CUPE Legal Branch

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MEMO

DATE: October 6, 2021

TO: Saskatchewan Staff Reps

FROM: Jake Zuk, Legal and Legislative Representative

RE: COVID-19 Mandatory Testing and Vaccinations

Use of COVID-19 testing in workplaces has been common in many sectors since the start of the pandemic, while COVID-19 vaccines have been given to the general population since December 2020.

Given the widespread availability of safe and effective COVID-19 vaccines, many employers are now implementing or developing vaccination policies. In some cases, governments are requiring certain employers to implement COVID-19 vaccination policies. As of October 1, 2021, the government in Saskatchewan has implemented a vaccine or test policy for all public employers. Employers outside of the public service have been given the option to "opt in" to this policy.

This memo assesses many of the legal issues arising out of the two main types of vaccination policies we are seeing being implemented in Saskatchewan:

- Mandatory vaccination policies, in which vaccination against COVID-19 is required to attend work (typically subject to only narrow exceptions, such as exemptions based on legally protected human rights grounds); and

- "Vax or test" policies that encourage employees to be vaccinated but allow employees to opt for regular COVID-19 testing if they do not want to be vaccinated.

The analysis below focuses on policies applicable to employees, including CUPE members. This memo provides an in-depth, but high-level overview of some of the legal issues arising from workplace mandatory vaccination and "vax or test" policies. **It is not an analysis of any policy or measure and does not anticipate every possible circumstance that may arise.** The below is strictly legal analysis and is not a statement of CUPE policy. Please refer to CUPE National's Vaccine Mandate Guidelines issued August 31, 2021.

As with any issue, staff and locals are reminded to analyze and assess policies and policy implementation issues on a case-by-case basis. In dealing with these issues, staff should first and foremost consider whether there is any language in the relevant collective bargaining agreement which would give the employer the power to impose mandatory testing and vaccination policies. With that said, this memorandum has been written based on the assumption that the collective agreement is silent on the issue of medical tests and vaccinations.

Locals requiring legal advice about specific policies or implementation issues that are not addressed by this memorandum should contact their assigned national representative.

The following topics are covered below:

- Legality of Unilateral Employer Policies
- Legality of Government-Imposed Policy Requirements;
- Privacy Rights;
- Duty to Accommodate;
- Discipline and Duty of Fair Representation.

Legality of Unilateral Employer Policies

Where the collective agreement or a statute does not expressly allow an employer to impose certain rules, the employer may still do so on the basis of its power to manage and direct the workplace.

Two of the key cases when assessing the reasonableness of a unilaterally imposed workplace policy with implications for employees' privacy and/or dignity are *Lumber & Sawmill Workers' Union, Local 2537 v. KVP Co.*, 1965 CarswellOnt 618, ("*KVP"*) and *Irving Pulp & Paper Ltd. v. CEP*, Local 30, 2013 CarswellNB 275 ("*Irving Pulp*").

Generally, any rules unilaterally introduced by the company, and not subsequently agreed to by the union, must satisfy the following requisites as outlined at paragraph 34 of *KVP*:

1. It must not be inconsistent with the collective agreement.

2. It must not be unreasonable.

3. It must be clear and unequivocal.

4. It must be brought to the attention of the employee affected before the company can act on it.

5. The employee concerned must have been notified that a breach of such rule could result in his discharge if the rule is used as a foundation for discharge.

6. Such rule should have been consistently enforced by the company from the time it was introduced.

The *Irving Pulp* analysis applies when an employer's policy affects employees' privacy interests. That analysis involves balancing the employer's interest in its policy as a safety measure against the harm caused by the policy to the privacy interests of employees. Under this analysis, arbitrators ask whether the benefit to the employer from imposing its policy outweighs the harm to employee privacy. If the need for the policy is greater than the harmful impact on employees, the policy will likely be reasonable.

The case of *Health Employers Assn. of British Columbia and HSA BC (Influenza Control Program Policy)*, Re 2013 CarswellBC 3189 ("*Health Employers Assn. of British Columbia*") dealt with an employer that required employees to either get vaccinated or wear a mask to protect against influenza. In deciding on the reasonableness of that policy, which was unilaterally imposed by the employer, the arbitrator held that the analysis from *KVP* and *Irving Pulp* ought to be applied, as explained at paragraph 169:

> The Policy, in my view, is a case of a unilaterally imposed set of rules. Therefore, it is necessary to establish that it is a legitimate exercise of the Employer's residual management rights recognized and retained in Article 4. That means the Policy must meet the tests set out in KVP. Further, because it contains elements that touch on privacy rights, it must meet the privacy tests articulated in Irving Pulp & Paper Ltd. v. CEP, Local 30, 2013 SCC 34 (S.C.C.). If those tests are met the Policy will be a valid exercise of the Employer's management rights. In addition, of course, given the Union's submissions it is necessary to determine whether there have been violations of the Human Rights Code, the Freedom of Information and Privacy Act and, if applicable, the Charter.

Employers are generally required to exhaust less intrusive means of achieving their objective of workplace safety before resorting to a measure that presents a greater infringement on employees' privacy or other interests. See, for example: *Health Employers Assn. of British Columbia*.

