

Member's Quarterly

Fall 2021 Edition

Feature

Employers' Mandatory COVID Testing and Vaccinations

Are they legal? It depends.

As the COVID-19 pandemic wages on, new practical and legal issues continue to affect employers and are resulting in new litigation. As courts and tribunals issue new decisions, employers will hopefully receive helpful guidance.

An arbitration decision from Ontario has attracted attention regarding an employer's ability to require employee COVID testing. In that case, the arbitrator upheld the employer's policy requiring all staff at a retirement home to be tested for COVID-19 every two weeks. In essence, the employer took an Ontario government recommendation and turned it into a mandatory requirement. Employees who refused to test were to be placed on a leave of absence until testing was completed. The mandatory testing was part of the home's overall COVID-19 precautions, which also included masking and requiring employees to change their clothes and shoes at the beginning and end of their shifts. It is also important to note that as of the date of the hearing (September 24 and 30, 2020), no positive cases of COVID-19 had been identified among staff, management or residents of the home.

In the unionized context, a rule unilaterally imposed by an employer will only be upheld if it meets the following criteria:

1. it is consistent with the collective agreement;
2. it is reasonable;
3. it is clear and unequivocal;
4. it was brought to the attention of the affected employees before the employer attempted to act on it;
5. the employees were notified that a breach of the rule could result in discipline; and
6. the employer consistently enforces the rule.

The arbitrator focused on the reasonableness of the policy. The union objected to the required testing on the basis that it breached the employees' dignity and was unjustifiably invasive of privacy. The union specifically pointed to the following in making its arguments:

1. the policy is unnecessary: the alternate recommended mitigation strategies already in place have been successful in preventing an outbreak;
2. the policy is unfair because the residents are not being tested; and
3. the testing doesn't provide anything of value to the employer beyond a "point in time" positive or negative result and does not prevent infection for the employee being tested.

In dismissing the union's objections, the arbitrator found the employer did not have to wait for an outbreak to justify the implementation of its policy. Given the highly infectious nature of COVID-19 and potential deadly consequences for elderly living in contained environments, the intrusiveness of the testing was outweighed by its usefulness. While a negative test may be of limited value to the employee being tested, it is valuable to the employer in terms of risk management. Further, a positive test is of immense value to the employer because it allows for immediate identification, isolation and contact tracing that combats the spread of the virus.



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Remembering that the facility in the decision is a retirement home where individuals live independently with minimal to moderate support, this decision suggests that similar policies would also be upheld in long-term care homes where residents require more support. As such, this decision is a welcome one for employers who work with vulnerable populations and arguably for organizations where the unavoidable proximity of employees to one another puts them at greater risk of infection.

An important consideration to any policy is what alternatives are available to reduce risks where employees are not vaccinated. There may be many available alternatives, such as allowing employees to work at home, allowing employees to work with a mask, allowing employees to work under heightened hygiene protocols and physical distancing, and possibly requiring COVID testing of such employees.

We are increasingly being asked about mandatory vaccination policies. As mandatory vaccination is much more invasive, it is decidedly more difficult to implement and more vulnerable to challenge. Legal risks include potential human rights complaints, privacy complaints, constructive dismissal claims and union grievances. While employers also have health and safety responsibilities, these can be addressed without forcing employees to vaccinated. If desired, a vaccination incentive program would be easier to defend, less offensive to some employees and potentially just as effective.

It is important to remember that what we perceive as a risk right now may change over time. If sufficient numbers of the population get vaccinated, there may be herd immunity regardless of whether particular employees get vaccinated. There are other serious diseases for which not everyone gets vaccinated. In addition, if most of your employees do get vaccinated, what really is the risk that some do not? In such cases, vaccinated employees will be prepared to accept the risk to themselves and they shouldn't pose a risk to the employees who have not been vaccinated.

What is appropriate for your workplace will depend on its unique circumstances, such as whether employers are union or non-union, essential or not, isolated in their work environments, capable of working from home and physically close to vulnerable people. Employee concerns are also relevant, as is the possibility of accommodating those concerns.

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