

# **COVID-19 Vaccinations and Workplace Rights 2022 Case Law Update**

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## Overview

Last year, there was much discussion on whether or not employers could legally implement mandatory vaccination policies in Canada. In the first part of 2021, COVID-19 vaccines were not readily available to all Canadians, and most employers had not implemented mandatory vaccination policies yet. By August 2021, most Canadian adults had been given the opportunity to become fully vaccinated. In this context, on August 13, 2021, the Federal Government of Canada announced the requirement for all federal public servants to be fully vaccinated by the end of September 2021. The Federal Government also instituted mandatory vaccination requirements for all employees in the federally regulated air, rail and marine transportation sectors by October 2021, while at the same time, requiring vaccination to travel by air or train effective November 2021. After the Federal government took the lead, many Canadian employers followed suit, and there was a rapid influx of mandatory vaccination policies implemented throughout the country in both public and private sectors (including unionized and non-unionized workforces).

There are now several Canadian labour arbitration decisions that consider whether or not mandatory vaccination policies in the unionized context are reasonable and justified. To date, most of these decisions have held that mandatory vaccination policies are reasonable and justified, illustrating an overwhelming consensus that employers can legally implement significant health and safety protections in the context of the COVID-19 pandemic. However, not all policies have been upheld in arbitral law. For instance, in one circumstance a labour arbitrator found a mandatory policy to be unreasonable given that workers could perform work remotely, and other measures (such as testing) could be effective in the absence of vaccination. In all circumstances the context of the workplace, along with the alternative mechanisms in the related policy, will be considered when evaluating the reasonableness of a particular policy.

This article will provide a case law update regarding the legality of vaccination policies in Canadian workplaces, updating a previous article written prior to the emergence of these decisions. While these recent decisions are directly relevant for unionized workplaces, the principles set out are useful for all employers, as the courts may consider similar principles when evaluating mandatory vaccination policies in relevant matters (such as wrongful dismissal claims arising out of the implementation of such policies). The current case law suggests that employers can implement protections against COVID-19 in the workplace, but

such protections must be reasonable, balanced and relevant to the particular workplace. In the context of the COVID-19 pandemic, employers must continually consider the ongoing changes in public health direction as well as case law, as matters have continued to evolve and change quickly throughout the last two years, and so should each employers' approach relating to health and safety measures (including mandatory vaccination policies).

## **Unilateral Implementation of Policies in Unionized Workplaces**

In several recent decisions, labour arbitrators have considered whether or not mandatory vaccination policies implemented by employers are reasonable and justifiable in the unionized context. These decisions involve policy grievances filed by unions in response to employers implementing COVID-19 vaccination policies. Labour arbitrators have largely considered six criteria when determining whether or not an employer can justifiably impose a unilateral rule or policy within a unionized workplace. The "KVP Test" (named after the case it was first articulated in from 1965), requires that a policy or rule that is unilaterally introduced by a company must satisfy the following criteria to be enforceable:

1. The policy must not be inconsistent with the collective agreement;
2. The policy must not be unreasonable;
3. The policy must be clear and unequivocal;
4. The policy must be brought to the attention of the employee affected before the company can act on it;
5. The employee concerned must have been notified that breach of such policy could result in discharge if the policy is used as a foundation for discharge; and
6. Such policy should have been consistently enforced by the company from the time it was introduced.<sup>1</sup>

The above criteria would be considered when a union grieves any unilaterally imposed policy (which would apply to mandatory vaccination policies).

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<sup>1</sup> See oft-cited decision of *Re Lumber & Sawmill Workers' Union, Local 2537, and KVP Co. Ltd.* (1965), 16 L.A.C. 73.

## **Mandatory Vaccination Policies Upheld**

Below is a summary of several decisions wherein arbitrators considered whether or not mandatory vaccination policies were reasonable and should be upheld. The decisions illustrate that employers can justify health and safety measures to protect the workplace from COVID-19, although context is always important as noted below.

### **United Food and Commercial Workers Union, Canada Local 333 and Paragon Protection Ltd (“Paragon Decision”)**

In the Paragon Decision, the Arbitrator rejected the union’s policy grievance and found that the mandatory vaccination policy was reasonable, enforceable and compliant with Ontario’s *Human Rights Code* (the “Code”) and the *Occupational Health and Safety Act* (the “OHS”).

The employer, Paragon Protection Ltd (“Paragon”) employs 4,400 security guards at approximately 450 client sites throughout Ontario. At least 50% of these client sites were subject to COVID-19 vaccination policies. Prior to the COVID-19 pandemic, the collective agreement had a provision that stated that in the event a security guard is stationed at a third-party site with a mandatory vaccination requirement, that guard must agree to be vaccinated or reassigned to another site.

