

# MANDATORY VACCINATION POLICY: “REASONABLE, ENFORCEABLE”

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As the pandemic persists, labour arbitrators have consistently upheld and enforced reasonable employer policies aimed at preventing the spread of COVID-19 (“**COVID**”). For example, breaches of symptom self-screening protocols and self-isolation policies have led to the [termination of unionized employees with just cause](#), and an arbitrator upheld a [workplace COVID testing policy](#). The latest development in the fight against COVID is a [decision released on November 9, 2021](#), in which Arbitrator Von Veh upheld a mandatory workplace COVID vaccination policy.

Many employers have already implemented, or are planning to implement, mandatory vaccination policies. The question is whether such policies can be justified as reasonable in light of the effectiveness of vaccines in preventing the spread of COVID (particularly the Delta variant), the nature of an employer’s business, and whether the policy has a sufficient mechanism for evaluating exemption requests. Arbitrator Von Veh [1] held that this employer’s mandatory vaccination and exemption policies (collectively, the “Policy”) struck the appropriate balance of respecting the rights of employees who have not, or do not wish to be vaccinated, while protecting the collective health & safety of others who could be exposed to the virus by unvaccinated employees.

Most interesting is Arbitrator Von Veh’s finding that this employer’s mandatory vaccination policy fulfilled the employer’s duty to take “every precaution reasonable in the circumstances for the protection of its workers” under the *Occupational Health and Safety Act* (“**OHSA**”).

A copy of the policy in question is available at Schedule “A” to the decision, however certain amendments were recommended by the Arbitrator in order to be fully compliant with common law and human rights legislation.

## Background

The employer is a large private security contractor employing approximately 4,400 security guards at over 450 client sites. The majority of the employer’s clients implemented their own mandatory vaccination policies requiring all workers on their site, such as security guards, to be fully vaccinated.

The employer implemented a mandatory vaccination policy and the accompanying vaccination exemption policy on September 3, 2021, requiring all workers to be vaccinated by October 31, 2021. The Policy provided that exemptions would be provided for health and religious reasons and the exempted workers would be accommodated to the point of undue hardship.

The union challenged the Policy as being unreasonable pursuant to the principle of workplace rules in *KVP Co. v. Lumber and Sawmill Workers' Union* [2], and contrary to the *Ontario Human Rights Code* ("Code").

### **Mandatory Vaccination Policy Upheld**

The arbitrator upheld the Policy, finding it to be reasonable, enforceable, and compliant with the Code and the OHSA.

Pursuant to section 25(2)(h) of the OHSA, the employer was required to take "every precaution reasonable in the circumstances of protection of its worker." In light of the health & safety risk posed by COVID, the emergency measures enacted to contain and manage the pandemic, and the definitive science confirming the effectiveness of COVID vaccines, the Arbitrator held that the employer had an obligation to protect workers from COVID, and this Policy fulfilled this obligation.

Further, the Policy did not violate the Code as the Policy provided exemption and accommodation for legitimate health and religious reasons. The Policy rightfully denied exemption to the workers who chose not to be vaccinated based on personal preference, as an employee's personal and subjective perceptions did not amount to a creed protected under the Code according to the Ontario Human Rights Commission.

Finally, unilaterally implementing the Policy without the union's consent was a reasonable exercise of management rights. The collective agreement granted the employer the right to make rules to be followed by the employees. The Policy was implemented to comply with the employer's obligations under the OHSA and to satisfy client demands. Nothing in the Policy forced the workers to be vaccinated without the workers' consent and exemption was available on legitimate grounds.

The arbitrator ultimately found that the Policy struck the proper balance in order to respect the rights of workers who had not or did not wish to be vaccinated, while also ensuring a safe workplace for workers, clients, and members of the public.

### **Takeaway for Employers**

Employers can generally make workplace policies to protect workers and the public, including mandatory vaccination policies, provided these policies are reasonable, not contrary to an applicable collective or employment agreement, not contrary to applicable human rights legislation, and clearly communicated to the

workers in advance of implementation.

While each case will turn on its distinct facts, this recent decision provides employers with confidence that carefully drafted mandatory vaccination policies can be found to be reasonable, enforceable, and in compliance with the law.

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][ps2id id='1' target=''] *UFCW, Canada, Local 333 v. Paragon Protection Ltd.*, November 9, 2021.

[2][ps2id id='2' target=''] 16 LAC 73

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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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