In other similar cases, arbitrators overturned influenza "vaccinate or mask" (VOM) policy as being unreasonable on a *KVP* analysis: see *Sault Area Hospital and Ontario Nurses' Association*, 2015 CanLII 55643 (ON LA) (Hayes); and *St. Michael's Hospital v Ontario Nurses' Association*, 2018 CanLII 82519 (ON LA) (Kaplan). However, there are many important differences between the context of those cases and the current context of mandatory COVID-19 vaccination policies, including:

- In the VOM cases, the collective agreements had language allowing employees to refuse influenza vaccination, which is not the case with COVID-19 vaccinations and any CUPE collective agreements of which we are aware;

- The influenza vaccine is very ineffective some years, in comparison with the available data for the current COVID-19 vaccines, which show high rates of efficacy;

- The evidence around applying masking only to those who were not vaccinated for influenza was found to be weak, whereas many workplaces presently require universal masking for during the COVID-19 pandemic;

- COVID-19, and particularly the delta variant, is much deadlier and more transmissible than influenza;

- There is strong evidence of asymptomatic COVID-19 transmission, which was not found to be proven for influenza.

Can an employer impose mandatory testing to attend work?

In the context of the COVID-19 pandemic, there are three arbitral decisions so far dealing with the reasonableness of mandatory testing policies. We are not yet aware of any decisions dealing with mandatory COVID-19 vaccinations. The analysis outlined in mandatory testing policy cases will likely be relevant in mandatory vaccination cases, especially where an employer's policy provides employees a choice between vaccination and regular testing.

The three mandatory testing policy cases are:

> • *Caressant Care Nursing & Retirement Homes and CLAC (Covid Testing), Re*, 2020 CarswellOnt 18430, 146 C.L.A.S. 279 ("*Caressant Care")*
>
> • *Unilever Canada Inc. v United Food and Commercial Workers, Local 175* (unreported) ("*Unilever*")
>
> • *EllisDon Construction Ltd. and LIUNA, Local 183 (Rapid Testing Grievance), Re*, 2021 CarswellOnt 8605 ("*EllisDon*")

In all three cases, the arbitrators found that the mandatory COVID-19 testing policies imposed by employers were reasonable exercises of managerial rights. *Caressant Care* dealt with a mandatory testing policy at retirement homes. Employees were tested every two weeks. They worked with elderly residents who could live independently with minimal to moderate support. The arbitrator held that the mandatory testing policy in that case was reasonable. The arbitrator stated, at paragraph 45:

> In my view, when one weighs the intrusiveness of the test: a swab up your nose every fourteen days, against the problem to be addressed – preventing the spread of COVID in the Home, the policy is a reasonable one. While the Home had not had an outbreak, I agree entirely with the Employer that, given the seriousness of an outbreak, waiting to act until that happens is not a reasonable option.

In *Unilever*, the employer introduced a mandatory testing policy due to rising case counts in the community. Several employees at the workplace (a food manufacturing plant) had tested positive for COVID-19 since the beginning of the pandemic, although there was no evidence of spread within the workplace. Employees were tested once a week. The arbitrator found the mandatory

testing policy to be reasonable and was influenced in this decision by the following factors: many employees worked on multiple production lines and worked in food manufacturing, which meant concerns of food safety were present; several employees had contracted the virus in a relatively short time period; and there were benefits of the testing program to prevent the spread of COVID-19 to other employees.

In *EllisDon*, the employer required employees working at its construction sites to be tested twice a week. The employer 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 employer had practices in place to ensure the privacy of employees while they were being tested and the privacy of the test results. The arbitrator found that the policy of mandatory testing reasonable and was influenced by the following factors:

- the high case counts in the community surrounding the work sites;
- several positive tests among employees over the course of the pandemic and evidence of workplace transmission;
- the inability to socially distance at some work sites due to the large amount of people present;
- the fact that, due to the nature of the construction industry, employees moved around to different job sites frequently, making it easier to spread the virus; and the fact that steps were taken to ensure the privacy of individuals tested.

These privacy measures were described at paragraph 31 of the decision:

> (a) Individuals being tested are physical distanced from others during the testing (aside from the healthcare professional administering the test).
>
> (b) Swabbing is conducted in a manner such that it cannot be observed by anyone other than the healthcare professional administering the test.
>
> (c) Testing results are read and recorded by healthcare professionals such that they cannot be observed by anyone other than the healthcare professional administering the test.
>
> (d) Healthcare professionals sanitize before and after each test, and deep cleaning of the test site is conducted at regular intervals throughout the day.
>
> (e) All biohazardous waste from the test site is disposed of through a registered hazardous waste removal process.

Employers may point to these decisions as determinative of all grievances pertaining to COVID-19 testing. However, these decisions arise from particular sets of facts that may be distinguishable from the facts underlying other grievances. It also remains to be seen whether

unions receiving similar awards will apply for judicial review and whether a reviewing court may endorse this approach. At this time, it seems highly likely that a mandatory testing policy would be upheld by a labour arbitrator in almost any workplace where there is regular or even semi-regular interaction between employees and/or clients.

Can the vaccine be mandated for attendance at work?

With respect to strict vaccine policies, we expect that employers would extrapolate the same arguments used to justify mandatory testing, as follows:

- COVID-19 is a disease caused by a dangerous virus that poses a severe risk to the health and safety of workers and anyone else present on a worksite (e.g., patients, residents, students, clients, customers).

