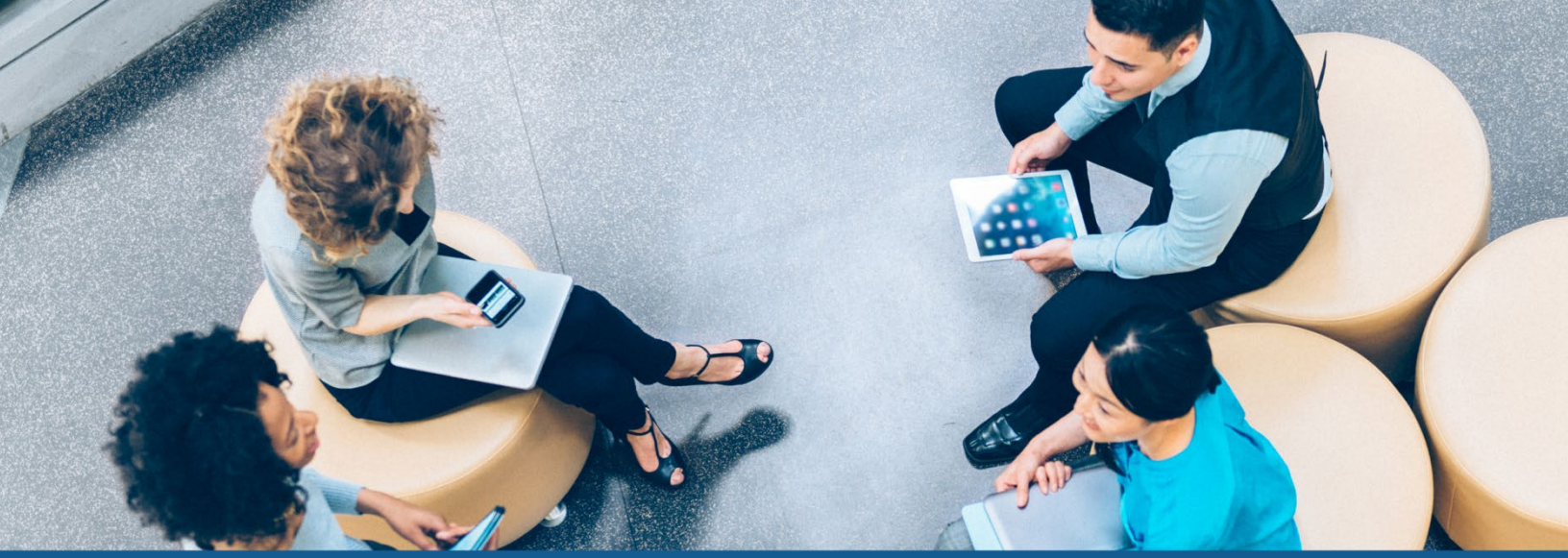

What's New in HR Law

Arbitrator Upholds Employer's Mandatory COVID-19 Testing Policy

January 20, 2021

Bottom Line

In a recent decision, an Ontario Arbitrator upheld an employer's mandatory COVID-19 testing policy. The union filed a group grievance on behalf of its members working in a retirement home. The grievance challenged the reasonableness of the employer's unilateral decision to adopt an Ontario government recommendation for long-term care homes by converting the recommendation into a mandatory COVID-19 testing policy.

Background Facts

The employer operated a retirement home that provided rental accommodation with care services to residents who live independently with minimal to moderate support. Being a retirement home, the home is provincially regulated by the *Retirement Homes Act, 2010*. The retirement home was physically attached to a long-term care home that was managed by the same employer. Employees from the retirement home were responsible for doing laundry for residents of the long-term care home. As the facilities were connected, both homes were subject to the directives issued under the *Health Protection and Promotion Act, 1990*, as

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outlined under Directive #3 for *Long-Term Care Homes under the Long Term Care Homes Act, 2007*.

The Policy

The policy in question imposed mandatory bi-weekly testing by nasal swab of all staff in the retirement home. A refusal to comply with the testing requirement would result in the employee being held out of service or, alternatively, the employee being required to wear full personal protective equipment for the entirety of the employee's shift. The policy also incorporated an accommodation provision where challenges to the nasal swab were addressed on a case-by-case basis. Finally, the policy allowed employees to be tested by third parties, outside working hours with compensation for the resultant expenses.

The Decision

The union argued that the policy constituted an unreasonable exercise of the employer's management rights and an unjustified invasion of employee privacy. Moreover, given all the safety measures in place and the absence of a single positive case in the home, the union argued that the employer had not established that the testing policy was required. Furthermore, the union described the policy as unfair, and incoherent, in that it was incapable of achieving its purpose given that residents were not required to be tested. Finally, the union took issue with the policy on the basis that testing was mandatory without the requirement of symptoms as a triggering factor.

For its submissions, the union relied on the "KVP" principles that were endorsed by the Supreme Court of Canada in *C.E.P, Local 30 v. Irving Pulp & Paper Ltd.*, 2013 SCC 34, which was an alcohol testing case. The KVP principles state that a rule introduced by an employer without the union's assent will give rise to discipline only if the rule 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 employee(s) affected before the employer attempts to act on it; (5) where the rule is invoked to justify discharge, the employee was notified that a breach of the rule could result in discharge; and (6) the employer has enforced the rule consistently. Given that a failure to comply with the testing policy could result in employees being held out of service, the Arbitrator characterized the potential consequences as disciplinary and acknowledged that the KVP analysis was applicable

In dismissing the grievance, the Arbitrator found that the policy was consistent with the collective agreement and constituted a reasonable exercise of the employer's management rights. The Arbitrator stated that, while the union's reliance on drug and alcohol testing cases was a reasonable starting point for the analysis, weighing the privacy breach against the goal of controlling COVID-19 infections was not the same as monitoring intoxicants in the workplace. In addition, the policy needed to be weighed in light of the highly infectious nature of the virus and the often deadly consequences for the elderly, especially those living in contained environments.

Significantly, the Arbitrator accounted for the novelty of the Coronavirus and the fact that public health authorities are still learning about its symptoms, transmission, and its long term effects. The Arbitrator also accounted for the "generous" accommodation provision that allowed employees to be tested by third parties outside of working hours while being compensated for the resultant expenses. Weighing all the relevant factors, the Arbitrator found that when the intrusiveness of the test – a swab up the employee's nose – was weighed against the problem to be addressed, the policy was reasonable. Although the home had yet to suffer an outbreak, given the serious consequences that would arise from an outbreak, the employer's preventative approach was deemed reasonable.

The Arbitrator acknowledged that the policy had its shortcomings. For example, the fact that residents were not being tested was specifically noted. However, the shortcomings were outweighed by the utility of the policy as a positive test would lead to identification, isolation, contact tracing, and the implementation of tools used to combat the deadly effects of the COVID-19 virus.

Check the Box

As employers contend with the uncertainty surrounding the implementation of COVID-19 related health and safety policies, there are a number of emerging cases offering guidance that will inform how an employer can implement reasonable and effective COVID-19 safety measures. In most cases, the specific nature of the workplace will be a significant consideration when assessing the reasonableness of any policy. As such, employers are well-advised to keep abreast of emerging COVID-19 related cases in order to better inform their health and safety policies and procedures. We will likewise continue to monitor and keep our readers informed of these developments as they occur.

Need more information?

For more information about workplace management amidst the COVID-19 pandemic, please contact Tawanda Masimbe at 416.408.3221 or your regular lawyer at the firm.

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