HUNTER-LIBERATORE-LAW

Vaccine Mandate Update

In past updates, we have reported on the arbitration, court and Ontario Labour Relations Board (OLRB) cases that have considered mandatory vaccination polices. In the last months, we have seen vaccine mandates lifted by the provincial and federal governments despite the ongoing pandemic. Many, but not all employers have also chosen to end their policies. What does this mean going forward?

Until now, most mandatory vaccination policies that were challenged have been upheld as reasonable. However, one recent arbitration case found that it was not reasonable to continue a policy going forward. Another arbitrator reached a different conclusion and upheld continued exclusion of unvaccinated employees from the workplace. In this article we review both cases and other recent decisions including:

- a second case from the education sector upholding a vaccination mandate (now lifted)
- a case that looks at whether a contractor should have laid off staff who don't meet customer vaccine requirements rather than placing them on unpaid leave
- a case where the OLRB considered whether requiring employees to share their vaccination status is a breach of the *Occupational Health and Safety Act* restriction on sharing personal health information.

FCA Canada Inc. v Unifor, Locals 195, 444, 1285, 2022 CanLII 52913 (ON LA)

On June 17, 2022, Arbitrator Marilyn Nairn found that the mandatory vaccination policy of an employer, FCA Canada Inc. was reasonable from the date it was implemented to the date of the hearing. However, she also ruled that the Policy was of no force or effect as of June 25, 2022.

a) Facts

The Employer implemented their Policy on a national basis at their manufacturing/assembly operations, parts distribution warehouses, research/development, business centres, training centres, and offices. Three unions filed the policy grievance.

Throughout the COVID-19 pandemic (the "pandemic"), the Employer introduced health and safety protocols at the plants, such as physical distancing, adding physical barriers where distancing was impossible, requiring all employees to be screened or self-screen for COVID-19 symptoms, and more.

On October 14, 2021, the Employer released its Policy which required employees to be fully vaccinated by December 17, 2021, which was extended to December 31, 2021. Employees who were not fully vaccinated by that date would be placed on an unpaid leave of absence. The Policy also stipulated that employees *may* be subject to discipline up to and including termination of employment for non-compliance. In administering the Policy, the Employer did not terminate the employment of any employees.

At the time of the hearing, 94.6% of the plant employees were fully vaccinated.

b) Decision

Arbitrator Nairn applied the same *KVP* reasonableness framework of analysis as other arbitrators. She considered the nature of the workplace (employees were required to attend the workplace, could not work from home, there was significant congestion at change of shift in entering and exiting the plants, and distancing could not always be maintained). She also considered the competing interests between an employee's decision to not become vaccinated and the health and safety of employees in the workplace. She agreed with the arbitrator in the *Coca-Cola Bottling* decision that an employee's belief must give way to the health and safety concerns that animate the Policy. She concluded that employees have a right to remain unvaccinated, but they have a corresponding responsibility not to place co-workers at increased risk as a result. She also found that the risks from contracting COVID-19 continues to outweigh the risks from the vaccine.

However, based on the literature before her at the hearing, Arbitrator Nairn concluded that there was now scientific evidence supporting the "waning efficacy of [a] vaccination status", as well as a conclusion that there is negligible difference in the risk of transmission in respect of Omicron as between a two-dose vaccine regimen and remaining unvaccinated.

Notably, expert evidence regarding the efficacy of vaccines was not put before Arbitrator Nairn. The only material before her were publications, some of which had not yet been peer reviewed.

Arbitrator Nairn concluded that when the Policy was introduced, it was reasonable and continued to be reasonable in its application *prior to the rise of the Omicron variant and availability of scientific evidence regarding the efficacy of vaccines*. She noted the recent decisions by provincial and the federal government to lift restrictions and vaccine mandates. She also considered the wording of the policy and found that "under the definition of the Policy", there is no longer a basis for removing unvaccinated employees from the workplace. She noted that the Policy did not incorporate periodic reviews, so delays in responding to changing circumstances and any resulting risk assessment was inevitable.

Arbitrator Nairn declared the Policy to be of no force or effect, effective June 25, 2022.