- The delta variant of COVID-19 that is now widely circulating is particularly transmissible. Transmission can occur after even brief interpersonal interactions, and the virus can be airborne. The virus still can be transmitted to and by vaccinated individuals (known as "breakthrough" infections), though the risk is much lower than with unvaccinated individuals.

- Other available control measures, such as masking, physical distancing, and improved ventilation, can reduce the risk of transmission, but these measures alone will be insufficient to eliminate the risk of transmission in any workplace involving indoor interpersonal interaction.

- Allowing unvaccinated workers to regularly test does not provide all the same benefits as requiring vaccination. Testing helps identify a COVID-19 infection after it has occurred and limit exposure from the time of the test result onwards but does nothing to prevent initial infection of the index case or spread of infection prior to testing and does not reduce the risk of serious harm or death to the infected person.

- The available COVID-19 vaccines can reduce the risk of workplace transmission by reducing the likelihood that a vaccinated individual will be infected with COVID-19 relative to an unvaccinated individual.

- Where an individual does become infected with COVID-19, vaccines substantially reduce the risk of severe outcomes.

- Requiring COVID-19 vaccination therefore reduces risk to both the worker who is vaccinated, and people with whom the vaccinated worker comes in contact—workers and others. Employers will rely heavily on their obligations under the health and safety legislation to protect workers, and on other legal obligations they owe to protect the health and safety the populations they serve, such as patients, residents, students, clients, and customers.

In contrast, the argument that a policy requiring vaccination to attend work is unreasonable would be largely based on the invasiveness of requiring vaccination. There is no doubt that a vaccine requirement is more invasive than a test and could never be justified without compelling and exceptional circumstances. However, given the significant health and safety benefits of requiring vaccination to both the vaccinated worker and others in the workplace, it is likely that in many contexts an arbitrator would find the risk inherent in COVID-19 and the delta variant to be great enough to justify upholding a strict vaccination policy.

It is also highly relevant that the scientific evidence of vaccine safety is growing on a daily basis. As of October 2021, Health Canada has reported the following information with respect to vaccines:

- There are four (4) federally approved and regulated COVID-19 vaccines available in Canada, commonly known as *Moderna, Pfizer, AstraZeneca* and *Johnson & Johnson*;

- There have been approximately 55,500,000 doses of the approved vaccines distributed to date;

- Of the nearly 56 million doses administered, there have been approximately 17,000 documented adverse reactions (0.031% of doses);

- Of the 17,000 adverse reactions reported, there have been approximately 4,400 adverse reactions classified as severe (0.008% of doses);

- In the rare event that a recipient of a Health Canada-approved vaccine experiences "serious and permanent injury", that person will be entitled to compensation under the national vaccine injury support program.

If a vaccination policy were challenged at arbitration, the evidence of vaccine safety as well as vaccine efficiency would be factored into the *KVP* balancing act. As the medical consensus that the delta variant is dangerous – especially in comparison to the miniscule risk of adverse vaccination reaction – the chances of successfully challenging an employer policy are greatly diminished.

On a related note, some employees may feel as though mandatory vaccination or testing is unreasonable as it is applied to them because they work in an open-air environment or they have limited contacted with others. This is relevant because many vaccination policies that we have seen so far cover all employees of a particular employer. However, given the highly transmissible nature of the delta variant, even passing interaction with others can trigger a transmission risk. It seems highly unlikely at this time that arbitrators will want to engage in the difficult exercise of parsing out exceptions to mandatory vaccine policies on a position-by-position basis in each workplace.

Finally, none of the above is to suggest that a mandatory vaccination or testing policy is sufficient as a stand-alone occupational health and safety response to COVID-19 and its variants. Vaccination is simply one tool that can significantly reduce risk for workers, but it is

unreasonable for an employer to rely on vaccination alone. Employers must continue to implement other health and safety measures as appropriate to control the spread of COVID-19 and exposure risks at work.

At this time, the Saskatchewan government employers that are imposing strict mandatory vaccine policies are largely in health care and/or long-term care. In these contexts, it is very likely that vaccine policies would be upheld given the vulnerability of clients and patients. If strict vaccination policies are implemented in other contexts, they will need to be evaluated based on all of the information set out above, as well as the current legislation and regulations.

Government Mandates Requiring Testing or Vaccination

Regulations in Saskatchewan

In addition to employer policies, mandatory vaccination or "vax test" policies are or can be mandated by the government. In Saskatchewan, the provincial government has recently mandated – via regulations under the *Saskatchewan Employment Act* that public service employees must provide either a proof of vaccination or weekly negative test in order to attend work. These regulations are called *The Public Employers' COVID-19 Emergency Regulations*, and came into effect on October 1, 2021. They apply to public service employers as specifically set out in section 2(1) of the regulations. Please refer to these regulations to determine whether your employer is a public service employer.

In addition to the mandatory regulations for public employers, the government has also legislated a second set of "opt-in" style regulations for employers outside of the public service. These regulations are called *The Employers' COVID-19 Emergency Regulations*, and allow employers defined in the regulations to opt-in to a similar "vax or test" regime on or after October 1, 2021. An important feature in both sets of regulations is that employees who choose weekly rapid-testing in lieu of vaccination will be required to bear the costs of those tests.

