Mandatory Workplace COVID-19 Testing Policy Upheld

Many employers are planning to gradually recall employees to physical workplaces this fall. While employers were required by legislation to create COVID-19 screening procedures, there has been an open question as to whether employers can require workers to be vaccinated or at least have a negative COVID-19 test to enter the physical workplace.

A recent labour arbitration decision in Ontario found that an employer can implement a mandatory COVID-19 testing policy, suggesting that in the current climate and with the emergence of the Delta variant, arbitrators are willing to relax strong protections around employee privacy in favour of reasonable employer policies aiming at preventing the spread of COVID-19.

Mandatory Testing Policy

The employer was a large general contractor. As part of a pilot program with the Ministry of Health, the employer implemented a COVID-19 testing policy in February 2021. Under the policy, everyone attending an affected construction site was required to take a rapid COVID-19 test. This particular test was the less invasive throat and nose swab as opposed to the deep nasal swap. The testing was done on site by external nurses with steps taken to ensure health information was kept private. The swab was collected for the sole purpose of the test, and disposed of in front of the employee.

The union challenged the policy as an unreasonable exercise of management rights. The workers were concerned that rapid testing is invasive and experimental, a violation of their privacy, and produces false positives. The union’s position was that the policy was unreasonable since the affected sites were primarily outdoor construction sites where transmission risk was lower.

The arbitrator upheld the policy, stating the policy was reasonable in light of the current circumstances. The arbitrator stated the construction industry has a high risk of spread as subcontractors travel from site to site, and physical distancing was often impossible. Combined with the past outbreaks at the employer sites and the policy’s objective of preventing the spread of COVID-19, the policy was viewed as reasonable despite the intrusive nature.
**Takeaways for Employers**

Management can generally make workplace policies to protect workers and the public, provided these policies are reasonable, not contrary to the collective or employment agreement, and clearly communicated to the workers in advance of implementation. This decision confirms that the broader public health interest of preventing the spread of COVID-19 can be an important consideration for arbitrators in assessing the reasonableness of a COVID-19 prevention policy against the employees' privacy interests.

Further, employers can still implement COVID-19 prevention policies without an express clause in the collective agreement. Most collective agreements do not have express provisions dealing with pandemic prevention measures. However, arbitrators have held that management retains the power to make reasonable workplace policies whether or not the collective agreement contains an express clause for such policies. As such, the main contention will often be the reasonableness of the policy.

If there is a way to minimize the privacy intrusion, it should be implemented to ensure the policy is reasonable. Any confidential employee medical information, including the COVID-19 testing results and bodily samples collected, must be stored or disposed of in a secure manner in compliance with applicable privacy legislation.

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

[6] Ibid., at para 45.

By Victor Kim, Dave McKechnie and Patrick Pinho (Articling Student)

**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.

© McMillan LLP 2021