Vaccination Requirements And The Canadian Workplace: Anticipating The Next Big Question Of The Pandemic

Whether an employer can require its employees to be vaccinated against COVID-19 as a condition of continuing employment is the latest in a series of important legal questions to arise from the COVID-19 pandemic. While it is already attracting media interest, the issue of mandatory vaccination has not been conclusively decided in a judicial context in Canada. It is therefore likely that workplace COVID-19 vaccination requirements will be litigated before too long, whether in the courts or ‘ in unionized workplaces ‘ by arbitrators.

In this post, we look at what the existing authority in Canada tells us about the legality of mandatory vaccination policies, which has long been a controversial subject. The balance of existing authority suggests that the enforceability of such policies is partly dependent on the workplace in which they are applied:

- In **healthcare** (hospitals and long-term care homes) it is likely that an appropriately drafted and implemented mandatory COVID-19 vaccination policy would be upheld as both necessary and reasonable.
- In **other “congregate work settings”** where there is a demonstrated and heightened safety risk from COVID-19 transmission (e.g., meat packing plants, warehouses, construction), such a policy may also be upheld.
- In **other contexts,** where the existing evidence of the risk of transmission is less clear and may be mitigated by workplace measures less intrusive than vaccination (such as masks, physical barriers/distance, and testing), or by working from home, the enforceability of a mandatory vaccination policy is similarly less clear.

In the unionized context, the Supreme Court of Canada has endorsed a balancing-of-interests approach to the unilateral exercise of management rights to ensure reasonable safety in the workplace.[1] Accordingly, a mandatory vaccination policy may be considered both necessary and reasonable if the need for the rule outweighs the harmful impact on employee rights. For any employer considering the implementation of a mandatory COVID-19 vaccination policy, it would be crucial to design a policy that provides employees with a reasonable, non-disciplinary alternative to vaccination, such as working from home (where possible) or an unpaid leave of absence (where working from home is not

possible), and to accommodate employees who cannot get vaccinated for medical reasons or because of protected grounds for discrimination under human rights legislation. A mandatory COVID-19 vaccination policy should not be a blanket policy. A policy that distinguishes between high risk and lower risk roles, akin to safety-sensitive and non-safety-sensitive roles in the drug and alcohol testing context, would likely enhance a policy's justification.

It should be noted that certain public sector employers have statutory authority to require their employees to be vaccinated against specific diseases.[2] Special legislation can also be applicable to supplement employee rights ' Ontario, for example, has adopted legislation that provides for job-protected leaves of absence during the pandemic.[3] However, private sector employers have no statutory authority at this time to require their employees to get vaccinated against COVID-19, and provincial governments have so far indicated that COVID-19 vaccination will not be made mandatory.

In this post, we look at the existing law on mandatory workplace vaccination in the common law provinces. In a future post, we will look at some of the emerging decisions on COVID 19-related testing and screening policies.

Mandatory Workplace Vaccination: Past Rulings

Provincial occupational health and safety (OHS) legislation stipulates that employers have a duty to protect employees from work-related illness or injury.[4] To fulfill this duty, some hospital employers have previously introduced mandatory vaccination policies to limit the spread of influenza in the workplace, with most (but not all) such policies upheld.

The limits to an employer's ability to implement mandatory flu vaccination policies have generally only been addressed in arbitration cases in the unionized context, thus the applicable collective agreement will often have an impact on what is permissible in the specific circumstances. In addition, given that arbitration decisions are not binding on other arbitrators or courts, it is uncertain how much weight these past cases will have on the question of whether employers can implement a mandatory COVID-19 vaccination policy, especially in a non-union setting. Moreover, a vaccination requirement imposed as a result of an ongoing pandemic or an active outbreak of a highly infectious disease is likely to be treated differently from one imposed on employees in ordinary circumstances.

Where an employer unilaterally imposes a policy in a union setting, the criteria to determine whether the policy is reasonable and enforceable are as follows (the *KVP* factors):

- It (the policy) must not be unreasonable.
- It must not be inconsistent with the terms of employment for non-unionized employees or collective agreement for unionized employees.
- It must be clear and unequivocal.
- It must be brought to the attention of the employee affected before the employer can act on it.
- The employee concerned must have been notified that a breach of such rule could result in their discharge if the rule is used as a foundation for discharge.
- Such rule should have been consistently enforced by the employer from the

time it was introduced.[5]

Employers bear the burden to justify that a unilaterally implemented policy is reasonable on health and safety grounds.[6] Generally, the most significant hurdle for employers is demonstrating whether the policy is reasonable, as this inquiry goes to the root of why the policy is required and is balanced against employee rights. If the need for the policy is greater than the harmful impact on employees, the policy will be reasonable.

While labour arbitrators in Alberta and British Columbia have upheld mandatory vaccinate-or-mask policies (VOM policies) imposed by hospital employers to combat seasonal influenza, arbitration decisions in Ontario have gone the other way.[7]

In *St Michael's Hospital*, the Ontario Nurses Association challenged a VOM policy that had been put in place for flu season by a Toronto hospital. The hospital was one of a small number (less than 10%) of Ontario hospitals at that time with a VOM policy. The arbitrator followed an earlier Ontario decision and struck down the VOM policy as being unreasonable because there was insufficient evidence the policy protected the workers and patients from harm:

131] … Ultimately, I agree with Arbitrator Hayes [in *Sault Ste Marie*]: "There is scant scientific evidence concerning asymptomatic transmission, and, also, scant scientific evidence of the use of masks in reducing the transmission of the virus to patients" (at para. 329). …

132] One day, an influenza vaccine like MMR may be developed, one that is close to 100% effective. To paraphrase Dr. Gardam, if a better vaccine and more robust literature about influenza-specific patient outcomes were available, the entire matter might be appropriately revisited. For the time being, however, the case for the VOM policy fails and the grievances [are] allowed. I find St. Michael's VOM policy contrary to the collective agreement and unreasonable.

