their employer, the arbitrator concluded [*Construction Workers Union, CLAC Local 63 v Brock Canada Field Services Ltd.*, 2022 CanLII 22228 (AB GAA), March 23, 2022].

Employer Loses

The second case involved a similar policy adopted by an employer in BC. As in the Alberta case, workers who chose not to get vaccinated had to pay for their own rapid antigen tests. The difference was that taking a simple home test wasn't enough. Workers had to be tested either by a certified lab or with the supervision of a certified lab assistant. The union claimed that making workers

pay for their own tests was unreasonable and in violation of the collective agreement. The BC labour arbitrator agreed but stopped short of finding that the workers should be paid for the time they spent in getting the required tests [*Finning (Canada) v International Association of Machinists and Aerospace Workers Vancouver Lodge 692*, 2022 CanLII 25773 (BC LA), March 31, 2022].