***Alectra Utilities Corporation v. Power Workers Union,* 2022 CanLII 50548 (ON LA)**

In contrast to Arbitrator's Nairn's decision, in her June 9, 2022, award, Arbitrator Susan Stewart found that an employer's mandatory vaccination policy, which was introduced on October 19, 2021, and was ongoing, was reasonable.

a) Facts

On October 19, 2021, Alectra Utilities Corporation implemented its mandatory vaccination policy which required all employees to provide confirmation of their vaccination status as of December 13, 2021. Specifically, the Policy:

1. Required proof of full vaccination;
2. Referred to a requirement to adhere to any future additional vaccination recommendations made by government and/or health care authorities (i.e., any recommended booster shots);
3. Provides exceptions to the vaccination requirement with respect to medical exemptions and the Ontario *Human Rights Code* (the "Code");

4. Provides for graduated steps where there has been non-compliance, with the final step being denial of access to Alectra property, effective January 14, 2022 (extended date);
5. States that non-compliance and certain other conduct in relation to the Policy may give rise to disciplinary action, up to and including termination of employment.

Alectra is a large public utilities and local distribution company responsible for the distribution of electrical power to residents and businesses in cities across the province. Further, the employer operates pursuant to a statutory mandate to install, maintain, and repair electrical distribution infrastructure to ensure a reliable and uninterrupted supply of power.

At the time of the hearing, unvaccinated employees in positions that required attendance at work were put on an unpaid leave. Additionally, the employer had begun, and was planning to continue, a partial transition back to the physical workplace for employees who had been working remotely. The transition would result in increased numbers of people in the workplace.

b) Decision

Arbitrator Stewart began her analysis by noting the recent arbitration awards relating to mandatory vaccination policies, and found that the *Power Workers' Union and Elexicon Energy Inc.* decision was compelling, especially given the similarity of the work performed at both Elixicon and Alectra.

Like Arbitrator Nairn, Arbitrator Stewart considered the competing interests. She recognized that becoming vaccinated was a personal decision relating to bodily integrity yet balanced this decision against the health risks that unvaccinated people posed to others in the workplace.

The employer presented a report from an occupational health physician whose expert opinion was that "a mandatory vaccine policy is the most effective method of ensuring a safe workplace".

The union presented evidence (data released by the UK Health Security Agency) that the effect of vaccinations wanes over time, that vaccines do not provide immunity from infection, as evidenced by the number of vaccinated individuals who have been infected by the Omicron variant of the virus. The union also pointed the arbitrator to changes in public policy including the

governments' lifting of vaccine mandates. Furthermore, many employers, including those in the same industry, had no mandatory policies or were lifting their policies.

After considering the context and evidence before her, Arbitrator Stewart concluded that protecting the health of those in the workplace prevailed over the interests of the unvaccinated maintaining their livelihoods. She wrote,

> **The fact that protection afforded by vaccination wanes does not alter the fact that those who are unvaccinated create a risk for those who are vaccinated where there is congregation.** In fact, it would seem to make the risk greater, although it is reasonable to assume that at least some vaccinated employees would have had booster shots, affording them greater protection. While individuals can take measures to restrict their activities and exposures outside of the workplace, **in the workplace they are, for the most part, unable to individually manage their environment and must depend on the employer taking reasonable precautions to protect their health.** The Policy does that by removing the risks associated with the potential for transmission associated with the presence of unvaccinated employees in the workplace.

In response to the Union's argument that Alectra could and should allow employees to continue working remotely, Arbitrator Stewart disagreed — "I note that an employer's assessment as to how work is most efficiently and effectively conducted is a critical management prerogative."

Arbitrator Stewart also noted that "one of the hallmarks of [the [Policy's] reasonableness" is that it specifically contemplated amendment, as relevant circumstances changed. Arbitrator Nairn in the *FCA Canada* case, on the other hand, noted that the policy she was considering (and found to be unreasonable going forward) lacked this feature.

Arbitrator Stewart concluded that the policy was reasonable and Alectra's careful return to work plan was also reasonable. The grievance was dismissed.

***Elementary Teachers' Federation of Ontario v Ottawa-Carleton District School Board*, 2022 CanLII 53799 (ON LA)**

On June 21, 2022, Arbitrator Michelle Flaherty dismissed the policy grievance filed by the Elementary Teachers' Federation of Ontario (ETFO), finding that the consequences imposed under the Ottawa-Carleton District School Board's mandatory vaccination policy were reasonable for the period it was in effect — October 2021 to March 2022.

a) Facts

On September 2021, the School Board implemented its Vaccination Protocol requiring employees be vaccinated against COVID-19. The parties agreed that vaccinations were the most effective strategy to reduce the transmission of COVID-19 in schools, and that they were safe and effective. The Federation filed two policy grievances, however, relating to the consequences of failing to comply with the Policy.

From October 2021 to March 2022, unvaccinated contract teachers who had contact with others in schools and who did not have a valid human rights exemption, were placed on an administrative leave of absence. Unvaccinated occasional teachers were removed from any long-term occasional in-person assignments and restricted from accepting in-person work assignments.

