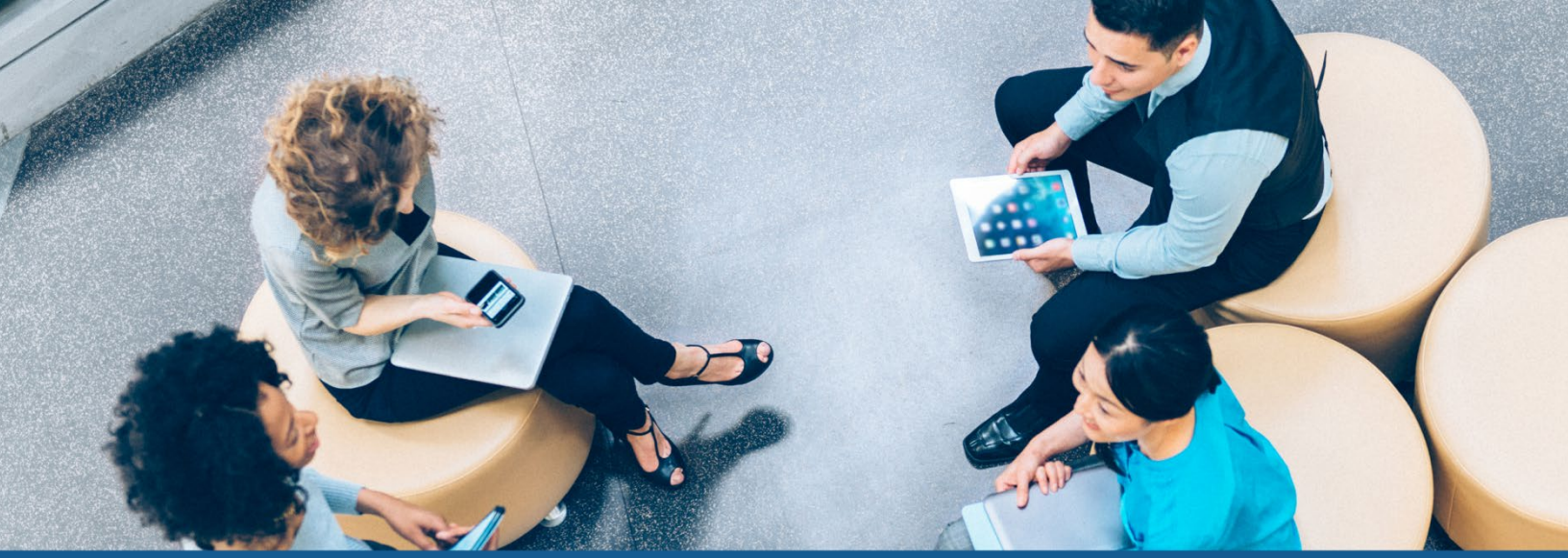

What's New in HR Law

Arbitrator Holds Mandatory Vaccination Policy is Unreasonable

December 01, 2021

Bottom Line

In *Electrical Safety Authority v Power Workers' Union*, a decision issued on November 11, 2021, an Ontario arbitrator held that the Electrical Safety Authority(the "ESA")'s mandatory COVID-19 vaccination policy was unreasonable. In upholding the union's grievance, Arbitrator John Stout concluded that the employer's previous voluntary vaccination policy was an appropriate policy in light of the specific context of the workplace. This is the second decision addressing mandatory COVID-19 vaccination policies in Ontario, and the first decision in which such a policy has been held to be unreasonable. This case is a helpful reminder that a reasonable policy is one in which the particular context of the workplace and its risks is carefully considered and accounted for.

The Decision

On October 5, 2021 The ESA implemented a mandatory vaccination policy in which all employees were required to be fully vaccinated, barring valid exemptions under the *Human Rights Code.* Under the policy, an employee's choice to refuse vaccination could be met with discipline or administrative leave without pay. Prior to October 5, 2021, the ESA had a voluntary vaccination

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and testing policy which allowed employees who did not voluntarily disclose their vaccination status to be tested for COVID-19 on a regular basis. The union did not grieve the earlier policy.

At arbitration, the union argued that the mandatory vaccination policy was an over-reach of management rights, violated the collective agreement, and violated an employee's privacy rights and right to bodily integrity. The ESA argued that the policy was reasonable and that it fulfilled its legal obligation under the *Occupational Health and Safety Act* to take every reasonable precaution to protect their workers.