These recent regulations will likely make it very difficult for unions in Saskatchewan to challenge employers who opt-in to the regime. On the one hand, the fact that the regulations are optional means that a union could argue that the decision to opt-in is an exercise of management rights and subject to the *KVP* analysis. On the other hand, the fact that the regulations exist will give employers significant ammo to argue that opting-in was a reasonable decision. In other words, an employer's choice to opt-in to the vaccination or test regime is "prescribed by law" and so it would be hard to argue that the choice to do so is unreasonable. As previously mentioned, evidence in favour of vaccine safety and efficiency will also support employers who opt-in to the regulations.

As noted above, the directive that employees must bear the cost of weekly testing – if they choose that route – is likely grounded in the fact that the testing alternative is a choice. What remains to be seen is whether or not employees who are exempt from vaccination under a human rights ground should be required to bear the cost of testing. The recent regulations do not distinguish between those who choose not to vaccinate and those who cannot vaccinate.

However, an employer's duty to accommodate under the *Saskatchewan Human Rights Code* remains, and it is certainly arguable that employers should bear the cost of testing for employees who have a medical or religious exemption.

One potential benefit of the new regulations is that they arguably set a clear benchmark for what the government is deeming to be a reasonable vaccination or test policy for most employers. While this means most employers will be able to easily opt-in and defend their decision to do so, it also means that decisions to go "beyond" the legislation might be harder to justify. For example, any employer who seeks to eliminate the testing alternative in favour of a strict vaccine mandate will be tasked with proving why their workplace demands a stricter policy. This could be especially difficult given the fact that the Saskatchewan Health Authority has announced its intention to adopt a vaccination or test policy. In short, the government in Saskatchewan seems to be establishing a presumption in favour of the "vaccinate or test" approach.

While actions of government are subject to judicial review, the grounds for such review are narrow. A court can overturn a regulation or directive if it determines that the relevant government actor exceeded its statutory authority. However, such a finding is generally unlikely when it comes to mandatory vaccination or testing regulations. There are many existing statutes – Saskatchewan's *Public Health Act* and the *Saskatchewan Employment Act* for example – that give broad latitude to different parts of government to take actions relating to health and safety. Ultimately, governments who are seeking to impose vaccination or vax and test policies have statutory options to do so, and where those options are limited the statutes can be amended.

The Canadian Charter of Rights and Freedoms

Even where government action or regulation is "prescribed by law" under a relevant statute, that action can be challenged as a breach of the *Charter of Rights and Freedoms*. A challenge would seek to invoke section 7 of the Charter, which provides that: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

Charter challenges relating to mandatory vaccination, or vax or test regimes, are likely to fail based on historical case law. That Supreme Court case law shows that a challenger would have to overcome all of the following hurdles:

1. The party challenging the action would have to show the action in question was one to which the *Charter* applied, which may or may not be the case depending on who created the policy or measure and how.

2. The party challenging the action would have to show the policy in question fell within the scope of section 7 by virtue of impacting someone's life, liberty, or security of the person.

3. The party challenging the action would have to show that the action in question constituted an infringement of section 7. This could prove difficult because the

consequences of not adhering to a workplace vaccination policy are economic (in the form of losing earnings or employment), and there is case law indicating section 7 does not apply to purely economic (i.e., monetary) interests.

4. The party challenging the action would have to show that any infringement of section 7 rights was not in accordance with the principles of fundamental justice. A government actor could defend a mandatory vaccination requirement by demonstrating that there was no equivalent alternative measure reasonably available to it that would be as effective.

5. If the party challenging the action succeeded on points 1-4, the government could still save the measure under section 1 of the *Charter*, which says that *Charter* rights are guaranteed "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The government could rely on the exceptional circumstances of the COVID-19 pandemic as providing it a wider berth to implement measures designed to stop the spread of the virus.

In any case, if a Charter challenge did succeed, the federal parliament or provincial legislature could invoke section 33 (the "notwithstanding clause") to override the Charter and re-enact a particular measure. Section 33 is rarely invoked, but one could foresee the COVID-19 pandemic giving rise to its use in the future.

Any challenge to the *Public Employers' COVID-19 Emergency Regulations or the Employers' COVID-19 Emergency Regulations* would almost certainly fail. This is especially true because the regulations provide for testing as an alternative to vaccination.

Conscientious Objection

Some employees may question whether they retain the right to refuse a vaccine on the basis of "conscientious objection". For example, *Section 64 of The Public Health Act* prescribes the following:

> **Conscientious objection to immunization**
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> 64(1) A person who conscientiously believes that immunization or prophylaxis would be prejudicial to his or her health or to the health of his or her child or ward, or who for conscientious reasons objects to immunization or prophylaxis, may swear or affirm an affidavit to that effect before a justice of the peace, commissioner for oaths or notary public.
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> (2) A person described in subsection (1) is excused from compliance with any regulation, bylaw or order pursuant to this Act that makes immunization mandatory if the person delivers personally or by registered mail to the local authority for the area in which the person resides a duly attested affidavit described in that subsection.

It is important to note that these provisions apply only to regulations or orders prescribed under this Act. For that reason, "conscientious objection" does impact the recent regulations that were passed under the *Saskatchewan Employment Act.* The conscientious objection also does not limit the ability of an employer to require vaccination to attend work.

