

CANADA: Are Mandatory COVID-19 Vaccination Policies Enforceable? Maybe, Maybe Not.

November 17, 2021

Since the release of government-approved vaccines to help fight the COVID-19 pandemic, employers have been wrestling with how to implement vaccination policies in the workplace. For those employers who have implemented a mandatory vaccination policy, two recent decisions shed some light on their enforceability.

Paragon Protection Case: Mandatory Vaccination Policy Reasonable

On November 9, 2021, Arbitrator Von Veh's decision in *UFCW, Canada, Local 333 v. Paragon Protection Ltd.* (the "**Paragon Matter**") was released. This decision appears to be the first example of an employer implementing a mandatory vaccination policy that has withstood legal review.

Paragon Protection Ltd. operates in the private security space, offering security services to both public and private organizations. Working across 450 site locations, and employing over 4,400 security guards, the company was concerned about protecting both the lives of its employees and those of its customers.

On September 3, 2021, the company implemented two policies, the "*COVID-19 Vaccination Policy*" and an accompanying "*Exemption Request Form*." The policy required all Paragon staff to be fully vaccinated with a Health Canada approved vaccine by October 31, 2021, or face disciplinary action, including termination. Exemption terms were drafted within the policy to allow for special considerations for either medical or religious grounds.

The Union, Local 333, asserted in its grievance to arbitration that the policy violated the Collective Agreement, arguing that the company's conduct was unreasonable and was also a violation of the Ontario *Human Rights Code*, RSO 1990, c H. 19. Importantly, the Collective Agreement at issue in this case already contained agreed upon language which required employees to be vaccinated in certain situations.

Arbitrator Von Veh analyzed the "KVP Rules" in considering the reasonableness of the policy imposed by Paragon. Arbitrator Von Veh found that the policy was reasonable and found that it did not violate the Collective Agreement, the Ontario *Human Rights Act*, or any other applicable legislation. In reaching this conclusion, the Arbitrator stated:

"The company has an obligation and responsibility to protect the health and safety of its employees... an employer must take "every precaution reasonable in the circumstances for protection of its workers." The company by introducing its Vaccination Policy and Vaccination Exemption Policy has taken "every precaution reasonable" to satisfy its obligations and responsibility."

Arbitrator Von Veh also went on to note that given the wealth of scientific information available, the issue of an employee choosing not to be vaccinated based on "*personal preferences*" cannot displace and override available scientific considerations and health and safety requirements.

Electrical Safety Authority Case: Mandatory Vaccination Policy Unreasonable

Continued

The support for mandatory vaccination policies provided by Arbitrator Von Veh's decision in the *Paragon Matter* will be short lived. On November 11, 2021, only two days after the decision in the *Paragon Matter* was released, Arbitrator Stout found that the mandatory vaccination policy at issue in *Electrical Safety Authority v. Power Workers' Union* (the "**ESA Matter**") was unreasonable.

Applying the KVP test, Arbitrator Stout analyzed the differing circumstances under which the Electrical Safety Authority ("**ESA**") intended to implement their policy. While both policies contained similar provisions, unlike in the *Paragon Matter*, Arbitrator Stout found that ESA's employees were at "*no significant risk related to an outbreak, infections, or significant interference with employer's operations.*"

Arbitrator Stout came to this conclusion by noting that most ESA employees were working remotely, the ESA had minimal COVID-19 related incidents since the start of the pandemic, and the ESA could implement simple procedural changes to ensure that workers who are exposed to the public and who may need to enter private dwellings are fully vaccinated, without significantly impacting the employer's operation.

Given these differing circumstances, Arbitrator Stout affirmed that ESA's policy was not reasonable. Arbitrator Stout noted that given the severity and changing state of this pandemic, as well as the changing circumstances under which a policy is implemented, there will be differing conclusions on what policy provisions are reasonable at differing times. Perhaps most importantly, the Collective Agreement at issue in the *ESA Matter* did not already contain vaccination language whereas the Collective Agreement in the *Paragon Matter* did.

Notably, Arbitrator Stout also found that it was reasonable for the ESA to require employees to confirm their vaccination status if the personal medical information is adequately protected and only disclosed to third parties with their consent.

We will continue to monitor the case law developing in this area, as inevitably more decisions arise providing clarity on how an employer can implement a "*reasonable*" vaccination policy, and under what circumstance it may be appropriate.

Please note that this bulletin is intended for informational purposes only and does not constitute legal advice or an opinion on any issue. We strongly recommend that you contact your Miller Canfield lawyer with any specific questions you may have so that those questions can be addressed properly with you.