Employer vaccine policy upheld in arbitration

November 12, 2021

An arbitrator rejected a recent grievance filed against Paragon Protection over its COVID-19 vaccine policy.

On Nov. 9, 2021, Arbitrator Frederick R. von Von Veh ruled against the United Food and Commercial Workers Union, Local 333. He found that Paragon's COVID-19 vaccine policy was reasonable, enforceable and complied with *Ontario's Human Rights Code* (the Code) and the *Occupational Health and Safety Act* (OHSA).

Background

Paragon employs approximately 4,400 security guards in Ontario. Those security guards provide services to Paragon's clients at some 450 sites. Of those clients, 226 had policies requiring Paragon's employees to receive the COVID-19 vaccine.

On Sept. 3, 2021, Paragon implemented its COVID-19 Vaccination Policy, along with its COVID-19 Vaccination Exemption Policy. The Vaccination Policy and the Exemption Policy mandated that:

- All staff had to be fully vaccinated by Oct. 31, 2021;
- All staff had to provide a signed declaration confirming they are fully vaccinated;
- Paragon reserved the right to ask its staff for proof of vaccination status;
- For unvaccinated staff, Paragon had the discretion to:
    - Require them to work at different sites at the prevailing rate of pay for that site and position;
    - Require them to be tested for COVID-19; and/or
    - Place them on unpaid leave of absence.

Anyone not complying with the Vaccination Policy could face disciplinary action up to and including termination for just cause. Under the Exemption Policy, Paragon would consider exemption requests for religious and health reasons.

On Sept. 13, 2021, United Food and Commercial Workers Union, Local 333 filed a grievance arguing that the Vaccination Policy violated the collective agreement's Management Rights Provision, as well as the Code.

The decision

The collective agreement contained a broad and typical management rights clause that, amongst other things, permitted Paragon to make, enforce and alter, from time to time, reasonable rules and regulations the employees are required to observe.

In finding that the COVID-19 Vaccination Policy did not violate the collective agreement nor the Code, the arbitrator referenced the Ontario Human Rights Commission's (OHRC) September 2021 policy statement. It states, "the OHRC takes the position that mandating and requiring proof of vaccination to protect people at work … is generally permissible under the [Code]."

The arbitrator confirmed that Paragon had an obligation and responsibility to take "every precaution reasonable in the circumstances for protection of its worker," pursuant to section 25(2)(h) of the OHSA.

As such, he ruled that the Vaccination Policy and Exemption Policy are reasonable, enforceable and comply with the *Code*, as well as satisfying its obligation under the OHSA.

Arbitrator Von Veh also made the following statements:

- The unilateral introduction of the Vaccination Policy was consistent with the Management Rights Provision;
- There are distinct differences between this case and *St. Michael's Hospital v Ontario Nurses' Association*, (St. Michael's), a 2018 arbitration case where it was held that a policy mandating health care workers to receive the annual flu shot or wear a surgical or procedural mask, was unreasonable. The arbitrator found that the St. Michael's award dealt with influenza-related considerations, which is a materially different context than the COVID-19 pandemic;
- Mandatory vaccine policies do not amount to forced healthcare and do not violate the *Ontario Health Care Consent Act*; and
- Personal subjective perceptions of employees regarding vaccines cannot override and displace available scientific considerations. Therefore, they cannot be a basis for exemption under the Code.

Takeaways

This case is significant because, in our understanding, it is the first one to fully analyze whether a mandatory vaccine policy complies with an employer's obligations under the *Ontario Human Rights Code*, the *Occupational Health and Safety Act*, and a collective agreement.

This case supports imposing mandatory or so-called "or else" vaccination policies. These policies require employees to be fully vaccinated, "or else" face various employment-related consequences, such as relocating to a different work site, placed on unpaid leave or even terminated for cause.

This case holds that such policies are not only consistent with an employer's obligations under the Code and the OHSA, but are a necessary component of its obligation to take every reasonable precaution to protect the health and safety of its workers.

We will continue to monitor these vaccination policy cases as they move through the courts and labour arbitrations. If you have questions regarding this decision, reach out to any of our Labour & Employment members listed below.

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