



Canada: Mixed Results in Cases Challenging Vaccine Requirements

By Leah Shepherd

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Recent arbitration decisions have provided some guidance for Canadian employers looking to establish a COVID-19 vaccine requirement or enforce the one they already have.

The outcomes of these cases show a need for employers to carefully consider certain factors before they enforce a COVID-19 vaccine requirement, including:

- Any union contracts that apply.
- Whether the work is done in close proximity to others.
- Whether the work takes place indoors or outdoors.
- Whether employees interact with customers.
- The location of the worksite, especially if it is on a client's property or public land in the transportation industry.

Chantel Goldsmith, an attorney with Samfiru Tumarkin in Toronto, commented, "We're in a strange limbo period. Over the next year, we're going to be seeing many decisions from both arbitrators and the courts regarding whether terminations and unpaid leave decisions for unvaccinated employees are permissible."

Employers and HR professionals "need to understand that this is not settled law by any means. It's one of the first of many that we're going to be seeing. I personally believe we'll be seeing things on a case-by-case basis," she added. "We're seeing decisions come out on both sides in favor of employees and in favor of employers."

Recent Cases

The United Food and Commercial Workers Canada, Local 175, recently filed a grievance against the canola processor Bunge Hamilton Canada, alleging that the employer's vaccination requirement was unreasonable and violated employees' privacy rights.

In the fall, the Canadian government required all employers in the air, rail and marine transportation sectors to establish mandatory vaccination policies ensuring that all employees be vaccinated against COVID-19 by Jan. 24. About half of Bunge's operations take place on land owned by the Hamilton-Oshawa Port Authority, so Bunge needed to comply with the federal requirement on that property.

The arbitrator found that Bunge's vaccine policy was reasonable and necessary to protect the health and welfare of all employees.

A separate case involved Maple Leaf Sports and Entertainment, which owns several sports teams, and an employee who was put on unpaid leave for not complying with its vaccine requirement. The employer announced a vaccine requirement for employees after the provincial government instituted a requirement that spectators at sports events be vaccinated.

Teamsters Local Union 847 argued that the employer violated the workers' seniority rights and the collective bargaining agreement. The employee who filed the grievance had a job that demanded he work in close proximity to many other employees when setting up for events. On Jan. 12, an arbitrator ruled that the employer's vaccine policy was permissible.

In another arbitration case between Elexicon Energy, a utility company in Ontario, and the Power Workers' Union, the arbitrator ruled on Jan. 14 that the employer's vaccination requirement was permissible, but not when it applied to employees who worked exclusively at home or outside.

A fourth arbitration decision on Feb. 7 confirmed that an employer's vaccine requirement was reasonable, but not the way the employer enforced it. Chartwell Housing, which owns several nursing homes, fired 14 employees for not being vaccinated. The Healthcare Office and Professional Employees Union, Local 2220, filed a grievance, and the arbitrator found that the employer should have placed the employees on unpaid leave instead of firing them.

Goldsmith said, "Terminations and unpaid leaves will be dealt with on a grievance-by-grievance basis. It's not an outright confirmation that vaccine mandates are permissible."

Patrick Groom, an attorney with McMillan in Toronto, and one of the lawyers representing the employer Bunge Hamilton Canada in its arbitration case, said, "There's a general acceptance now by arbitrators that vaccine mandates are justified in order to protect health and safety of employees where employees work in close proximity to each other or those employees work in the public," such as security guards.

The bottom line is employers need to look at their unique set of circumstances.

Shifting Sands

Jeffrey Patterson, an attorney with Miller Canfield in Windsor, Ontario, said, "What's reasonable today may become unreasonable tomorrow, and vice versa. Employers will have to continue to re-evaluate their approach to the virus as a result. This may mean implementing or amending vaccination policies, COVID-19 safety plans, remote-work arrangements, flexible working conditions and so on."

In many cases, Canadian employers are looking at a small percentage of their workforce that hasn't been vaccinated already. "The vast majority of Canadians are already vaccinated and agree with the mandates that are in place," Groom said.

Leah Shepherd is a freelance writer in Columbia, Md.

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