Employees or unions must resort to the grounds for exemption under the *Human Rights Code* (see below) in order to prove legitimate exemption from the COVID-19 vaccination. Those who simply object on the basis of conscience or bodily integrity do not have a similar legal basis for "opting-out" of the vaccine. Rather, their personal interests will be weighed against the health and safety concerns of COVID-19 under the *KVP* balancing act.

Locals and members should be aware that failure to comply with a policy on the basis of conscientious objection could lead to discipline.

Bill S-201 – The Genetic Non-Discrimination Act

The *Genetic Non-Discrimination Act*, SC 2017, c 3 (the *"GNDA"*) makes it an offence to require an individual to undergo a genetic test. For the purposes of this act, a genetic test is defined as a "test that analyzes DNA, RNA, or chromosomes for purposes such as the prediction of disease or vertical transmission risks, or monitoring, diagnosis or prognosis." This Bill predated the COVID-19 pandemic and was largely a response to the growing industry of genetic tests and issues surrounding the regulation of their use.

It must be noted that the COVID-19 test does not collect the *DNA* or genetic material of the individual taking the test. Rather, the COVID-19 test is meant to detect the genetic material of the virus itself. The definition of "genetic test" set out in the *GNDA* is broad, but it is unlikely that it could capture a COVID-19 test or vaccine, as they clearly do not analyze the DNA of the test taker. The Supreme Court of Canada has rendered a similarly narrow interpretation of this legislation – that it must apply only to the genetic information of the individual.

Privacy Rights and Medical Information

Common Law Privacy Rights

Where an employer requires employees to provide proof of vaccination or negative test, this should be accompanied by stringent policies and practices to protect the confidentiality of those medical records and documentation. Staff should consider questions such as:

- Who will have access to the records?

- Does the employer have rules and procedures in place to ensure that those records are not shared with anyone at the workplace who does not need access to that information for the purpose for which the information was collected?

- What safeguards has the employer put in place to protect the confidentiality of the records of vaccination?

- How long will the employer retain its records? How will the employer dispose of the medical records and information in a manner which protects employee privacy?

In *Rio Tinto Alcan Primary Metal v. CAW-Canada, Local 2301*, 2011 CarswellBC 353, the arbitrator stated, at paragraph 35:

> There is a special privacy interest which attaches to medical information and the doctor-patient relationship is one of the most private. Therefore, medical information should receive no broader distribution than is reasonably necessary.

In *Canadian Pacific Railway v. CAW-Canada, Local 101,* 2012 CarswellNat 915, the union challenged the employer's decision to require a number of employees to undergo medical assessments and drug and alcohol testing. The arbitrator held that the release which employees were required to sign was not overly intrusive with respect to privacy rights because it fairly balanced the privacy interests of employees against the company's need for reliable medical information. The arbitrator held, at paragraph 26 to 27:

> Paramount in the release is the obvious concern of the Company to ensure a full and unqualified disclosure of all medical history and medical conditions on the part of the employee. As is evident from the text, it is only in the context of an investigation as to whether the employee has concealed facts or provided false information, that he or she consents to the release by OHS of medical information to the Company's Industrial Relations Department "for the purpose [of] this investigation". In other words, medical information cannot pass from OHS to the Company's Industrial Relations arm absent a very narrow condition, namely that there are reasonable grounds to believe that an employee has withheld or falsified medical information, and secondly that an investigation in respect of that allegation has been undertaken. In my view it must be understood as implicit that the release of medical information in that limited circumstance must be exercised so as to maintain the confidentiality of the information so disclosed and to limit it to the express purpose of the disciplinary investigation which is undertaken. The Industrial Relations Department is clearly not at liberty to use it or communicated it for any other purpose.
>
> Nor can I see anything offensive in requiring an employee to consent to the release by any physician, hospital, clinic or other health service information which may establish "... a threat to safe railway operations." Medical privilege is important, but it is not unqualified. Medical information which is reasonably known to possibly impact the health and safety of others is information whose disclosure may properly trump the general privacy considerations which underlie medical privilege. In the Arbitrator's view the situation at hand is somewhat analogous to those federal regulations which, for example, require medical practitioners to disclose to the appropriate authorities that an airline pilot suffers a condition which could affect his or her abilities to safely operate an aircraft.

In *North Bay General Hospital v. O.P.S.E.U.*, 2006 CarswellOnt 8751, the arbitrator awarded monetary damages to the grievor because the employer found out that she had not taken anti-viral medication to protect against the flu after the Occupational Health Services Department, which administered the vaccination and inoculation policy and had access to staff medical records, told the employer's supervisor this information. At paragraph 84 of the decision, the arbitrator held:

> I set the Grievor's damages at $750. This amount reflects the need to underscore the importance of maintaining the integrity of the OHS system. The Grievor was entitled to the assurance that OHS nurses would not actively engage in informational exchanges with managers which revealed personal health information, especially in the context of a disciplinary investigation. Leaving aside the thorny issue of whether mere fitness is privileged, I have no doubt that Ms. Anger's discussions with the nurses, which reveal her personal attitudes to the taking of the flu shot and anti-viral medication, are privileged communications, and need to be strictly safeguarded to ensure the integrity of the system.