In reaching his decision, Arbitrator Stout emphasized that the situation involving the pandemic is fluid and continuing to evolve and noted that what may be unreasonable at one point, may be reasonable at a later point. Arbitrator Stout also underscored that the case was not about the merits of vaccination or the effectiveness of COVID-19 vaccines as there is scientific consensus that the vaccines being used are safe and effective. Arbitrator Stout reinforced that the matter strictly concerned the interpretation and scope of management rights.

The Arbitrator noted that when assessing employer policies that affect employees' individual rights, arbitrators must apply the *KVP* test to determine whether the policy is a reasonable exercise of management rights. Among other considerations, the *KVP* test requires that the policy be: consistent with the applicable collective agreement; clear and unequivocal; and consistently enforced. Arbitrator Stout explained that the *KVP test* required a "balancing of interests" and a "nuanced contextual approach."

A nuanced contextual approach considers the unique risks and dangers in a workplace and in terms of the specific workplace, the ESA had not had a COVID-19 outbreak. Arbitrator Stout reiterated that only seven of 400 employees had contracted COVID-19 and that the two possible work-related infections occurred prior to vaccination availability. Arbitrator Stout made clear that the ESA had done a "tremendous job" of protecting their employees from the risks of contracting COVID-19 and that it had lived up to its reputation as a safety organization.

Furthermore, the Arbitrator explained that the prior policy was reasonable and appropriate. The prior voluntary disclosure policy was seemingly effective as Arbitrator Stout noted that 88.4% of employees had voluntarily been vaccinated and disclosed their status. Furthermore, the ESA had not previously required vaccination prior to hiring and there was no legislated authority or collective agreement language requiring that the ESA's employees be vaccinated.

The Arbitrator found that there was no evidence that operating without such a policy would cause substantial interference with the ESA's operations. Although some staff were required to travel or access third-party sites, the ESA's operations were not significantly impacted if some employees were not vaccinated especially given a COVID-19 testing alternative and that many workers were able to work remotely. The union acknowledged they would raise no objection to travel only being assigned to fully vaccinated employees.

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Arbitrator Stout also distinguished this case from *United Food and Commercial Workers Union, Canada Local 333 v Paragon Protection Ltd.*, ("*Paragon*") the first and only other Ontario mandatory vaccination decision and one in which the policy was upheld. Arbitrator Stout reiterated that considering the unique context is critical and commented that the Paragon decision was reasonably decided. In contrast to Paragon, the relevant collective agreement in this matter did not include a clause which contemplated mandatory vaccinations for third-party sites.

Ultimately, the ESA's concerns did not justify imposing a mandatory vaccination regime in which employees could be disciplined or dismissed for vaccination refusal. However, Arbitrator Stout concluded that it was reasonable for the ESA to require employees to confirm their vaccination status as long as employee personal medical information was kept confidential and only disclosed with the employee's consent. Furthermore, he noted that if significant issues arose with respect to accessing third-party sites, the ESA may have cause to place the employee on unpaid administrative leave.

Arbitrator Stout directed the ESA to amend their policy so that employees would not be disciplined or dismissed for vaccination refusal and to provide a testing option to employees who are not fully vaccinated. The ESA was ordered to revise their policy to indicate that at some point in the future, if problems occur in their operations or safety concerns become such that they cannot adequately be addressed by a combined vaccination and testing regime, then with reasonable notice the ESA may place employees on an unpaid administrative leave if they are not fully vaccinated. The ESA was also directed to amend their policy to provide employees with the option of providing a general consent to disclosure of vaccination status in order to access third-party premises or to reserve their right to disclose on a case-by-case basis. Finally, the ESA was directed to provide a copy of their revised policy to the Joint Health and Safety Committee and advise them of any and all concerns they may have about health and safety in the workplace and at third-party sites.

Check the Box

This is the second Ontario decision addressing the enforceability of a mandatory COVID-19 vaccination and the first decision in which such a policy was unenforceable. Read together, this case and *Paragon* demonstrate that the context of the workplace and its unique risks are critical in assessing the reasonableness of a mandatory vaccination policy. In workplaces with high risk of transmission or vulnerable populations, mandatory vaccinations may not only be entirely reasonable but necessary. However, where employees may work remotely and evidence does not demonstrate that there has been a particular COVID-19 risk in the workplace, a mandatory policy *may* be unreasonable.

There will be more cases addressing mandatory vaccination policies in the near future. We are continuing to track this issue closely and will provide readers with updates as further developments occur.

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Need more information?

For more information about workplace vaccination policies, or related litigation, contact Stephanie Nicholson at (416) 684-7398 or your regular lawyer at the firm.

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