ETFO's position was that the School Board ought to have permitted unvaccinated and unexempted teachers to remain in the workplace, subject to rapid antigen testing ("RATs") and other protective measures.

The School Board, on the other hand, contended that precautionary measures were necessary to ensure that schools remained open and safe as they delivered a critical public service in the face of evolving circumstances and significant health risks.

The School Board's Policy was lifted in March 2022, and unvaccinated and unexempted teachers returned to in-person work.

b) Decision

Arbitrator Flaherty acknowledged that each case turned on its facts, and that several general principles had emerged from the jurisprudence regarding the importance of context, the role of the precautionary principle, and the need to balance the rights and interests of employees with the risks of harm.

Arbitrator Flaherty noted that the precautionary principle allowed employers to take steps to address reasonable risks, without evidence of actual harm and in the absence of scientific certainty (see *Elexicon*). The purpose of the precautionary principle was to allow employers to take reasonable steps against the unknown, to prevent unnecessary illness and death rather than await scientific certainty that may not be timely or available. While public

health authorities did not require or specifically recommend that the School Board impose a vaccine mandate, they were supportive of this approach.

ETFO argued that the OHSA and the precautionary principle only contemplated reasonable precautions and that "they do not permit measures that are excessive or that attempt to fully eliminate risk". In addressing ETFO's argument, Arbitrator Flaherty cited para. 97 of *Elexicon*, writing that "while it is not possible for all risk to be eliminated, it does not follow that the obligation of employers is to the minimum required in a regulation." The School Board was not required to furnish scientific evidence and provincial or public health direction establishing that it was necessary to remove unvaccinated and unexempted teachers from the workplace:

> "The Board was not required to impose less restrictive or effective measures such as RAT as an alternative consequence. **Applying the precautionary principle and given the importance of in-person learning and the existing public health concerns, it was reasonable for the Board to employ the most effective strategy available to reduce risks.** This included removing unvaccinated and unexempted teachers from the workplace between approximately October 2021 and March 2022."

Arbitrator Flaherty concluded that vaccines were safe and were the most effective strategy for limiting the transmission of COVID-19 and keeping schools open. The grievances were dismissed.

Liuna Local 183 v Nova Services Group Inc. - Compass Group Canada Ltd, 2022 CanLII 59509 (ON LA)

The most recent decision on this subject was released on July 6, 2022. Arbitrator Ian Anderson dismissed a grievance filed by the union claiming that employees placed on unpaid leaves due to their failure to become vaccinated, should have been laid off instead.

a) Facts

The Employer, Nova Services Group Inc. – Compass Group LTD ("Nova Services") contracts with long-term care homes to provide cleaning, maintenance, dietary and environmental services at various long-term care

homes across the province of Ontario. These clients implemented their own mandatory vaccination policies (pursuant to the Minister's Directive on the long-term care home COVID-19 immunization policy), which evolved over time with the most recent iterations requiring third dose boosters. Nova Services informed its employees by way of various letters that they had to be vaccinated to comply with the LTC client requirements. Employees who were non-compliant were eventually placed on a temporary unpaid leave of absence.

This was not a case in which the Union challenged the reasonableness of mandatory vaccination policies. The Union asserted that Nova Services, did not have a mandatory vaccination policy of its own, nor did it adopt the policies of the operators of the long-term care homes who were its LTC clients. The application of the LTC Client policies prevented unvaccinated employees of Nova Services from working at homes operated by the LTC Clients. The Union contended that the appropriate course of action was to lay off those employees, not place them on leaves of absence as Nova Services did.

The union argued that the infectious disease emergency leave (IDEL) set out in s. 50(1.1)(b)(iv) of the *Employment Standards Act, 2000* did not apply. The Union argued that leaves under the *Employment Standards Act, 2000* are in the nature of employee entitlements taken at the behest of the employee. The affected employees did not elect to take infectious diseases emergency leave; therefore, it had no application. Further, the affected employees were not acting under the direction of the Employer, they were acting under the direction of the third party LTC Clients. Therefore, the employee should be considered laid off, not on IDEL.

b) Decision

After having reviewed relevant case law, Arbitrator Anderson accepted the well-established proposition that an employer who receives instructions from a client to remove an employee from a site controlled by the client, must act on those instructions and that to do so does not constitute a discharge.

