



Mandatory Vaccination Policies in Unionized Settings

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Further case law has come out in support of mandatory vaccination policies in unionized settings. Arbitrator Norman Jesin found that *Maple Leaf Sports and Entertainment's* vaccination policy is reasonable and not a violation of their collective agreement with teamster's Local 437.

Facts

The Union filed a grievance after the Employer put an employee, who works at Scotiabank Arena on an unpaid leave of absence after he refused to disclose his vaccination status. The Union claims that in doing so, the Employer violated the collective agreement, specifically, the grievor's seniority rights.

The Grievor was a member of the Employer's conversion division, meaning he worked closely with a team of other employees to convert the arena from one type of event to another. During this process there could be up to 100 people working in close proximity to the grievor.

In order to align with the newly announced provincial guidelines, the Employer implemented a policy requiring all employees to be fully vaccinated by October 31, 2021. Employees were informed that if they failed to disclose their vaccine status by that date, they would be placed on an indefinite unpaid leave of absence and might be subject to termination.

Employee's vaccination status and underlying medical information would be kept anonymous and confidential as employees were required to disclose their status through a secure portal operated by a third party. Access to the employee's medical information would be kept on a "need to know basis" and would be erased from the employees file when no longer needed. Any breach of the confidentiality of this information by a person with access to the information would result in discipline up to and including discharge.

The Employer believed the policy was necessary because there had been an outbreak at their workplace previously, and both the Toronto Medical Officer of Health and the provincial Ministry of Health recommended local employers institute vaccine policies to protect employees and the broader public from COVID-19.

The Grievor refused to comply and disclose his vaccination status. As a result, the Employer placed him on an unpaid leave of absence. The Grievor asserted that in doing so, the Employer violated his seniority rights because the Employer was obligated to provide employees with work opportunities by seniority and the employer should not be allowed to deny an employee's entitlement to work on the basis of a failure to disclose his vaccine status.

Further, the Union argued that an employee's vaccine status is private medical health information and as such should not be subject to disclosure. Instead, the Union suggested that the Employer could have required the employee to submit to regular rapid antigen testing for Covid-19.

The Employer responded that the Union's argument that the Grievor's right to work was subject to his ability to perform the work in question. The Employer had every right under the collective agreement to establish a requirement that employees be fully vaccinated. As a result of that new policy, an employee who did not disclose their vaccine status was not able to establish their ability to perform the work in question. Further, the Employer substantiated its position by relying upon its management rights to decide upon such practices.

The Employer said it had a duty to take every reasonable precaution to protect its workers. Requiring employees to be vaccinated was for the benefit and protection of all workers and for others with whom they come in contact. Employer observed that privacy rights are not absolute and must be balanced against other legitimate interests including the duty to protect the health and safety of employees.

Decision

The Arbitrator found that the Employer did not violate the collective agreement by requiring employees to disclose their vaccination status and by placing the grievor on an unpaid leave of absence for failing to comply. The Employer's ability to impose this policy arose out of its management rights to implement reasonable rules and regulations. Also, Arbitrator Jesin stated that under the OHSA employers have a duty to take any necessary measures for the protection of their workers. As a result, he declared that employers were entitled to inquire about an employee's vaccination status.

The Arbitrator disagreed with the Union's assertion that the Employer breached the grievors seniority rights. The Arbitrator accepted the right of the Employer to require all employees to be vaccinated as a necessary qualification for the performance of work within the bargaining unit.

Takeaway for Employers

This case provides further support to employers in unionized settings who are grappling with the idea of implementing a mandatory vaccination policy in their workplace. The cases are stacking up in favour of employers and mandatory vaccination policies. The policies must be reasonable in the circumstances and the employer must demonstrate appropriate steps to protect the confidentiality of any medical information that is disclosed under its policy. Good legal advice in advance of implementation will help avoid unnecessary arbitrations or non-union litigation about improper dismissal.

It is not too late or too hard to do things right. If you are thinking about implementing a mandatory vaccination policy at your workplace, call us. We can help.

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