

MANDATORY COVID-19 VACCINATION POLICY UPHELD

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Introduction

Over the past few months, there have been three previous decisions concerning the enforceability of mandatory workplace vaccination policies. Case-by-case, these decisions have gradually clarified when mandatory vaccination will be deemed reasonable. Most recently, [a decision released January 4th, 2022](#) held that a company's blanket mandatory vaccination policy was reasonable despite different work locations having differing third party vaccination obligations.

Summary

Background

Bunge Canada (the "**Employer**" or "**Bunge**") operates a vegetable oil refinery in Hamilton, Ontario. Bunge's primary operations are located on land leased from the Hamilton Oshawa Port Authority ("**HOPA**"), an organization created and regulated by the federal government (the "**North Property**"). Bunge's secondary operations are located directly across the street from the North Property on land that is owned by Bunge (the "**South Property**"). While employees generally work at either the North Property or the South Property, they are re-assigned between the properties as the Employer deems necessary. As well, most employee training occurs on the North Property.

Pursuant to a federal government requirement, HOPA announced that all employees of companies located on the HOPA port lands (which include the North Property) must be fully vaccinated (the "**HOPA Mandate**"). In response to HOPA's announcement, the Employer implemented a mandatory COVID-19 vaccination policy (the "**Vaccine Policy**"). The Vaccine Policy requires all employees of Bunge, whether working at the North or South Property, to be fully vaccinated unless they are subject to an approved medical or religious exemption.^[1] Employees who do not provide proof of vaccination by January 24, 2022, would not be allowed on site, would be placed on unpaid leave, and may be subject to disciplinary action (including termination).

The union filed a grievance alleging that the Vaccine Policy "violates employee personal privacy/personal information and employee privacy rights."^[2] They claimed the requirement to disclose vaccination status was unreasonable and also breaches the *Personal Health Information Protection Act, 2004* ("**PHIPA**"). The union

also argued that Bunge cannot justify the application of the Vaccine Policy to the South Property, as only the North Property is leased from HOPA and subject to HOPA's vaccination requirement.^[3] The Employer could simply arrange for the few unvaccinated workers to work solely on the South Property.^[4]

Arbitrator Upholds Mandatory Vaccination Policy

The *KVP* test requires that any policy affecting employees must be reasonable and must not be inconsistent with the collective agreement.^[5] Context and circumstances are "critical."^[6]

Under that framework, Arbitrator Robert J. Herman held that the Vaccine Policy is "a reasonable policy in the circumstances" and a "reasonable exercise of management's right to issue workplace policies."^[7]

The Vaccine Policy was found to be enforceable against all employees "regardless of their work location".^[8] The arbitrator emphasized the proximity of the North and South Properties and their integrated operations. If the Vaccine Policy were only to apply to the North Property and the Employer were to move all unvaccinated employees to the South Property, then the Employer's operations "would have to be changed in some material respects" and would "incur significant additional operating costs". For example, the Employer could not reassign employees between the properties and may have to establish a separate training program to occur on the South Property.^[9] Arbitrator Herman also noted that any intermingling between unvaccinated and vaccinated employees would place all employees at a greater COVID-19 risk – therefore, if the Vaccine Policy were only to apply to the North Property, it would likely require all vaccinated employees to work solely on the North Property, which would further impede the "existing integration of operation between the two sites."^[10] This transfer of employees would also likely breach the union's collective agreement, specifically the job posting, transfer, and seniority rights provisions.^[11]

In finding the policy reasonable, the arbitrator also considered that the employees cannot work remotely and that a testing alternative would not comply with the HOPA Mandate.^[12] Moreover, in response to the union's argument that there was no recent COVID-19 transmission on the properties, Arbitrator Herman stated that a "lack of recent confirmed cases does not render unreasonable what is otherwise a reasonable policy."^[13]

Finally, the required disclosure of vaccination status was found to be reasonable and not a breach of *PHIPA*.^[14] Any rights the employees have to privacy are "considerably outweighed by the minimal intrusion on such rights and the enormous public health and safety interests at issue."^[15]

Takeaway for Employers

Recent decisions on mandatory vaccination policies have started to clarify the situations where these policies will be enforceable.

In *Ontario Power Generation v The Power Workers' Union*, released November 8, 2021, the mandatory vaccination policy had a rapid test alternative for employees who were unvaccinated or who refused to disclose their vaccination status. The policy was found to be reasonable as long as the employer covered the cost of the rapid tests.

In *United Food and Commercial Workers Union, Canada Local 333 and Paragon Protection Ltd.*, released November 9, 2021, a security company (Paragon) implemented a mandatory vaccination policy after a majority of its clients' sites required security personnel to be vaccinated. The arbitrator found Paragon's mandatory vaccination policy to be reasonable, albeit subject to modifications and amendments necessary for compliance with the *Human Rights Code* & ensure a reasonable application of the policy.

In *Electrical Safety Authority and Power Workers' Union*, released November 7, 2021, the employer's mandatory vaccination policy was found to be unreasonable. Despite some client sites requiring vaccinated workers, the ESA presented no significant evidence that this third party obligation created substantial problems for its operations.

The recent Bunge decision pushes the law on mandatory vaccination another step forward. The decision found mandatory vaccination (with no testing alternative) to be reasonable on the South Property despite no third party requiring vaccination on that site. This is the first decision to fully endorse an employer's mandatory vaccination policy without amendment or an alternative for frequent testing of unvaccinated employees, even on a site where no third party obligation applied.

This decision could make it easier for employers to implement a blanket mandatory vaccination policy across multiple workplace locations. This includes employers in industries such as construction, where employees are assigned to third party sites with varying vaccination policies. For example, a contractor may require its employees to be vaccinated so that they could move between sites where vaccination is mandatory (i.e. City of Toronto and City of Ottawa sites) and other sites where vaccination is not mandatory.

This decision also highlights the importance of carefully crafting a mandatory vaccination policy that addresses the specific requirements of an employer's business, as well as complying with the *Human Rights Code* and other statutory obligations.

If you have any questions related to the above, please do not hesitate to contact a member of the [Employment and Labour Relations Group](#).

[1] Paras 22, 27.

[2] Para 8.

[3] Paras 8, 9.

[4] Para 9.

[5] Para 14; and *Lumber & Sawmill Workers' Union, Local 2537, and KVP Co. (1965)*, 16 L.A.C. 73 (Robinson) [KVP].

[6] Para 14.

[7] Para 35.

[8] Paras 21, 33.

[9] Para 19.

[10] Para 20.

[11] Para 20.

[12] Paras 29, 33.

[13] Para 29.

[14] See para 24 for a list of the seven reasons Arbitrator Herman found a requirement to disclose vaccine status to be reasonable.

[15] Para 25.

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A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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