Statutory Privacy Rights

In addition to the privacy rights outlined in the case law above, many employers in the CUPE context will be regulated by provincial and/or municipal privacy legislation. Saskatchewan has three statutes that govern privacy of health records and data, as follows:

- *The Freedom of Information and Protection of Privacy Act* (FOIP) applies to government institutions;

- *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP) applies to local authorities such as municipalities, universities and school boards; and

- *The Health Information Protection Act* (HIPA) applies to health trustees.

These Acts and accompanying Regulations govern the collection, use and disclosure of personal information or personal health information in most situations. Each Act contains provisions to allow for the sharing of personal information or personal health information in the event of an emergency by public bodies and trustees. All three Acts require that any collection, use or disclosure of personal information or personal health information be limited to that which is needed to achieve the purpose of the collection, use or disclosure. This is referred to as the "data minimization principle."

Ultimately, these statutes follow the same general principles as the common law rules set out above. They largely *do not prohibit* the collective of health information, but rather regulate the way it is collected, shared and stored. CUPE locals should expect a detailed policy from employers on the collection and storage of testing or vaccination data. If there are any questions or concerns that cannot be answered by this memo or by reference to the legislation, please contact the National Representative assigned to you.

Duty to Accommodate

Scope of Human Rights Protection

In implementing mandatory vaccination or vax or test policies, employers must meet their duty to accommodate under the Saskatchewan *Human Rights Code* (provincially regulated employers) or the *Canadian Human Rights Act* (federally regulated employers). The analysis below focuses on the provincial human rights scheme, though the federal scheme is largely similar.

The grounds under Saskatchewan's *Human Rights Code* most likely to give rise to accommodation needs in relation to mandatory vaccination are disability and creed (i.e religion).

Employers must accommodate employees who are medically unable to receive a COVID-19 vaccine. Employees requesting an accommodation must be able to support their request with reasonable medical documentation from a medical professional qualified to speak to restrictions on their ability to receive a COVID-19 vaccine. Most people can safely receive a COVID-19 vaccine.

The ground of creed can be complicated to apply. A creed can include a religion but may also include other belief systems. The Ontario Human Rights Commission's Policy on Preventing Discrimination Based on Creed defines a creed as follows:

A creed:

- Is sincerely, freely and deeply held
- Is integrally linked to a person's identity, self-definition and fulfilment
- Is a particular and comprehensive, overarching system of belief that governs one's conduct and practices
- Addresses ultimate questions of human existence, including ideas about life, purpose, death, and the existence or non-existence of a Creator and/or a higher or different order of existence
- Has some "nexus" or connection to an organization or community that professes a shared system of belief.

It is very likely that the Saskatchewan Human Rights Commission would draw upon the leading case law arising out of British Columba and Ontario in determining how creed and/or religious exemptions should be applied. Judicial decision makers have not accepted that any individual personal belief constitutes a creed. In the context of COVID-19, the Human Rights Tribunal of Ontario rejected a claim by an employee that his anti-mask beliefs were a creed. See: *Sharma v. City of Toronto*, 2020 HRTO 949 (CanLII).

Some employees who oppose COVID-19 vaccines may try to claim that a personal belief that vaccines are ineffective or harmful amounts to a creed. Absent a connection between such views on COVID-19 vaccines and a broader religious or analogous belief system (rather than a political ideology), such claims are unlikely to be successful.

While it is possible someone could require an accommodation relating to COVID-19 testing based on disability, creed, or some other ground, there are in practice very few reasons someone could not regularly take a COVID-19 test. Where an employee is invoking an exemption based on human rights, that claim must be substantiated by evidence.

Accommodation to the Point of Undue Hardship

Where an employee demonstrates they have an accommodation need based on a protected human rights ground like disability or creed, the analysis turns to the question of what the employer must do to accommodate them. An employer must accommodate employees to the point of undue hardship, which is a high bar for the employer to meet.

One of the factors an employer may rely on to establish undue hardship is health and safety requirements (see sections 11(2) and 17(2) of the *Human Rights Code*). As such, some employers may assert that it would be an undue hardship to allow employees who cannot be vaccinated for reasons protected by human rights legislation to continue to attend work in person. Whether an employer has established undue hardship will depend on the circumstances at hand, which should include an assessment of the work and workplace. Employers must consider what measures could be taken to modify the work and/or workplace to allow an employee to continue to work safely—even if these measures have an associated cost—and should make every effort to ensure the economic interests of employees requiring human rights accommodation are not harmed.

Staff and locals should attempt to negotiate solutions that protect the health and safety of all workers in the workplace while minimizing any negative impacts on workers requiring accommodation. Employers must bear the monetary costs of any accommodation up to the point of undue hardship.

Duty of Fair Representation and Discipline

Employee Right of Refusal and Discipline

Employees cannot be compelled by their employer to undergo medical testing or vaccination. In short, your employer cannot hold you down and subject you to a needle or a nasal swab. The case law is quite clear on this. However, your employer can make testing or vaccination a pre-requisite for attending work, as discussed above. While there are limited cases on this issue, the case law relating to “fitness to work” can be instructive. These cases consider the safety implications where individuals fail to provide a return to work medical certificate.

