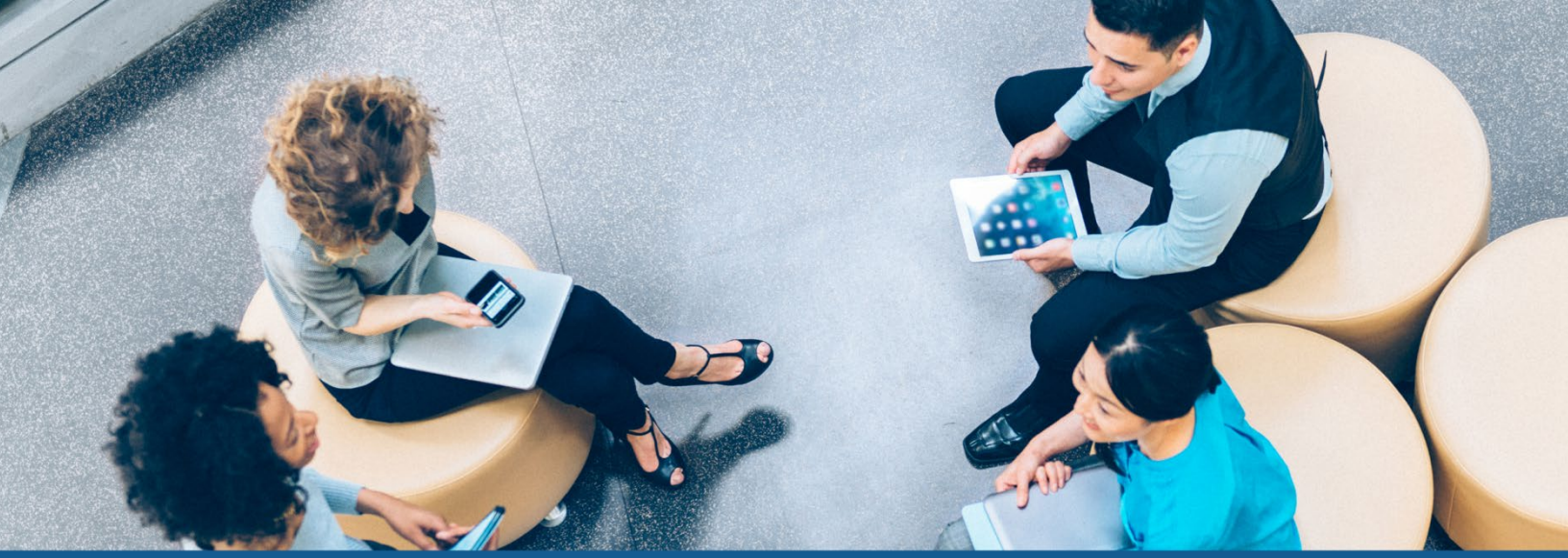

What's New in HR Law

Ontario Arbitrator Upholds Rapid Testing Protocol

June 30, 2021

Bottom Line

In a recent decision, an Ontario Arbitrator upheld an employer's compulsory rapid testing protocol. The Union's grievance, which alleged that the testing protocol was unreasonable, was dismissed. Filion Wakely Thorup Angeletti LLP's very own Carl Peterson, Di ane Laranja, and Danny Parker were involved in achieving this successful outcome.

Background Facts

In late February of 2021, EllisDon Construction Ltd. (the "Company") implemented a Rapid COVID-19 Antigen Screening Program (the "Policy") as part of a pilot program that was led by the Ontario Ministry of Health, with support from Public Health Ontario and Ontario Health. EllisDon used the "Abbott Panbio COVID-19 Antigen Screening Test" which is a form of rapid point-of-care test that has been approved by Health Canada.

The Policy

Pursuant to the Policy, all individuals attending at affected job sites were required to submit to the Rapid Antigen Screening Protocol twice weekly in order to gain access to the worksite. EllisDon decided which job sites would be subject to rapid testing based on a number of criteria

including community spread and case counts, hot-zone locations, size of project, risk level for workplace transmission, critical infrastructure projects, and client requirements.

