



# What's New in HR Law

## Arbitrator Finds Mandatory Vaccination Policy Did Not Violate the *Charter*

March 30, 2022

### Bottom Line

In [\*Toronto District School Board and CUPE, Local 4400 \(PR734 COVID-19 Vaccine Procedure\), 2022 CanLII 22110 \(ON LA\)\*](#), Arbitrator Kaplan concluded that the Toronto District School Board's (the "Board") mandatory vaccination policy did not violate section 7 of the *Charter of Rights and Freedoms* (the "Charter") and that the Policy was, on a whole, an entirely reasonable exercise of management rights.

### Background Facts

On March 11, 2020, the World Health Organization declared the Novel Coronavirus (or COVID-19) as a pandemic. The next day, the Ontario Minister of Education issued an order requiring that every school in the province close on March 14, 2020. Schools remained closed for the remainder of the academic year.

In September 2020, Ontario schools reopened and mask guidelines were introduced. With the reopening of its schools, the Board introduced a number of health and safety measures, including the installation of 500 air filters at the highest risk schools, physical distancing, and daily screening. Despite these measures, school closures occurred in response to the emergence of new variants and COVID-19 outbreaks in the weeks and months that followed.

On August 25, 2021, Board trustees voted unanimously to begin developing a mandatory vaccination procedure for Board employees. This was done in anticipation of a return to in-person learning, which was scheduled to begin on September 8, 2021.

*This article is for the purposes of only general information and does not constitute legal advice or opinion.*

## The Policy

On September 14, 2021, the Board implemented a policy requiring all employees with direct contact with staff or students at a Board workplace to be fully vaccinated against COVID-19 (the “Policy”). For the purposes of the Policy, “fully vaccinated” was defined as having two doses of an approved COVID-19 vaccine.

Employees were required to provide evidence of their fully vaccinated status by November 1, 2021, or establish that they had a valid medical or *Human Rights Code* (the “Code”) exemption from COVID-19 vaccination. Pursuant to the Policy, Board employees who did not disclose their vaccination status by the deadline and employees who did not become fully vaccinated within prescribed timelines were placed on non-disciplinary leaves of absence without pay.

Students and their families were not subject to the Policy.

After implementing the Policy, the Board continued to monitor the pandemic circumstances and related changes to public health measures. The Board ultimately repealed the Policy effective March 14, 2022, after the Ministry of Education advised that public school boards were no longer required to have employees disclose their vaccination status.

## The Decision

CUPE, Local 4400 (the “Union”) filed more than 60 policy, group, and individual grievances relating to the Policy. By agreement of the parties, two principal issues from these grievances were to be determined by Arbitrator Kaplan: (1) whether mandatory vaccination infringed section 7 of the *Charter* and, if so, whether it was saved by section 1; and (2) the overall reasonableness of the Policy, including, especially, vaccine attestation and the requirement that employees be vaccinated to attend at work with the placing of non-compliant/unvaccinated employees on non-disciplinary leave without pay.

Arbitrator Kaplan concluded that the Policy was not contrary to any part of section 7 of the *Charter* and that the Policy was a reasonable exercise of management rights.

## The *Charter* Issue

With respect to the *Charter* issue, Arbitrator Kaplan held as follows:

- Because employees still retained the right to make fundamental life choices about their life, liberty, and security of the person, there was no basis to conclude that the Policy impaired employees’ section 7 rights in any manner. Although the Policy had an impact on employees who decided not to attest to vaccination and/or get vaccinated, the Policy did not mandate a medical procedure nor did it seek to impose a medical procedure without consent. Even if some employees lost pay as a result of their non-compliance with the Policy, Arbitrator Kaplan specifically noted that section 7 of the *Charter* does not insulate an employee from the economic consequences of their decision to not get vaccinated.
- The Policy was not arbitrary as it sought to protect the health and safety of employees and students in the midst of a worldwide pandemic where many students were ineligible for vaccination. The medical evidence showed that full vaccination was the best means available to prevent the contraction and transmission of COVID-19. There was a clear connection between the Policy’s attestation/full vaccination requirements and the achievement of its stated objective of protecting health and safety.

- The Policy was tailored and nuanced, and not overbroad. Instead of a blanket rule, the Policy contained a decision matrix that granted exemptions based on individual circumstances (such as whether an employee could be readily replaced, whether alternatives to employing the unvaccinated employee were available, whether the particular need for that employee outweighed the risks to employee/student safety, and whether an unvaccinated employee would be able to work with other COVID-19 safety measures in place).
- The Union did **not** have evidence to show that the Policy's effects on individual life, liberty, and security of the person were so grossly disproportionate that they could not be rationally supported. To the contrary, the consequences of non-compliance were purely economic and were proportionate to the objectives of preventing COVID-19 transmission to employees and students of the Board, and reopening the Board's schools and keeping them open.

### The Reasonable Exercise of Management Rights Issue

Arbitrator Kaplan disagreed that the Policy was an unreasonable exercise of management rights, as argued by the Union, and held as follows:

- Vaccination was clearly necessary to protect extremely vulnerable populations and to keeping the Board's schools open during the pandemic. These propositions were supported by evidence, including expert evidence on the efficacy of COVID-19 vaccination.
- The requirement for employees to be vaccinated against COVID-19 and attest to their vaccination status was consistent with the precautionary principle under the *Occupational Health and Safety Act*.
- Nothing in the applicable collective agreements fettered the Board's right to promulgate rules and policies, especially in the context of an urgent pandemic circumstance that wreaked havoc on the education system, prevented the stable introduction of in-person learning, and necessitated the protection of employees and students.
- The Board had clearly and unequivocally explained to employees what the Policy required and the consequences that would occur in the event of non-compliance.
- The Policy was applied in a consistent, careful, and nuanced fashion that allowed exemptions for essential workers and permitted employees with human rights claims to work if they were regularly tested for COVID-19.

### Check the Box

Arbitrator Kaplan's decision confirms that public sector employers will not be in violation of the *Charter* if they have vaccination policies that respect each employee's right to decide whether to get vaccinated or not. Even if an employee is placed off work due to their non-compliance with a vaccination policy, section 7 of the *Charter* does not protect economic interests and, as Arbitrator Kaplan confirmed, individuals have no *Charter* right to pursue or maintain a chosen profession.

With respect to mandatory COVID-19 vaccination policies in unionized environments, the specific workplace context, including the risk of COVID-19 transmission in the workplace, remains the central

consideration in assessing whether a vaccination policy is reasonable. The scientific evidence regarding the effectiveness of vaccination in reducing transmission also continues to evolve.

There will no doubt be further cases addressing mandatory vaccination policies in the near future. We continue to track this issue closely and will provide readers with updates as further developments occur.

### Need More Information?

For more information or assistance with workplace management issues amidst the COVID-19 pandemic, contact [Emily La Mantia](mailto:emily.la.mantia@filion.on.ca) at 416.408.5511 or your regular lawyer at the firm.



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