As explained in *Shell Canada Products Ltd. v. C.A.I.M.A.W., Local 12*, 1990 CarswellBC 1996 ("*Shell Canada*") at paragraph 17:

> [T]he reason why an employer is not entitled to compel an employee to submit to a medical examination against his will is that unless the employee consents, the doctor would commit a trespass for which he would be liable in damages. Logically, that principle would even apply against the employee's personal physician because if the employee does not give his consent, no doctor is entitled to examine him. Then, at paragraphs 20 and 23 of *Shell Canada*: While an employee may refuse to submit to a medical examination or to provide medical information to the employer, it does not leave the employer without recourse. Where the employer has reasonable cause to believe that an employee is unsafe or unfit to work or that information that the employee may have tendered to the employer is not valid, he may refuse to permit the employee to work.
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> It is also important that the right of the employer to refuse work to an employee who is not fit contemplates that it is the employer who is entitled to determine the manner in which the work is to be done. Where the collective agreement leaves the employer with a discretion to organize the work place, that employer cannot be required to reorganize the work or to provide light duties to accommodate an employee who has been ill or injured and is not able to perform his regular duties. However, if there is work available under the existing work structure that the employee might be able to do, the employer may be required to assign that work to the employee provided that the assignment does not contravene the seniority rights of other employees. The jurisprudence requires that the employer consider if there is other work within the organization which the employee is capable of doing which may be given to the employee under the terms of the collective agreement: Re CIP Inc., Container Division and C.P.U., Loc. 343 (1983), 11 L.A.C. (3d) 348 (McLaren). After that procedure has been followed and it is determined that there is no work available that the employee can do, the employee may be refused work.

At paragraph 31 of *Shell Canada*, the arbitrator explained that refusal to submit to a medical test or procedure is an except to the "work now, grieve later" rule:

> Finally, on this point, it would appear that such a refusal constitutes an exception to the work now grieve later principle: Re Riverdale Hospital and C.U.P.E., Loc. 79 (1985), 19 L.A.C. (3d) 396 (Burkett). The employee cannot be compelled to give up a basic civil right and agree to be examined by a doctor of the employer's choice in order to avoid termination. It is a right that is incapable of being properly compensated at arbitration. And it could happen that an employee, having been examined by the employer's doctor, may be determined not to be fit to return to work in any event.

Similar principles were outlined in *VIA Rail Canada Inc. v. CAW-Canada*, 2002 CarswellNat 5953, at paragraph 55:

> The arbitral reasoning with respect to medical examinations reflects a consensus that, while employers cannot impose discipline upon employees for a refusal to submit to

> either an independent medical examination or an examination by a doctor appointed by the employer, they can be kept out of service where the employer has reasonable grounds to question the fitness of the employee to perform his duties. That reasoning has particular application to the facts found in this dispute.

However, the case of *Garda Security Screening Inc. v. IAM, District 140 (Shoker Grievance)*, [2020] O.L.A.A. No. 162 is helpful to consider in the context of employer policies regarding COVID-19. In that case, an employee was dismissed because she failed to self-isolate and instead came to work when she was waiting for results from her COVID- 19 test. This was contrary to the employer's workplace policy, which required employees who were awaiting test results to isolate. The arbitrator dismissed the grievance challenging her dismissal. At paragraph 15:

> The actions of the grievor were a clear violation of the employer's and public health guidelines. Her claim of not feeling sick is absolutely irrelevant. She was required to isolate, as she knew, for the safety and health of others. She chose not to, thereby putting countless others at risk of illness or death.

Finally, there is at least one case of an individual being dismissed for failure to follow a vaccination policy. In *Barclay v Mohawk Council of Akwesasne*, 2000 CarswellNat 3877 (Can Adj), the employee was a Registered Practical Nurse who brought a unjust dismissal complaint under the *Canada Labour Code* after refusing to get the flu vaccine. Ultimately, the adjudicator found that the policy was reasonable and the dismissal was upheld. This was not in the unionized context, but is helpful as preliminary guidance.

These cases are all indicative of the fact that, even though employees cannot be compelled to take vaccines or tests, they may still be disciplined for failing to follow a workplace policy. This is an important legal distinction. Locals and their members need to be aware that the COVID-19 pandemic brings their privacy interests into conflict with the employer's duty to provide a safe workplace. In almost all cases this means that some level of vaccination or "vax or test" policy will be reasonable, and that non-compliance may lead to discipline.

Fake & Forged Vaccination Cards

A related issue that has been raised in recent days is the possibility of individuals acquiring or creating "fake" vaccination cards, either to access certain public spaces and or to attend work. From an employment perspective, we would warn locals and members that fraudulent vaccination data would certainly be considered insubordinate behaviour and a violation of any employer policy. There is also a very real possibility of criminal fraud charges or hefty fines under public health legislation if an individual is found with a forged document.

Duty of Fair Representation

As staff and locals navigate mandatory vaccination and vax or test policies, they must consider their legal duty to represent all bargaining unit members in a way that is not arbitrary, discriminatory, or in bad faith. Avoiding arbitrary, discriminatory, and bad faith conduct means

thoroughly investigating the circumstances of every case and making an informed and reasoned decision that properly considers and weighs all relevant individual and collective interests.

Unions must consider the interests of persons disciplined or terminated for breaching employer policies. They must also consider the interests of all their members to a safe and healthy workplace, which is enhanced where all workers who can be vaccinated are vaccinated.

