Mandatory COVID-19 testing found reasonable in Ontario care home

December 17, 2020

Background

On Dec. 9, 2020, Arbitrator Dana Randall issued an award upholding an employer's right to make employees take a COVID-19 test.

CLAC Local 303 (the Union) filed a group grievance on behalf of its members at Caressant Care Nursing and Retirement Home in Woodstock Ont. (CCRH Woodstock), arguing against the reasonableness of CCRH Woodstock's mandatory biweekly COVID-19 surveillance testing of all staff.

CCRH Woodstock provides rental accommodations with care and services to residents who require minimal to moderate support. They currently serve 100 residents.

CCRH Woodstock took an Ontario government recommendation for individuals working in retirement homes and incorporated it into a mandatory policy. The policy included the following requirements:

1. All staff are to participate in ongoing COVID-19 surveillance testing conducted by nasal swab every two weeks;
2. Medical accommodations will be addressed on a case by case basis; and
3. A refusal to participate in the testing will result in the employee being held out of service, until such testing is undertaken.

Between June 7 and June 29, 2020, CCRH Woodstock made its staff aware of the new policy and provided each staff member with a comprehensive memo on the new policy and a copy of the policy itself.

Some staff members expressed discomfort with the process. They felt that the process was too invasive, painful, and not valuable, as it would simply show the employee did not have COVID-19 at that specific point in time. The Union argued the policy was overbroad, and suggested that testing is only a reasonable invasion of someone's privacy when they are symptomatic.

The decision

The most contentious issue was the reasonableness of the policy. Arbitrator Randall weighed the privacy intrusion of the members against the safety benefits and goals of the policy. Applying well-settled arbitral principles around the establishment of workplace rules, he found that the policy was reasonable.

Arbitrator Randall emphasized the novelty and infectious nature of COVID-19 and distinguished it from previous decisions on mandatory breathalyzers for alcohol, citing the rate of transmission and the gravity of risk of death to residents from a COVID-19 outbreak in a care home. Arbitrator Randall found the privacy intrusion was sufficiently mitigated with biweekly testing and was outweighed by the risks of COVID-19 transmission in an elderly population.

He also found that the rule was justified in giving rise to disciplinary action, as it was:

a. consistent with the collective agreement;
b. clear and unequivocal;
c. brought to the attention of the employees before the employer acted on it;
d. contained clear notice that non-compliance of the rule would lead to discharge;
e. enforced consistently since its introduction; and
f. reasonable.

Finally, Arbitrator Randall found that the policy was also reasonably accommodating. For instance, when a staff member could not tolerate a nasal swab, CCRH Woodstock used a throat swab instead.

Despite the Union's position that the pre-policy rules were sufficient since there had been no COVID-19 outbreaks, and their argument that the policy is incoherent as it does not test the majority of people in the facility (the residents), Arbitrator Randall still found the policy to be appropriate. The grievance was dismissed.

Takeaways

The decision can be framed as a better-safe-than-sorry approach to workplace policies on COVID-19, as long as employers accommodate and mitigate invasiveness enough to be considered reasonable.

The award is also a reminder that context is important. The decision may have been different were the policy implemented in a setting where staff were not working with elderly, vulnerable residents, and it may have been different if it was decided at a time in the pandemic when cases were stable or in decline.

It remains to be seen whether mandatory testing will be upheld in different settings and at different infection points in the pandemic. It also remains to be seen whether any employers will take this a step further and implement mandatory vaccination policies.

If you have any questions about COVID-19 workplace policies, get in touch with Rob Weir at RWeir@blg.com or Maddie Axelrod at MAxelrod@blg.com.

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