Parts of employer vaccine policy found unreasonable in arbitration

November 17, 2021

While our recent article highlighted an employer's successful defence of its COVID-19 vaccine policy in *UFCW v. Paragon Protection*, the outcome was different in *Power Workers' Union v. Electrical Safety Authority*.

On November 11, 2021, Arbitrator John Stout found that the mandatory vaccination policy of the Electrical Safety Authority (ESA) was unreasonable to the extent that employees may be disciplined, discharged, or placed on unpaid leave for failing to get fully vaccinated; however, Arbitrator Stout emphasized that context is everything. As detailed below, his conclusion rested on a few factors specific to this workplace. He emphasized that the outcome may be different elsewhere or at another time.

Background

The ESA had initially implemented a policy whereby employees could be unvaccinated but would need to submit to regular testing (the Vaccinate-or-Test Policy). The Power Workers' Union (PWU) – the union representing certain ESA employees – supported that policy.

The ESA later adopted a more stringent policy, however, which removed the testing option (the Mandatory Vaccination Policy). Under the Mandatory Vaccination Policy, employees who remained unvaccinated beyond the applicable effective date, without a human rights exemption, would be subject to discipline, discharge, and/or unpaid leaves.

The PWU challenged the Mandatory Vaccination Policy on the grounds that it was unreasonable and an invasion of employees' rights to privacy and bodily integrity. ESA's position was that it was a reasonable exercise of management rights under the collective agreement.

The decision

Arbitrator Stout applied the well-known "KVP Test" to determine whether the workplace policy could be upheld as a reasonable application of management rights. The KVP

Test examines six specific factors, but in brief and among other things, it asks whether a workplace policy is "reasonably necessary and involve[s] a proportionate response to a real and demonstrated risk or business need."

Accordingly, Arbitrator Stout focused primarily on the question of balancing interests – an individual employee's rights to privacy and bodily integrity, on the one hand, and other employees' rights to a safe and healthy workplace, on the other, both of which he said were fundamental rights. In doing so, he made the following observations:

- At this workplace, there were generally no vulnerable populations such as the elderly or young children who remain unvaccinated.
- ESA employees can generally work remotely.
- Because of the nature of the work and the ability to work remotely, there was no significant risk relating to outbreaks or interference with operations.
- There was also no specific workplace hazard identified relating to COVID-19.
- Most ESA employees are vaccinated.
- While testing is a less effective means of protection than vaccination, it was a reasonable tool and a reasonable alternative in the circumstances. It also seemed to have been effective here, as the ESA had done an excellent job protecting employees to date, including under the Vaccinate-or-Test Policy, with no workplace outbreaks identified.
- There had been no significant change in the situation since the Vaccinate-or-Test Policy had been implemented.
- There would be no significant impact on operations from unvaccinated employees being unable to access third-party sites or to travel.

As a result, Arbitrator Stout concluded that the Mandatory Vaccination Policy was unreasonable to the extent that employees may be disciplined, discharged, or placed on unpaid leave for failing to get fully vaccinated. He ordered that the policy be revised and reviewed by the Joint Health and Safety Committee. Notably, he also ordered that the revised policy could reintroduce unpaid leaves in the future if problems occur or safety concerns arise such that testing is no longer a reasonable option.

Takeaways

This second case analyzing the reasonableness and enforceability of a mandatory COVID-19 vaccination policy provides further nuance and confirms that ultimately, each case will need to be assessed in view of its own unique circumstances.

In fact, although he reached a different conclusion, Arbitrator Stout specifically endorsed the outcome in *Paragon*, noting that it arose in different circumstances with different collective agreement language.

He was also careful to emphasize that his conclusion did not mean that mandatory vaccination policies could not be upheld as reasonable in other circumstances. Regarding those who make the personal choice not to be vaccinated (outside a human rights exemption), Arbitrator Stout noted that, among other things, "these individuals should not construe this award as a victory."

BLG's Labour and Employment team will continue to monitor these vaccination policy cases as they move through the courts and labour arbitrations. If you have any questions about this decision or how your business could be affected by vaccination policies, please reach out to the author or any of the key contacts below.

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