Among the issues the labour arbitrator took with the VOM policy was that it pressured employees to get vaccinations or face the stigma associated with wearing a mask and being identified as a non-vaccinated employee. Given that we now have significant evidence of the effectiveness of masks in reducing transmission of COVID-19, evidence of asymptomatic transmission, and vaccines reported to be highly effective, it is reasonable to conclude that the decision in *St Michael's Hospital* would be given little or no weight in the consideration of a mandatory requirement for COVID-19 vaccination.

Recent arbitration decisions on COVID-19 screening or testing policies (which we will be addressing in a follow-up blog post), also suggest that the safety risks posed by COVID-19 will in appropriate circumstances justify reasonable intrusions on employee rights.[8]

Non-Union Employees

In the non-union setting, employers will need to be concerned with three issues: constructive dismissal, human rights and privacy legislation.

First, if the mandatory vaccination policy results in a unilateral substantial change to a fundamental term of employment, an affected employee would be entitled to take the position that they have been constructively dismissed. In such circumstances, the employer could be exposed to significant termination costs depending on whether the employee has an enforceable contractual termination provision or is entitled to reasonable notice at common law. A mandatory vaccination policy may be more likely to result in a constructive dismissal where the repercussions for the employee who has decided not to be vaccinated (or refuses to disclose whether they have been vaccinated) are termination for cause or a forced leave of absence without pay. The risk of constructive dismissal will be lessened where employers obtain the employee's consent with fresh consideration in advance of implementing a mandatory vaccination policy or where the employer has given reasonable advance notice of the unilateral implementation of such a policy (generally considered to be the same amount of notice the employer would need to give to terminate employment without cause).

Second, a mandatory COVID-19 vaccination policy may be found discriminatory if it does not include exemptions for protected grounds, such as religious reasons or medical reasons (i.e., immunocompromised persons or those allergic to the vaccine). That said, in some circumstances an employer may be able to defend an otherwise discriminatory mandatory vaccination policy on the basis that it is a *bona fide* occupational requirement. However, the employer would need to show the purpose of the policy is rationally connected to the employee's performance of their job, it was adopted in an honest and good faith belief that it is necessary to fulfil that work-related purpose, and that the policy is reasonably necessary to accomplish such purpose. Part of this analysis looks at whether a policy can achieve its purpose through less discriminatory means. For example, a policy may be unreasonable and determined not to be a *bona fide* occupational requirement if it results in an employee's termination for cause when alternative measures may suffice, such as physical distancing, use of protective gear, barriers or working from home.

Third, employers regulated by privacy legislation must ensure they are only collecting, using or disclosing personal information (such as whether an individual has been vaccinated) for reasonable purposes. It may not be reasonable to request from all employees whether they have been vaccinated if some employees are in positions that will not require mandatory vaccination (i.e., full-time work from home).

Conclusion

Back in 2010, a case came before an arbitrator on the implementation of a vaccination program by a public sector employer during the H1N1 influenza pandemic.[9] The case was dismissed because that pandemic had come to an end before the appeal hearing. The union argued it should be heard anyway, as H1N1 was not the first pandemic and would not be the last. Nevertheless, the arbitrator concluded the issue had been rendered moot, and the employer's obligation to vaccinate, if any, must be considered in context, and that a decision on the merits "would not be useful for future potential pandemics which would present their own unique circumstances and issues."

COVID-19 has certainly presented its own unique circumstances and issues, and a number of labour arbitration cases have already been decided, with more to come,

no doubt, including the important question of whether an employer can adopt and implement a policy that requires its employees to be vaccinated against COVID-19.

Given the very limited availability of COVID-19 vaccines in the early stages of the vaccination campaign, it is likely premature for most employers to implement a mandatory COVID-19 vaccination policy at this time. However, once vaccines become more widely available, and provincial restrictions less onerous, the need for a properly drafted and implemented policy for some employers will become more pressing. Early movers can expect challenges to mandatory vaccination policies, particularly in the unionized context, which will make it even more important to have a carefully drafted policy.

Footnotes

1. *Irving Pulp & Paper Ltd. v CEP*, 2013 SCC 34 at para. 4.

2. For example, paramedics and other medical workers under the *Ambulance Act* (Ontario), and certain childcare workers under the *Child Care and Early Years Act, 2014* (Ontario).

3. *Infectious Disease Emergency Leave*, O Reg 228/20.

4. *Occupational Health and Safety Act*, RSO 1990 c O.1; *Occupational Health and Safety Act*, RSA 2000 c O-2; *Workers Compensation Act*, RSBC 1196, c 492.

5. *Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co.,* 1965 CarswellOnt 618 (Ont. Arb.) at para 34, paraphrased here.

6. *Ibid*.

7. *Chinook Health Region v UNA, Local 120*, 2002 CarswellAlta 1847 (Alta. Arb.); *Interior Health Authority v BCNU*, 2006 CarswellBC 3377 (BC Arb.); *Re St Michael's Hospital and ONA*, 2018 CarswellOnt 14889 (Ont. Arb.); *Re Sault Area Hospital and Ontario Hospital Assn. (Vaccinate or Mask)*, 2015 CarswellOnt 13915 (Ont. Arb.).

8. See for example, *Christian Labour Association of Canada v Caressant Care Nursing & Retirement Homes*, 2020 CarswellOnt 18430 (Ont. Arb.).

9. *Ontario Public Service Employees Union v. Ontario (Community Safety and Correctional Services)*, 2010 CanLII 52643 (Grievance Settlement Board).

by Christopher D. Lofft , David Price and Shreeya Handa
Stikeman Elliott LLP