Mandatory vaccination in businesses: developments in Ontario and Québec – and the road ahead

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It has been said that, from the outset of the COVID-19 pandemic, governments in Canada have been focused on getting people back together, while the U.S. has been more focused on keeping people at work. Indeed, in the United States, the Biden administration and the Occupational Safety and Health Administration (OSHA) have attempted to enforce very rigid mandatory vaccination policies for businesses with more than 100 employees. In Canada, the federal and provincial governments have not been involved in the issuance of mandatory vaccination policies for private businesses.

Interestingly, at the start of 2022, some governments in Canada have started to take public positions, including the Government of Canada, which has announced a regulation requiring employee vaccination in all federally regulated workplaces that is scheduled to come into effect in 2022. It will be interesting to monitor whether, in the context of several governments beginning to lift restrictions, the regulations will actually come into effect. However, as employers react and decide to rollout their own policies, it is clear that future developments regarding mandatory vaccination policies in Canada will involve more judicial decisions, including challenges before the courts. That is, unless and until clear directives are passed by governments in Canada.

In this regard, an analysis of the situation in Canada, particularly in Québec and Ontario, allows us to offer a few thoughts that companies should have when making a choice regarding the implementation of a mandatory vaccination policy.

Recent court decisions

In Ontario and Québec, the first arbitration decisions on vaccination policies were released in the last few weeks and months. These are, among others, the *Union des employés et employées de service, section locale 800, et Services ménagers Roy ltée* decision in Québec, as well as the *UFCW v Paragon Protection* and *Power Workers' Union v Electrical Safety Authority* decisions in Ontario, all of which have recently been covered by BLG's Labour and Employment group.

It is interesting to note that the *Electrical Safety Authority* decision and, more recently, the *Chartwell Housing Reit* decision, remain the only ones where the vaccination policies were considered unreasonable. The reasoning behind these decisions should be a further lesson to employers, as it demonstrates that each case will need to be assessed individually and that employers need to show that their policy is "reasonably necessary and involve[s] a proportionate response to a real and demonstrated risk or business needs", as our coverage of the *Electrical Safety Authority* decision explores in detail. Also noteworthy: in the *Chartwell Housing Reit* decision, the fact that the policy automatically provided for the termination of employees who refused to comply with the policy, in particular, was found to be unreasonable by the arbitrator.

Other recent decisions of note are the *Bunge Hamilton Canada* and *Maple Leaf Sports and Entertainment* decisions, which were rendered in Ontario. These decisions confirm some of the early developments seen in other decisions, but also provide some interesting new elements. In both cases, the vaccination policy was upheld by the arbitrator, further demonstrating that it is possible to implement a vaccination policy in a unionized context, in a reasonable and legal manner. In particular, the *Bunge Hamilton Canada* decision, in conjunction with the *Chartwell Housing Reit* decision, demonstrates that employers should be careful about including in their policy a provision to the effect that failure to comply with the vaccination requirement will result in termination of employment or other specific disciplinary action. On the other hand, the *Maple Leaf Sports and Entertainment* decision provides significant comfort to employers, as the arbitrator relied on the "weight of authority" that endorses mandatory workplace vaccination to reduce the spread of COVID-19.

Considerations in designing a mandatory vaccination policy

After reviewing these decisions, as well as taking into account our overview of the situation in British Columbia, we believe there are three issues that employers and legal counsels must consider when designing a mandatory vaccination policy.

1. Does the collective agreement allow for such a policy?

A collective agreement evolves and becomes more complex as the union-management relationship develops. As such, a review of the applicable collective agreement is necessary to ensure that an existing clause in the agreement will not be used by an arbitrator as the basis to overturn the policy.

Such a review is even more important where the clause in question was drafted in general terms, to cover general issues, and not any issue remotely applicable to COVID. Similarly, when adding provisions to a collective agreement, the parties must remain careful, because these added provisions could be used in the future as the basis for an arbitrator to rule against the legality of an employer's policy. Indeed, general language contained in a collective agreement related to health and safety, fairness or equal treatment of employees are just a few examples of this kind of broad language which could result in a broader interpretation than that intended when such general language was added into the collective agreement.

We saw a glaring example of this in the *Paragon Protection* decision, where a provision of the collective agreement adopted several years before the 2020 pandemic was decisive in the arbitrator's finding, as it related to the legality of the vaccination policy at this employer.

2. Should unions afford more protections to fully vaccinated employees, or to those who want the right to choose not to be vaccinated?

This will determine whether a trade union will decide to contest the vaccine policy. Equally true: employers will need to be particularly vigilant and diligent in balancing these two positions. It will necessarily involve a workplace analysis. As we have seen in recent arbitration decisions, the employer will have to justify its policy by taking into account various factors, which include the actual risk of an outbreak in the workplace, the possibility of telecommuting for the workforce, or accommodating employees who refuse the vaccine. The rate of vaccination among employees, if this data is available, will also be important to consider.