The testing was administered by third-party healthcare professionals and was done in accordance with Ministry of Health Guidelines. Notably, swabbing was conducted in a manner such that it could not be observed by anyone other than the healthcare professional administering the test, and testing results were read and recorded such that they could not be observed by anyone other than the healthcare professional administering the test. The Company made significant efforts to preserve the privacy of employees. Most significantly, no personal health card information was taken or stored during the testing and contact information was only used for the purposes of notification in the event of a positive test result.

Employees received their regular pay for the time spent testing and the 15-minute period between testing and the receipt of results.

Employees could refuse the test, however, they would be denied access to the worksite. In the event of a negative test, the employee returned to work. A positive test, however, resulted in the following:

a) The testing team communicated the results to the individual, as well as the Company's Health & Safety Coordinator.
b) The Health & Safety Coordinator notified the Company's Healthline and began contact tracing.
c) Any employees that had been in close contact with the COVID-positive employee were required to self-isolate.
d) The local public health unit was notified of the rapid positive test.
e) The individual that tested positive was required to receive a follow-up, confirmatory, lab-based test.
f) The individual was required to attend a COVID-19 Assessment Centre within 24 hours to get tested.
g) The individual was prohibited from accessing the job site, pending the outcome of the follow up test and was required to advise the Company of the result and self-isolate until results of the lab test were available.

As of May 12, 2021, there had been 100,237 tests conducted as part of the Company's testing program, producing a total of 179 positive results. Of these 179 positive results, 118 were later confirmed as positive by a lab-based test and 20 were false positives.

The Labourers' International Union of North America, Local 183 (the "Union") filed a grievance claiming that the Company had violated the Collective Agreements by implementing the testing. The Union took the position that the Policy was an unreasonable exercise of management rights and an unreasonable company policy or rule.

The Decision

In concluding that the Policy was indeed reasonable and dismissing the grievance, the Arbitrator considered the following factors in his analysis:

- The real threat of COVID-19 to the health and safety of workers;
- The nature of construction industry work is such that employees cannot always maintain social distancing;
- Employees in the construction industry regularly move between both job sites and employers;
- Employees belonged to several other trade unions and were likewise subject to mandatory testing without complaint; and
- The Policy made significant efforts to protect both the privacy and dignity of employees.

Ultimately, the Arbitrator weighed the intrusiveness of the rapid test against the objective of the Policy, which was to prevent the spread of COVID-19, and concluded that the Policy was reasonable in the circumstances.

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 as to what COVID-19 safety measures will be considered reasonable and appropriate in the circumstances. This case, in particular, provides support for employers who are currently using or may be considering implementing a rapid antigen testing protocol in their workplaces.

As with most cases issued to date, the specific nature of the workplace was a significant consideration when assessing the reasonableness of the Policy. Employers who are looking at introducing rapid antigen testing, or another health and safety measure to combat the spread of COVID-19 in the workplace, should carefully consider the nature of, and any particular risk that may by presented by, their individual workplaces.

Need more information?

For more information about workplace management amidst the COVID-19 pandemic, please contact Emily La Mantia at 416.408.5511 or your regular lawyer at the firm.

Filion Wakely Thorup Angeletti LLP
management labour and employment law

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Proud member of L&E GLOBAL
an alliance of employers' counsel worldwide

Toronto
Bay Adelaide Centre
333 Bay Street, Suite 2500,
PO Box 44
Toronto, Ontario M5H 2R2
tel: 416.408.3221
fax: 416.408.4814
toronto@filion.on.ca

London
620A Richmond Street, 2nd Floor
London, Ontario N6A 5J9
tel: 519.433.7270
fax: 519.433.4453
london@filion.on.ca

Hamilton
1 King Street West, Suite 1201
Box 57030
Hamilton, Ontario L8P 4W9
tel: 905.526.8904
fax: 905.577.0805
hamilton@filion.on.ca