
November 19, 2021

BULLETIN

**ENFORCEABILITY OF MANDATORY COVID-19 VACCINATION POLICIES:
GUIDANCE FROM RECENT DECISIONS**

Many employers, including governments and governmental organizations, have implemented mandatory vaccine policies for their employees. However, there are no current PHO Orders or WorkSafe rules requiring mandatory vaccines for local government employees. Therefore, local government employers must consider whether their particular policy is legally enforceable before implementing a mandatory vaccination policy in the workplace. Two recent decisions of Ontario labour arbitrators provide guidance on how to assess whether a mandatory vaccine policy will be able to withstand challenge by a union.

UFCW, Canada, Local 333 and Paragon Protection Ltd.

The Employer is a security company that employs approximately 4,400 security guards at 450 client sites in Ontario. The parties' collective agreement, which became effective in December of 2018, contains a provision that requires workers to receive any vaccinations that are required by the client site they are assigned to. Due to the COVID-19 pandemic, most of the Employer's clients began to require all staff, including security staff, to be fully vaccinated in order to continue working on their sites. Employees also raised concerns about working in close proximity with unvaccinated coworkers.

In response to these employee concerns and client safety measures, the Employer introduced a mandatory vaccination policy that requires all its workers to be vaccinated by October 31, 2021, subject to certain health and religious exemptions (the "Policy"). The Union argued that the Policy violated the collective agreement, contravened the Ontario *Human Rights Code*, and was unreasonable.

The Arbitrator upheld the Policy, finding it to be reasonable, compliant with the Ontario *Human Rights Code*, and consistent with the applicable provision in the parties' collective agreement. Further, the Arbitrator found that the Policy struck the appropriate balance of respecting the rights of unvaccinated employees and respecting a safe workplace for staff, clients, and members of the public. Finally, the Arbitrator found that in implementing the Policy, the Employer had fulfilled its obligation to take "every precaution reasonable in the circumstances" to protect its workers, in accordance with section 25(2)(h) of Ontario's *Occupational Health and Safety Act*.

Electrical Safety Authority and Power Workers' Union

The Employer introduced a mandatory vaccination policy that required all its staff to disclose their vaccination status to the Employer and be fully vaccinated against COVID-19, subject to a valid exemption under the *Human Rights Code* (the "Policy"). The Policy provides that employees who do not comply with its requirements would be subject to discipline up to and including discharge, or placed on an unpaid leave. The argued that the Policy was unreasonable, contravened the parties' Collective Agreement, and violated the workers' privacy rights.

The Arbitrator emphasised the importance of context when assessing the reasonableness of a mandatory workplace vaccination policy. Specifically, he held that such policies must be reasonably necessary in the circumstances and must introduce a response that is proportionate to the risk in the workplace:

"In workplace settings where the risks are high and there are vulnerable populations (people who are sick or the elderly or children who cannot be vaccinated), then mandatory vaccination policies may not only be reasonable but may also be necessary and required to protect those vulnerable populations. However, in other workplace settings where employees can work remotely and there is no specific problem or significant risk related to an outbreak, infections, or significant interference with the employer's operations, then a reasonable less intrusive alternative, such as the ESA's voluntary vaccination disclosure and testing policy (VVD/T Policy) employed prior to October 5, 2021, may be adequate to address the risks" (paras 17-18).

Applying this contextual approach to the Employer's workplace, the Arbitrator considered the following factors: the workplace did not have any COVID-19 breakouts; only seven of its 400 employees had contracted COVID-19, and only two of these cases were workplace-related; and the Employer provided no evidence of any COVID-related workplace dangers, problems or hazards to justify the Policy.

In light of this context, Arbitrator Stout held that the Policy was not a reasonable or proportionate response to the risks in the workplace. Given that noncompliant employees may be disciplined, discharged, or placed on leave without pay, the Policy unreasonably puts their employment in jeopardy. The Arbitrator also distinguished this case from the above Paragon Protection arbitration decision because here there was no language in the parties' collective agreement that mandated any vaccinations. He proposed an alternative policy for the Employer involving a combined vaccination and rapid testing option.

Takeaways for local governments

The outcomes of these two decisions demonstrate the highly fact-driven analysis of the enforceability of the above mandatory vaccination policies. It remains to be seen how arbitrators in BC will assess mandatory vaccine policies for employers who are not subject to PHO Orders requiring employees be vaccinated. However, we recommend that local governments carefully assess the particular risks and hazards in their workplace before implementing such a policy. It is important to ensure that the mandatory vaccination policy is a proportionate response to the risks in the workplace, is reasonably necessary, and is consistent with the applicable collective agreements, employment contracts, and human rights legislation.

Local government staff may contact us if they have any questions about drafting their mandatory vaccination policies.

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