In September 2021, Paragon unilaterally implemented a mandatory COVID-19 vaccination policy that required employees to be vaccinated by end of October 2021 (in all cases, even if the third-party worksite did not require mandatory COVID-19 vaccinations). The union grieved this vaccination policy, arguing it was not reasonable.

In finding that Paragon’s policy was reasonable, enforceable and compliant with Ontario’s *Human Rights Code* and the *OHS*, the Arbitrator found that Paragon’s vaccination policy was consistent with the collective agreement’s provision related to third-party vaccination requirements, as well as the vaccination requirements on many of Paragon’s client worksites. The arbitrator held that the employer had an obligation under the *OHS* to take every precaution reasonable in the circumstances for the protection of its workers and that “personal subjective perceptions of employees to be exempted from vaccinations cannot override and displace the available scientific considerations”.<sup>2</sup> In sum, in this decision, the

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<sup>2</sup> See page 19 of *United Food and Commercial Workers Union, Canada Local 333 and Paragon Protection Ltd* (2021)(Arbitrator Von Veh)

Arbitrator held that Paragon’s unilateral implementation of a mandatory vaccination policy was a permissible exercise of its management rights in accordance with the collective agreement.

***Bunge Hamilton Canada, Hamilton Ontario v. United Food and Commercial Workers Canada, Local 175 (“Bunge Decision”)***

In the Bunge decision, the Arbitrator rejected the union’s policy grievance and found that the mandatory vaccination policy implemented by the employer was reasonable (including a requirement for unvaccinated employees to be placed on an unpaid leave).

In this case, the employer, Bunge Hamilton Canada (“Bunge”) operates an oilseed processing facility that has operations on two properties across from one another. One of these properties (the primary location) is located on land leased from the Hamilton Oshawa Port Authority (which is a federally regulated organization) (“the Port Authority”). The other property (the secondary location) is owned by Bunge.

In November 2021, in order to comply with mandatory federal vaccination requirements, the Port Authority issued a vaccination policy requiring all employees working on land owned by the Port Authority to be fully vaccinated by January 24, 2022. Employees who could not confirm vaccination were therefore not permitted on Port Authority property after January 24, 2022. Bunge subsequently issued a vaccination policy in order to comply with the Port Authority’s requirements. Under Bunge’s policy, any employee who did not provide proof that they were fully vaccinated by January 24, 2022 could not attend on site and would be placed on an unpaid leave. The union grieved Bunge’s mandatory vaccination policy.

In dismissing the union’s grievance, the Arbitrator found that Bunge’s policy was reasonable, noting some of the following:

- Without the mandatory vaccination policy, Bunge could not properly operate its business (namely given its lease obligations and related policies as required by the Port Authority);
- Given the public safety and health risks unvaccinated persons create for both vaccinated and unvaccinated persons who come into contact with them, the policy is reasonable;

- The policy does not provide for automatic discipline or termination, but instead places employees who are not vaccinated on unpaid leave;
- A vaccinate or testing policy would not be possible in this case as that would not comply with the Port Authority's requirements.

Given the specific context of this case, the Arbitrator found the mandatory vaccination policy reasonable and therefore enforceable.

**Ontario Power Generation v. The Power Worker Union ("OPG Decision")**

In the OPG Decision, the Arbitrator considered whether or not Ontario Power Generation ("OPG") had properly implemented a policy related to COVID-19 vaccinations and other measures. The policy was a vaccinate or test policy, which included some of the following requirements:

- Employees who were not vaccinated or refused to disclose their vaccination status were required to self-administer COVID-19 rapid antigen tests twice per week (and video record) and take a photograph of the results;
- Employees were required to upload the video of the testing and photo of the result to an online portal;
- Employees were required to pay \$25 per week for the testing (to be paid by way of payroll deductions); and
- Employees who refused the testing would be placed on an unpaid leave for 6-weeks, and thereafter would be terminated for just cause.

In addition to the above, OPG also implemented a mandatory vaccination policy in relation to workplace gyms (i.e. provide proof of vaccination to use the company's on site gyms).