Arbitrator Anderson first looked to the collective agreement and found nothing in the agreement which contemplated the circumstances of the affected employees. He then concluded that:

1. The site ban cases establish only that an employer is entitled to lay off an employee in the fact of a third-party site ban, and if it does so it is not required to justify its decision on a just cause standard.
2. In any event, the site ban cases relied upon by the Union each involved a third party advising the employer that a specific employee was permanently banned from the site. There was no such specificity here. **The LTC clients, and the Ministry of Long Term Care, established a rule and requirement with which anyone working on the site must comply. Once an individual complies with the rule or requirement, they would be permitted to re-enter the site.**

Arbitrator Anderson found that in referring to the Policy of a particular site, Nova Services was adopting its own client and site-specific policy: **"a policy requiring employees to comply with the vaccination policies applicable at specific sites in order to work at those sites is a policy nonetheless".** He was satisfied that Nova Services adopted its own client and site-specific policy with respect to mandatory vaccinations. That policy provided that unvaccinated employees would not be permitted access to the client sites and would be placed on a temporary unpaid leave of absence. Furthermore, the affected employees were without work because they did not comply with Nova Services' policy requiring that they be vaccinated against COVID in order to access particular worksites. Since they did not comply with that requirement, they were not permitted to enter the workplace – the employees "absented themselves from the workplace". They were not laid off by Nova Services.

Arbitrator Anderson concluded that non-compliant employees were properly placed on unpaid leaves of absence.

Notably, this decision aligns with the *Bunge Hamilton Canada, Hamilton, Ontario v. United Food and Commercial Workers Canada, Local 175* decision, in which the employer's landlord was a federally regulated business that required everyone on its property, including the employees of its tenant (the employer) to be vaccinated. The employer in *Bunge Hamilton* required unvaccinated employees be put on unpaid leave, and this mandatory vaccination policy was found to be reasonable.

Marlene Woodrow v The Corporation of the Municipality of Leamington, 2022 CanLII 60830 (ON LRB)

On June 29, 2022, the OLRB, found that the employer's mandatory vaccination policy requiring employees to disclose their vaccination status did not contravene section 63(2) of the *Occupational Health and Safety Act, 1990* (the "OHSA").

a) Facts

The Complainant, Marlene Woodrow, made a complaint to the Ministry of Labour (MOL), claiming that the mandatory vaccination policy of her employer, the Corporation of the Municipality of Leamington, contravened section 63(2) of the OHSA, which states that:

> **Employer access to health records**
>
> (2) No employer shall seek to gain access, except by an order of the court or other tribunal or in order to comply with another statute, to a health record concerning a worker without the worker's written consent.

The municipality's policy was originally effective August 24, 2021, and subsequently amended effective December 16, 2021. The policy as amended stipulated that prior to attending the workplace, every employee shall be vaccinated at least two (2) weeks prior to the vaccination due date. It also stated that evidence of vaccination shall be submitted prior to the employee attending the workplace.

O. Reg. 364/20 , the "Rules for Areas at Step 3 and At the Roadmap Exit Step" was in place at the time of Ms. Woodrow's complaint under the *Reopening Ontario Act* , and provided as follows:

> (2.1) The person responsible for a business or organization that is open shall operate the business or organization in compliance with any advice, recommendations and instructions issued by the Office of the Chief Medical Officer of Health, or by a medical officer of health after consultation with the Office of the Chief Medical Officer of Health,
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> (a) requiring the business or organization to establish, implement and ensure compliance with a COVID-19 vaccination policy; or

(b) setting out the precautions and procedures that the business or organization must include in its COVID-19 vaccination policy.

In her complaint, Ms. Woodrow alleged that the Policy contravened section 63(2) because it required workers to disclose their vaccination status without written consent. Following an investigation, a Ministry of Labour investigator refused to issue an order regarding the alleged contravention.

b) Decision

The OLRB considered their previous decision in *Heather Wong v. Toronto Public Library*, in which a similar argument was made. In *Wong*, the applicant alleged that her employer's COVID-19 vaccination policy contravened section 63(2) of the OHSA by requiring disclosure of vaccination status, failing which there would be employment consequences up to and including termination of employment.

The Board in *Woodrow* focused on whether the municipal employer attempted to gain access to Ms. Woodrow's health records without her consent, an act prohibited by section 63(2) of the OHSA. The Board found that the employer did not do so. Instead, the employer expressly sought her consent.

The Board also noted, that at the time it implemented, established and took steps to ensure compliance with its Policy, the municipality had a statutory duty under the *ROA* to implement a vaccination policy, and that duty provided an exemption from the consent requirement in section 63(2).

The Board concluded that Ms. Woodrow failed to establish that the municipality's Policy contravened section 63(2) of the OHSA, and the appeal was dismissed.