The Saskatchewan Labour Relations Board has long held that trade unions have the discretion to take decisions that favour the interests of some members over others, provided they duly consider and weigh competing interests, and make decisions for reasons that are not arbitrary, discriminatory, or in bad faith. See the line of cases emerging from: *Hildebaugh v Saskatchewan Government and General Employees' Union and Saskatchewan Institute of Applied Science and Technology*, [2003] Sask. L.R.B.R. 272, LRB File No. 097-02

Staff and locals must take care to consider and weigh both individual and collective interests in decision making where mandatory vaccination or vax or test policies are in effect. In a workplace with a mandatory vaccination policy where a bargaining unit member refuses to be vaccinated and there is no protected human rights ground involved, a local may choose to take the position that the member not be allowed to attend work in person where they will interact with other members, even if attending in person is what the member refusing to be vaccinated wants. Indeed, the health and safety interests of other members is likely to weigh heavily in favour of taking such a position.

Similarly, where a vax or test policy is in place, a local may choose to take the position that a worker who refuses testing not be allowed to attend work as usual where there is interaction with others. Given the novelty of mandatory vaccination and the wish to preserve employment, staff and locals should seek solutions that protect the employment status of those refusing vaccination, but that do not undermine the health and safety of others. For example, where there are no other reasonable alternatives such as remote work, administrative leave for those who refuse vaccination is an option that protects workplace health and safety while avoiding termination. Particularly where there is no human rights accommodation involved, the reality is that such leaves will likely be unpaid.

If a member is disciplined or terminated, it is advisable to file a grievance to protect timelines and preserve rights. Locals should consider what remedy to seek in the grievance process, given their obligations to preserve workplace health and safety. In some cases, this may mean advocating administrative leave instead of termination. Locals will retain their usual discretion on what cases to refer to arbitration, and if referred, whether to withdraw, settle, or litigate. Decisions must be taken only after having properly investigated the circumstances of the case.

Conclusions & Recommendations

Reasonableness of Policies

In determining whether any given policy will be reasonable, locals and employers *must* consider the context of the specific workplace. In doing so, there are three factors that emerge as the most important:

1. **How dangerous is the COVID-19 virus**? This must consider the local data, the nature of the workplace, as well as the objective harmfulness of the current variant.

2. **How effective are the COVID-19 vaccines**? This must consider the efficacy of the vaccines in preventing serious illness as well as transmission, compared to other health and safety measures (i.e. masks and social distancing).

3. **How safe is the COVID-19 vaccine**? This must balance the invasion of bodily integrity against the risks inherent in taking the vaccine itself, compared to the risk in being unvaccinated.

In undertaking a *KVP* analysis, an arbitrator would balance all of the factors above to decide whether a specific policy is reasonable. This memo ultimately finds that the medical, legal, political and social consensus in favour of vaccines is growing on a weekly basis. The delta variant is proving to be more dangerous than previous strains of the virus, and the vaccines increasingly are proving to be effective and safe. Moreover, the limited amount of existing case law – particularly with respect to mandatory testing – shows that arbitrators are taking the threat of COVID-19 seriously. In contrast, a challenge to these policies would be costly, time consuming and would need to be supported by strong and convincing medical evidence against vaccination and testing.

More importantly, the Government of Saskatchewan has recently legislated regulations under the *Saskatchewan Employment Act* which give provincial employers outside of the public service the opportunity to "opt-in" to a vaccinate or test regime. Employer who "opt-in" to this regime could arguably still be subject to a *KVP* analysis as their decision to opt in is essentially an exercise of management rights. However, an employer could argue that their right to opt-in was "prescribed by law" and is thus reasonable. It is also important to remember that employers are still subject to scrutiny under the *KVP* analysis for actions that they take beyond government regulations.

One of the potential benefits of the recent regulations under the *SEA* is that they set a benchmark for what the government has deemed to be a reasonable policy. While this means that employers will be able to justify opting-in, it also means that it could be more difficult to justify going beyond the regulations. For example, an employer who wishes to remove the testing alternative and require vaccination in order to attend work will need to show why that strict requirement is reasonable in the context of their workplace. Likewise, an employer who requires testing more frequently than every 7 days will have to show why this increase in frequency is necessary.

Recommendations

Despite the foregoing opinion that vaccination and "vax or test" policies will be largely reasonable, locals should be prepared to pick through employer policies carefully to root out overreach or inconsistent application. The following is a list of things to watch out for as policies are implemented:

- **What is the policy**? Does the policy mandate a vaccination to attend work, and is there an alternative such as regular rapid testing?

- **If there is an alternative, is it the least intrusive**? This question relates directly to the nature of the workplace. For example, if there is clear evidence than an employee can complete the core functions of their job remotely, a vaccination or testing policy could be less reasonable.

- **What are the current public health orders and regulations?** Employers who are subject to government mandates will be insulated from challenge on the basis that the measures are prescribed by law. Similarly, employers who "opt-in" to these regimes will be able to defend challenges on the basis that they are following a government policy.

- **Are there provisions to deal with human rights exemptions**? What is the process for accommodation and are there members who could be legitimately exempt? These members must be distinguished from those who simply refuse to vaccinate for political or personal reasons.

- **What is the process for dealing with non-compliance**? Does the employer have an educational program for those unwilling to vaccinate? Will non-compliant members be forced to take unpaid leave, or subject to discipline up to termination?

I trust that this is of assistance. If context specific issues arise that cannot be answered by the above, please contact your national representative.

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