The union filed a grievance namely considering various issues including the following:

1. Should the cost of covid testing for unvaccinated employees be paid for by the employer and should such testing occur during working hours;
2. Treatment of employees who do not agree to undergo COVID-19 testing; and

3. Gym access for employees who are unvaccinated or choose not to disclose their vaccination status.

In relation to these issues, the Arbitrator held as follows:

- **Cost of Testing:** The Arbitrator ordered OPG to pay for the cost of the testing, while finding that employees had to do the test outside of working hours. In relation to the latter finding, the Arbitrator noted that it was not practical to have the test done during working hours (for instance if they tested positive they would be at work) and that compensating employees outside of working hours to do the test would be a disincentive for employees to get vaccinated.
- **Employees who Refused Testing:** The Arbitrator dismissed the union's grievance in relation to the OPG's policy requiring those who refuse testing to take an unpaid leave for 6-weeks. The Arbitrator further found that if an employee refuses to participate in testing, they do present an unnecessary risk to their coworkers during a pandemic. The Arbitrator noted that an employee's termination due to a refusal to get tested is "very likely" to be upheld at arbitration.
- **Mandatory Vaccination for Gyms:** The Arbitrator found that OPG's mandatory vaccination policy for the gym was reasonable, noting the gym as a high risk area and that the Province of Ontario requires gym patrons to be fully vaccinated.

The above decision provides insight on a vaccinate or test policy, which for the most part was upheld at arbitration (although the Arbitrator held the employer was required to pay the testing cost). It is significant that the Arbitrator specifically noted: "It is important for those individuals who are fired for choosing to not be tested to understand that they are very likely to find the termination of employment upheld at arbitration". In this case, the Arbitrator suggests that a termination with just cause may be justified if an employee refuses vaccination as well as the alternative measure of testing. The decision also specifically finds that a mandatory vaccination policy in relation to gym access was enforceable.

The above decisions suggest that labour arbitrators are willing to impose significant and strict measures when it comes to COVID-19 health and safety protocols (including

mandatory vaccination policies); however, the context of each workplace and the availability of alternate measures should always be considered, as further noted below.

## **Mandatory Vaccination Policy Overturned**

While the above decisions suggest that Ontario labour arbitrators will often uphold COVID-19 vaccination policies, employers powers are not limitless in this regard. The policy language and the specific context will always be considered, as noted in the decision below.

### **Electrical Safety Authority v. Power Workers' Union ("ESA Decision")**

In the ESA Decision, the Arbitrator found that the employer's mandatory vaccination policy was unreasonable in relation to the outcomes for non-compliance (i.e. that an employee could be disciplined, discharged or placed on unpaid leave for refusing to get vaccinated).

The Electrical Safety Authority ("ESA") had previously implemented a vaccinate or test policy, which it then replaced with a mandatory vaccination policy which the union grieved.

In making this decision, the Arbitrator noted that in workplaces where the risks are high and there are vulnerable populations, mandatory vaccination policies may not only be reasonable, but also they may be necessary. However, in other workplaces where these risks do not exist, a less intrusive approach may be more adequate. In this case, the ESA had previously implemented a vaccinate or test policy, and the ESA did not provide evidence that such measures were ineffective. At the time of the arbitration, only 7 of 400 employees had contracted COVID-19 and from those cases only 2 might have been work related. In making this decision, the arbitrator noted that much of the work in question could be performed remotely. In considering all of these facts, the Arbitrator directed the employer to amend the mandatory vaccination policy to make it clear that employees could not be disciplined or discharged for failing to get vaccinated and to instead reinstate the testing option for unvaccinated employees. Despite this finding, the Arbitrator upheld some parts of the policy including finding that it was reasonable for the employer to request disclosure of vaccination status as long as such was disclosed on consent with adequate privacy protections.

Finally, the Arbitrator confirmed that this ruling did not conflict with the Paragon Decision as the facts in each case were distinguishable including the vaccination clause in Paragon's collective agreement, along with the context of the workplace.

## Consequences of Non-Compliance

While the current case law makes it clear that employers can likely justify mandatory vaccination policies in many circumstances, the law does not allow for limitless actions. Employers should always consider reasonable and alternative measures when appropriate, which will assist if the policy or its impact is ever challenged at law. Certainly some circumstances may require mandatory vaccination policies (like working with vulnerable communities or within other legal implications like federal laws); however, in the event that these circumstances do not apply, employers might consider some of the following options:

