

Key Trends In Arbitration Awards Pertaining To Mandatory COVID-19 Vaccination Policies



Since late fall 2021, we have seen a steady flow of arbitration awards emerge in Ontario and British Columbia that consider issues relating to mandatory COVID-19 vaccination policies in the unionized workplace. In this Insight, we provide an overview of key trends in these awards.

- **Mandatory Vaccination Policies Are Reasonable and Enforceable and a Reasonable Exercise of Management's Right to Issue Workplace Policies:** The "weight of authority" supports the imposition of vaccine policies in the workplace to reduce the spread of COVID-19, provided that employers comply with their obligation to accommodate employees under human rights legislation. The authority to impose such policies arises from management's right to implement reasonable rules and regulations under the collective agreement, and from the employer's duty to take necessary measures to protect the health and safety of workers under occupational health and safety legislation, which outweighs the minimal intrusion on the employee's privacy rights. Apart from an employee's right to be accommodated under the human rights legislation, their beliefs or personal subjective preferences cannot override science and an employer's obligation to maintain the health and safety of the workplace. We are aware of only one arbitration award, rendered in November 2021, in which an arbitrator determined that a vaccination policy was unreasonable because the employer had been able to protect its workplace using a combination of vaccination and testing. Notably, this award was made when the Delta variant prevailed, and before the more transmissible Omicron variant had become dominant and it was discovered that rapid antigen tests were less reliable for Omicron than for Delta. In making this November 2021 award, the arbitrator emphasized the importance of context in conducting an assessment of a vaccination policy's reasonableness, and stated that due to the fluid nature of the pandemic, a policy that was once reasonable or unreasonable may not be at a later point in time.
- **Mandatory Vaccination Policies Do Not Force Employees to Get Vaccinated:** A number of arbitrators have expressed the view that a mandatory vaccination policy does not force an employee to get vaccinated without their consent. Employees are free to choose whether to get vaccinated or remain

unvaccinated. If they choose to remain unvaccinated, however, they will experience an economic consequence, *i.e.*, the loss of their income.

- **The Requirement to Attest to Vaccination Status is Reasonable:** The requirement to attest to vaccination status is reasonable to protect the health and welfare of other employees; however, it is helpful to give employees a reasonable period to attest to their vaccination status. Furthermore, to protect the information's confidentiality, it is important to ensure that an employee's vaccination status information is disclosed on a need-to-know basis only and securely stored.
- **Expert Scientific Evidence Supports the Effectiveness of Vaccination Over Rapid Antigen Testing:** In concluding that mandatory vaccination policies are a reasonable exercise of management rights, a number of arbitrators have stressed and appear to have been strongly influenced by expert scientific evidence regarding the efficacy of vaccines relative to rapid antigen testing, which confirms that vaccination is the most effective way to reduce COVID transmission in workplaces, and to reduce its severity, the risk of hospitalization, and death.
- **Context is Important in an Analysis of the Reasonableness of a Vaccination Policy:** Arbitrators have noted that context at the time of the analysis rather than when the policy was implemented, is an important factor to consider because reasonableness of a vaccination policy in a pandemic is contextual and highly dynamic. Precedents decided in a completely different context become less relevant than they otherwise might be, *e.g.*, a precedent decided before the Omicron variant became dominant may be less relevant than while Omicron is dominant. Examples of other contextual factors that influenced arbitrators include: whether the policy applies to employees who work indoors (even partially), exclusively outdoors, or at home with no intention of returning to the workplace in the near future; that the employer operated on land leased from a federally regulated entity that was subject to a federal government requirement to establish a mandatory vaccination policy, the lessor required that its lessees establish vaccination policies, and the employer's lease required that it follow the lessor's policies and procedures; the nature of the service provided by the employer, *i.e.*, that the employer provides an essential service and therefore it has a responsibility to do everything possible to ensure that its employees remain healthy in the face of COVID-19; that a significant percentage of the population in the workplace where the employees work (schools) are ineligible for vaccination; that the employees work and travel in close contact with other employees, contractors, and members of the public; and, more generally, the extraordinary health challenge of a global health pandemic that has claimed six million lives worldwide.
- **Testing of Unvaccinated Employees is Reasonable and While Employers Must Pay for the Tests They Need Not Compensate Employees for Time Spent Administering Them Outside Working Hours:** Arbitrators have said that the testing of unvaccinated employees is reasonable because occupational health and safety legislation requires an employer to take every precaution reasonable in the circumstances for the protection of a worker. Employers must pay for the tests for unvaccinated employees, but they are not required to compensate employees for time spent administering the test outside working hours.

- **Requiring Employees to Attest to Their Vaccination Status is Reasonable:** Arbitrators have said that the requirement that employees attest to their vaccination status is reasonable to protect the health and welfare of other employees; it helps to give employees a reasonable period before they must attest, and, to protect their privacy, it is important to ensure that their vaccination status information will be disclosed on a need-to-know basis only and securely stored.
- **Discipline and Termination of Employment for Non-Compliance With a Vaccination Policy is Reasonable:** The view has been quite consistent that a mandatory vaccination policy that contemplates the possibility of discipline or termination upon an employee's non-compliance with a mandatory vaccination policy is reasonable provided that the alternative is included in a manner that is consistent with the terms of the collective agreement; employees are warned that termination of employment is possible; and the employer inquires about individual circumstances and, when feasible, it accommodates them. Even in the absence of a termination alternative in a policy, employers will not be expected to keep non-compliant employees on an indefinite leave of absence; subject to the provisos listed above, employers may be able to utilize their Management Rights under their collective agreements to terminate the employment of non-compliant employees for just cause. Furthermore, when an employee advises their employer that they have no intention of ever becoming vaccinated, and for this reason there is no reasonable prospect of the employee's becoming eligible to work in the foreseeable future, termination is not considered an excessive response, subject also to the provisos listed above. We wrote about only one outlier award in which the arbitrator did not take this position and decided instead that the discipline aspect of the vaccination policy was unreasonable and should be severed.

Source: Littler

Written By: Rhonda B. Levy and Barry Kuretzky