



What's New in HR Law

Arbitrator Upholds Canada Post's Mandatory Vaccination Practice

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Bottom Line

In *Canada Post Corporation and CUPW (Grievance re: CUPW/STTP National Mandatory Vaccination Practice)* (unreported, 28 April 2022), Arbitrator Jolliffe upheld Canada Post Corporation's ("CPC") Mandatory Vaccination Practice (the "Policy") after finding it to be reasonable. Under the Policy, all CPC employees were required to be vaccinated by November 26, 2021, unless they were validly exempt from the Policy's requirements. Employees were placed on an unpaid leave if they failed to be vaccinated by November 26, 2021, or failed to attest to their vaccination status by that date.

Background Facts

The Canadian Union of Postal Workers (the "Union") represents approximately 42,000 employees in CPC's Urban postal operations. The bargaining unit employees work in post offices and mail processing plants across Canada, in roles such as letter carriers, mail service couriers, postal clerks, mail handlers, and mail dispatchers. Employees who are responsible for mail delivery regularly travel in the community and frequently interact with members of the public. Other employees work in close quarters with each other within CPC's mail processing plants.

From March 2020 until the rise of the Omicron variant in November 2021, CPC recorded 19 outbreaks of COVID-19 in its workplace, nine of which occurred during 2021. These outbreaks arose despite significant safety measures taken by CPC in response to the COVID-19 pandemic, including the implementation of

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comprehensive protocols relating to sanitizing, decontamination, physical distancing, staggered breaks, workstation redesigns, contactless mail delivery, and on-site COVID-19 screening and rapid testing.

In an attempt to prevent further workplace outbreaks, CPC unilaterally imposed the Policy on October 22, 2021. The Policy required all CPC employees to attest to whether they were fully vaccinated, partially vaccinated and intending to become fully vaccinated, unwilling to be vaccinated, or unable to be vaccinated. Employees were required to complete this attestation by November 26, 2021. Any employees who failed to attest or were unwilling to be vaccinated by November 26, 2021, were placed on unpaid leave.

After the Policy's implementation, there still remained a significant risk of COVID-19 in CPC's workplace. Between November 28, 2021, and January 20, 2022, there were approximately 2,180 cases of COVID-19 recorded across CPC's system. By January 24, 2022 (i.e., approximately two months after the Policy came into effect), 1,412 bargaining unit employees were still non-compliant with the Policy. Another 1,200 employees were actively employed and being tested up to three times per week for COVID-19, as they were either being accommodated under the Policy or awaiting their second vaccine dose.

The Union filed a national policy grievance alleging that the Policy was unreasonable and should not have been implemented. The Union proposed that frequent rapid antigen testing should have been made available to employees who were placed on unpaid leave for refusing to become vaccinated or for failing to attest to their vaccination status. Notably, by the time the Union filed its grievance, the Omicron variant had emerged in Canada and continued to spread throughout the country while the Union's grievance was being heard at arbitration.

The Decision

Arbitrator Jolliffe held that the Policy was, and continues to be, a reasonable exercise of CPC's management rights and responsibilities under the parties' collective agreement and its obligations under the *Canada Labour Code*. Arbitrator Jolliffe specifically highlighted the fact that vaccines appeared to have consistently created lower viral loads, thereby leading to less serious illness and less of a risk of infection.

Arbitrator Jolliffe held that the Union's preference for frequent rapid testing was not an appropriate substitute for being vaccinated against COVID-19. During the course of the hearing, each party produced a medical expert and Arbitrator Jolliffe ultimately found CPC's expert witness to be the more convincing of the two. In particular, Arbitrator Jolliffe accepted the expert witness's opinion that there was an absence of evidence that rapid antigen testing, on its own, reduced COVID-19 transmission; the expert witness did acknowledge, however, that rapid antigen testing could be a valid complementary approach to vaccination for the purposes of reducing transmission.

In coming to the decision to uphold the Policy, Arbitrator Jolliffe further emphasized and highlighted a number of fact-based points raised by CPC, including:

- The bargaining unit employees performed work involving high levels of interaction with individuals who may not be vaccinated;
- Physical distancing was not always possible in the workplace or when interacting with customers, some of whom are likely vulnerable;
- A large number of bargaining unit employees were required to go into a wide variety of locations to perform their duties;

- Additionally, thousands of bargaining unit members worked within large mail processing operations;
- There was no option for remote work or self-isolation while these employees performed assigned duties;
- CPC had to deal with a high number of COVID-19 cases since the beginning of the pandemic, which had been a “truly daunting experience” for CPC and the bargaining unit employees, even after the Union filed its grievance; and
- There had been an increase in COVID-19 cases caused by the Omicron wave and, even in the case of Omicron infection, vaccination provided protection in the form of lessening the risk of serious illness and reducing viral loads of infected individuals.

Notably, Arbitrator Jolliffe also rejected the Union’s argument that the emergence of the Omicron variant could be taken as suggesting a decrease in the need for vaccination. Rather, the Arbitrator stated that he was “satisfied that the best evidence suggests that abandoning mandatory vaccination requirements and moving into a testing regime has never been shown to be a better approach to protect the workplace and the Corporation’s employees in its dealing with this pandemic”.

Check the Box

Arbitrator Jolliffe’s decision is the latest in a [string of decisions](#) upholding workplace policies requiring employee vaccination. Employers operating in high-risk settings may find Arbitrator Jolliffe’s decision particularly helpful in defending the implementation and enforcement of their mandatory vaccination policies, especially where there is evidence of increasing COVID-19-related risks despite the implementation of robust workplace safety protocols.

More generally, employers should continue to stay informed on developments regarding the ongoing COVID-19 pandemic, including vaccination requirements and the emergence of COVID-19 variants or sub-variants in Canada, and adjust their workplace practices in line with the changing public health risks.

Need More Information?

For more information or assistance with workplace vaccination policies or related litigation, contact [Daniel Park](#) at 647.598.0516 or your regular lawyer at the firm.



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