



# What's New in HR Law

## Mandatory Vaccination Policy Upheld by Arbitrator

November 11, 2021

### Bottom Line

In [\*United Food and Commercial Workers Union, Canada Local 333 v Paragon Protection Ltd.\*](#), a decision issued on November 9, 2021, an Ontario arbitrator dismissed a policy grievance that challenged an employer's mandatory COVID-19 vaccination policy. In dismissing the grievance, Arbitrator Von Veh concluded that the policy was reasonable, compliant with the collective agreement, and in keeping with all applicable legislation. This decision provides helpful guidance for employers facing challenge with respect to their own vaccination policies.

### The Decision

Paragon Protection Ltd. is a privately owned security company (Company). It employs approximately 4400 security guards who are deployed across nearly 450 client sites. Security guards are unionized and represented by the United Food and Commercial Workers Union (Union).

In response to client demands for fully vaccinated security guards, the Company implemented a mandatory vaccination policy on September 3, 2021 (Policy). The Policy required all employees to be fully vaccinated, subject to substantiated human rights exemptions, by October 31, 2021.

Employees were advised that individuals who failed to comply with the Policy may be subject to disciplinary action, up to and including termination for just cause.

**This update is for general discussion purposes and does not constitute legal advice or an opinion.**

At the arbitration hearing, the Union argued that the Company's Policy was unreasonable, violated the collective agreement, and was in breach of various pieces of legislation including but not limited to the *Labour Relations Act, 1995* and the *Human Rights Code*.

The Union's grievance was ultimately dismissed. In the ambit of his decision, Arbitrator Von Veh made the following findings, among others:

1. The Company's Policy was reasonable, enforceable, and compliant with the *Human Rights Code* as well as the *Occupational Health and Safety Act*.
2. The Company's Policy was consistent with the Ontario Human Rights Commission's Policy Statement on COVID-19 in that it made provision for the accommodation of valid human rights-based exemption requests.
3. The Company, by introducing the Policy, took every precaution reasonable to satisfy its responsibility to protect its employees, as it is obligated to do under the *Occupational Health and Safety Act*.
4. The Company's Policy struck the right balance between respecting the rights of employees who had not been, or did not wish to be, vaccinated, while also meeting the Company's obligations to provide a safe working environment for staff, clients, and members of the public with whom employees interacted.
5. The Company's Policy did not compel anyone to get vaccinated. However, while workers retained the right to exercise their personal choice not to be vaccinated, "personal subjective perceptions of employees to be exempted from vaccinations cannot override and displace available scientific considerations."
6. Past cases dealing with flu vaccinations were of little utility in assessing the reasonableness of a COVID-19 vaccination policy that was implemented in the context of a global pandemic.
7. The *Health Care Consent Act, 1996* had no application in the circumstances of this case.

The Union's argument that the Company's Policy was in breach of the collective agreement and the Arbitrator's consideration of that argument warrants special mention, but should not be an undue distraction from other key aspects of the decision. In particular, it has to be noted that, in this case, the collective agreement between the parties contained a provision dealing expressly with vaccinations and inoculations. The relevant provision read as follows:

*If an employee is assigned to a site where specific vaccination and/or inoculation is required by law or where the conditions of the contractors having access to the site stipulates specific vaccination and inoculation requirement, the employee must agree to receive such vaccination or inoculation.*

*The Company shall provide access to any vaccination or inoculation and any cost for such will be borne by the company. In addition employees required to be vaccinated or inoculated on their own time shall be paid in accordance with the call in provisions of this agreement.*

*Where an employee refuses such vaccination or inoculation for any reason, the company shall reassign the employee as per the relevant provisions of this agreement.*

Arbitrator Von Veh concluded that the Company's Policy correctly incorporated the substantive and mandatory principles set out in the above-mentioned collective agreement provision, and that the implementation of the Policy was therefore a reasonable exercise of the Company's management rights.

In future cases where there is no such provision, unions can be expected to try to distinguish the decision. However, in our view, such an analysis would be unduly narrow. The fact that there was relevant language in the collective agreement compelled the Arbitrator to ensure that the Policy was compliant with the language. Where there is no such language, the other aspects of the decision should still be compelling insofar as there was found to be compliance with the *Human Rights Code* and the *Occupational Health and Safety Act*.

### **Check the Box**

This is the first known decision addressing the enforceability of a mandatory COVID-19 vaccination policy amidst the ongoing pandemic. Others will certainly follow. While the language included in the collective agreement as between the Company and the Union in this case may be distinguishable from that which will arise in subsequent cases, it was not the only basis upon which the Policy was determined to be reasonable and enforceable. The decision rendered by Arbitrator Von Veh provides helpful guidance as to what factors will be considered by adjudicators when assessing the reasonableness and enforceability of COVID-19 vaccination policies. We are continuing to track this issue closely and will keep readers apprised as further developments occur.

### **Need more information?**

For more information about workplace vaccination policies, or related litigation, contact [Ashley Brown](#) at 416.408.5563 or your regular lawyer at the firm.



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