- **Vaccinate or Test Policy:** Where appropriate, employers may consider a vaccinate or test policy rather than a mandatory vaccination policy. This approach may be most appropriate where other measures can assist in health and safety (like social distancing, working from home and personal protective equipment). This approach may not be appropriate when working with vulnerable communities or considering other mandates (i.e., customer site requirements, federal legal requirements, etc.).
- **Work from home:** In circumstances where employees can perform some or all of their work remotely, it will be less likely that a mandatory vaccination policy would be seen as reasonable or justifiable. Remote work can also be provided as an option to encourage employees to properly quarantine if they are experiencing symptoms.
- **Unpaid leave:** In the event a mandatory vaccination policy is reasonable, an employer still may not be able to justify termination of employment on the basis of a refusal to be vaccinated. To date there are no cases on this exact circumstance, and the safest view would be to place a worker on an unpaid leave for the time being. In the near future, we may have more case law guidance on this issue, but for now, the OPG Decision makes it clear a just cause termination may be justifiable based on refusal to get tested for COVID-19.
- **Contractual terms:** In non-unionized settings, employers have been increasingly including mandatory vaccination clauses in contracts for new hires. It is likely that these types of provisions and requirements for non-unionized employees are legal as long as there are exemptions as legally required for human rights protected grounds (such as religious and medical exemptions). While human rights

exemptions must be accommodated to the point of undue hardship, it has been noted by various human rights commissions across Canada that vaccine requirements are generally permissible, and that “personal preferences and singular beliefs” are not protected grounds.<sup>3</sup> In this regard, employers still need to consider human rights exemptions but such are strictly limited to medical and religious exemptions, which may be few and far between.

## Conclusion

Over the next year, we can expect more legal decisions addressing COVID-19 related workplace vaccination policies and other related case law (such as employment termination decisions). Currently, the available decisions generally support employers implementing strong health and safety measures to reduce the spread of COVID-19 (including mandatory vaccination policies). However, employers should not take limitless and unjustified actions as any decision maker will always consider the content of the policy along with the context of the workplace and employees involved.

For employers that require in-person workplace attendance and deal directly with the public or vulnerable communities, mandatory vaccination policies may be necessary for the health and safety of everyone involved. In such cases, employers will easily be able to demonstrate that a mandatory vaccination policy is reasonable and justifiable. In other cases, if employees often work from home, or can successfully use protective measures, less invasive policies may be more appropriate (like a vaccinate or test policy). The best practices and solutions in each workplace will vary depending on the industry and current public health and safety guidelines and requirements.

The COVID-19 pandemic has resulted in quickly evolving health and safety guidelines and related case law. With that in mind, employers should continually stay up to date on current case law, government direction and public health measures and make time to re-assess all related policies as matters continue to evolve.

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<sup>3</sup> See for instance, the Ontario Human Rights Commissions “Policy Statement on COVID-19 vaccine mandates and proof of vaccine certificates” available online at: [https://www.ohrc.on.ca/en/news\\_centre/ohrc-policy-statement-covid-19-vaccine-mandates-and-proof-vaccine-certificates](https://www.ohrc.on.ca/en/news_centre/ohrc-policy-statement-covid-19-vaccine-mandates-and-proof-vaccine-certificates)

## About the Author



Deborah is a founding partner of Hudson Sinclair LLP, where she represents both employers and employees in all aspects of labour and employment law. She was called to the Ontario Bar in 2008, and has practiced exclusively in the areas of labour and employment for her entire career. She spent the first eight years of her career at a prominent management-side firm, and then spent several years at a boutique workplace law firm where she broadened her practice experience to include acting as employee-side counsel and workplace investigator.

Deborah provides her clients with practical, timely and highly specialized legal advice. She regularly advises both employers and employees in relation to matters occurring at all stages of the employment relationship. She values the importance of early and productive resolution discussions when beneficial and appropriate. In circumstances where resolution is not achievable or advantageous, Deborah advocates on behalf of her clients in all legal forums. Deborah also conducts workplace investigations as an external, independent investigator relating to various workplace circumstances and allegations including: harassment/bullying, human rights matters, privacy breaches and fraud.

Deborah has authored and contributed to a number of publications concerning workplace issues. Most recently, Deborah was a contributing author of: [Startup Law 101: A Practical Guide](#) (2017)<sup>4</sup>; [Ontario Human Rights Code: Quick Reference](#) (2015)<sup>5</sup>; and [Accommodation Issues in the Workplace](#) (2014).<sup>6</sup> Deborah has also published numerous articles for Queen's University IRC.

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<sup>4</sup> Lovrics, Catherine et al, *Startup Law 101: A Practical Guide* (Toronto: LexisNexis Canada, 2017)

<sup>5</sup> Jamie Knight et al, *Ontario Human Rights Code: Quick Reference*, 2015 ed. (Toronto: Thomson Reuters Canada, 2014).

<sup>6</sup> Jamie Knight et al, *Accommodation Issues in the Workplace*, (Toronto: Wolters Kluwer Limited, 2014).

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