This consideration applies equally to unions, which in Québec are subject to a duty of representation under section 47.2 of the *Labour Code*. Other provinces have similar, if not identical, legislation. Thus, unions will have to weigh the competing interests of their members in the event of a grievance on the issue of contesting vaccination policies.

Although much has been written on this subject of the duty of fair representation and the ability to choose between conflicting issues, the matter remains one where employers or trade unions alike have not been willing to push this to the line. An example of this existing type of quandary for a trade union is the situation where the trade union must choose between representing the supposed harasser who is disciplined in the workplace or defend the rights of the employee harassed, to ensure a workplace that is free from harassment.

Similarly, **do the health and safety protections and the obligations imposed on employers to safeguard these protections existing under the laws of the applicable province outweigh the fundamental privacy rights and human freedoms of many of the same employees?** This balancing act is neither easy to answer nor determine. However, these questions will not disappear and will require trade unions and employers to deal with these issues, either together at a bargaining table or in front of the applicable tribunal or court. Where the first option is chosen, the parties will need to make sure that the language inserted into the collective agreement does not compromise either party, nor extend beyond the purpose of why such language was added into the agreement.

3. In a non-unionized workplace, whose responsibility is it to protect the employees?

In the context of a global pandemic, we believe that this responsibility cannot rest solely on the employer's duty of prevention set out in section 51 of the *Act respecting Occupational Health and Safety* (AOHS) in Québec or, for that matter, any other similar provincial legislation. Workers themselves already have an obligation to "take the necessary measures to ensure their health, safety or physical and psychological

integrity" and to "see that they do not endanger the health, safety or physical and psychological well-being of other persons at or near the workplace" under the AOHS.

It is possible that the choice not to be vaccinated (for reasons other than religious or health reasons) could be interpreted as a breach of these obligations, as was the case in Services ménagers Roy. In addition, one must also consider the important role that government plays in managing the pandemic and its consequences on the public, as citizens and employees. Consequently, is the application of government measures, including the implementation of vaccine rollouts, sufficient to ensure the safety of workers, or are other measures necessary, such as mandatory vaccination laws? These are difficult questions to answer and balance.

One size does not fit all

These recent arbitration decisions highlight that each case is a particular situation, and that there is no uniform model applicable to all employers, employees and/or trade unions. Thus, considerations in designing a mandatory vaccination policy must be tailored to each individual case, and we suggest that you contact a member of BLG's Labour and Employment group to advise you on your particular situation.

Following these initial jurisprudential developments regarding vaccination policies, the debate already seems to focus on more specific issues. It appears necessary to take a step back and consider the fundamental principles of the Canadian occupational health and safety regime, for instance sections 2 and 4 of Québec's AOHS. These sections stipulate that the law aims to eliminate at the source dangers to the health, safety and physical and psychological well-being of workers, and all employers, employees and trade unions should factor in the public order nature of these provisions. These principles should serve as a starting point for any analysis of the legality of a vaccination policy, particularly when it comes to balancing the rights of vaccinated persons against the rights of non-vaccinated persons. As arbitrator Denis Nadeau stated in *Services* ménagers Roy, the Charter rights of some employees cannot be used to obscure the occupational health and safety rights of the rest of their colleagues, nor the obligation of employers to take measures to protect the occupational health and safety of their employees.

While this line of case law has been a positive for employers and unions alike, in that all of us are now much better informed of the interpretation to be given to vaccine mandates, the last few weeks have forced us to take a step back and reconsider how applicable this case law is, within the present reality. As previously mentioned, governments all over Canada have started to eliminate the use of vaccine passports, to ease occupancy limits, to eliminate the need for exclusive remote working, and to allow people to slowly get back together. In particular, the Québec CNESST, health and safety division, has set out on their website the following guidelines, among others: "remote work is no longer mandatory and a progressive hybrid return to work is possible and according to the terms decided by the employer and a choice between the wearing of masks or social distancing of two (2) meters or the continued existence of physical barriers."

Final thoughts

So what does all this mean for employers' prerogatives, employees' rights and the future steps that should be taken with regard to the non-vaccinated or partially vaccinated employees? Can employers realistically continue to impose and apply rules which demand to be fully vaccinated, and terminate those employees who refuse or are not willing to complete the vaccination procedures in place? The answer to this question becomes even more complex as governments loosen previous regulations and reshape our understanding of them.

This is the new reality facing employers, looking ahead. The last two years have been a series of turns and twists. The present changing landscape is yet another turn in the road that employers must consider. While some would recommend holding the course, one must consider how arbitrators and the judges of the TAT will decide when faced with the changing legislative landscape. In light of this, employers may well be advised to revisit their existing policies and consider whether to keep the same policies in place, scrap them or just consider their decisions on a situation-by-situation basis.

There is no right answer at the present time but, as always, BLG's Labour and Employment group will continue to monitor these vaccination policy cases as they proceed through the courts and before grievance arbitrators, and keep you up-to-date with any relevant case law and regulatory items.

If you have any questions about this bulletin or how your company may be affected by the implementation or rollout of vaccination policies, please contact any of the contacts below.

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