



e2r Alert!

Are COVID-19 Vaccine Mandates Still Reasonable?

Over the past several months, many employers across Canada have implemented mandatory COVID-19 vaccination policies within their workforce. In the context of labour arbitrations, unions have challenged their reasonableness and enforceability. Largely, arbitral decisions have favoured the implementation of mandatory vaccination policies, provided that the consequence of non-vaccination is reasonable, i.e. immediate dismissal for non-compliance as a consequence may be unreasonable and removed, but an unpaid leave may be reasonable.

As public health guidelines change across the country and restrictions ease, the question continues to loom, how long will these policies be reasonable?

A recent arbitral decision, *FCA Canada Inc. v Unifor, Locals 195, 444, 1285* ("FCA Canada") held that a mandatory vaccine policy implemented by the employer was no longer reasonable and was struck down entirely.

The policy required that employees obtain full vaccination or be placed on an unpaid leave of absence and could face disciplinary action for non-compliance as well.

The arbitrator found that the policy was reasonable at the time it was implemented in October 2021, but that it no longer was. The arbitrator found that there was scientific evidence of waning efficacy of a two-dose vaccination status, particularly in regards to the Delta variant. Despite vaccination remaining effective against preventing serious illness to the vaccinated individual, the evidence showed that there was a failure to establish a "notable difference in the degree of risk of transmission of the virus" between vaccinated and unvaccinated people. It is noteworthy that "vaccinated" in the context of the policy is defined as having two shots. Perhaps it is also noteworthy that the arbitrator made this decision with "considerable personal reservation" and stated that the decision "should in no

way be taken as support for remaining unvaccinated against COVID-19 absent a legitimate exemption."

As a result, the policy was struck down, and the employer could no longer rely on it.

Contrast the FCA Canada decision with another recent arbitral decision, *Alectra Utilities Corporation v Power Workers' Union* ("Alectra"). These decisions were released within about a week of one another. The Alectra decision sides with the majority of previous arbitral decisions rendered whereby mandatory vaccine policies have been upheld, or at most, subject to some variance. The arbitrator in this case considered vaccination to continue to provide protection to the health and safety of employees. The policy also required employees to be double vaccinated. The arbitrator held that a "very important aspect" of that policy, as it relates to its reasonableness, is that it contemplated amendments as circumstances change. The arbitrator found the employer was interested in full employee reintegration in the workforce in due course. The decision held that the policy is enforceable and remains in place.

While these two decisions are at odds and may leave us all with more questions rather than answers, they do serve as a helpful reminder to review your mandatory vaccination policies, if applicable, from time to time, to ensure they align with the current realities of the ongoing COVID-19 pandemic.

As always, we recommend speaking to an e2r™ Advisor in these cases, or if you would like to discuss this topic in further detail.