BIRD RICHARD
LAWYERS FOR EMPLOYERS

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In this Issue

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Arbitrator Strikes Down Mandatory Vaccine Policy due to Outdated Definition of "Fully Vaccinated"

In a recent arbitral decision released on June 17, 2022, *FCA Canada Inc. v. Unifor, Locals 195,444,1285*, 2022 CanLII 52913 (ON LA), an arbitrator considered whether a mandatory vaccine policy, in a federally regulated workplace, ought to continue given the shifting nature of the pandemic. This was considered in the context of a unionized workplace.

The Employer's Vaccination Policy (the "Policy) required employees, contractors, suppliers and visitors to be fully vaccinated (defined as two doses of a two-dose vaccine) in order to attend the workplace.

Arbitrator Nairn reviewed the generally accepted jurisprudence that has generally established an employer's right to implement a mandatory vaccine policy, if it is done so in a reasonable manner to provide a safe workplace to employees.

The arbitrator reviewed the history of the pandemic, from the declaration of a pandemic in March 2020 by the World Health Organization, the various waves that have occurred, to March 2022, when vaccine mandates in schools, hospitals and long-term care homes were lifted. A statutory duty to accommodate those with religious or medical exemptions was specifically acknowledged in the Policy. The Policy also recognizes the statutory duty under the *Occupational Health and Safety Act,* to take "*every precaution reasonable in the circumstances*" to provide a safe workplace. Employees who failed to provide proof of vaccination were placed on an unpaid leave of absence, effective December 31, 2021.

The union argued that the evolution of the pandemic and the scientific evidence was that a mandatory vaccine policy would not achieve protection for workers in relation to the Omicron variant. Significant medical evidence was presented demonstrating a two-dose vaccine provided very little protection for employees in the workplace as it pertained to

the predominant Omicron variant and therefore, the continuation of the policy failed to balance the interests of those who had chosen not to be vaccinated for various reasons with the responsibility to maintain a healthy workplace. The union sought the suspension of the Policy from its inception and full compensation for those placed on unpaid leave.

The employer argued that the Policy was reasonable and that while the science continues to evolve, vaccines remain the predominant effective measure against COVID-19, and that putting unvaccinated workers back in the workplace exposed those workers to a higher risk of infection and serious disease. The Employer acknowledged some evidence of waning vaccine efficacy, but argued that up to June 30, 2022, the Policy was necessary and reasonable.

The arbitrator accepted that the Policy was reasonable, and that the employer had the right under the management rights clause in the collective agreement to implement reasonable rules in the workplace and employee safety is a legitimate object of those rules. The arbitrator referenced the decision in *Coca-Cola Bottling,* where a vaccine mandate was upheld. The terms of the Policy were reasonable, and balanced. At paragraph 92, Arbitrator Nairn stated:

> "I observe that there is no right to remain unvaccinated and remain in the workplace. The right is one of personal autonomy and bodily integrity, in this circumstance, having the choice to remain unvaccinated. Exercising that choice may give rise to other impacts. For every right there is a corresponding responsibility – the Employer has the right to make workplace rules but has the corresponding responsibility to ensure that those rules are reasonable. An employee has the right to remain unvaccinated but has a corresponding responsibility not to place co-workers at increased risk as a result."

The arbitrator took judicial notice of the fact that the federal government announced on June 14, 2022, that it was lifting vaccine mandates for federal public services as of June 20, 2022. He also considered that as of April 14, 2022, the Ontario Science Advisory Table defines a "*complete vaccine series as 2 doses in children, 3 doses in adolescents and adults, 4 doses in older adults and high-risk groups.*"

The arbitrator concluded that the Policy, when introduced, was reasonable and continued to be reasonable in its application *until June 25, 2022*. The arbitrator concluded that a Policy which included a vaccine mandate, with "fully vaccinated" defined as a 2-dose regiment was no longer reasonable based on the evidence supporting waning efficacy of that vaccination status and the failure to establish that there was any notable difference in the degree of transmission of the virus between the vaccinated (as defined by the Policy) and the unvaccinated. The evidence supports a negligible difference in respect of the Omicron variant.

The arbitrator noted that based on the definition under the Policy, there was no longer any reasonable basis to remove the unvaccinated from the workplace. Despite this, the arbitrator rejected the request for any back pay and confirmed that the Policy was reasonable and appropriate. He noted that there was no provision in the Policy for a periodic review and that his decision was based on the Policy as written. He declared the Policy, introduced on October 24, 2021, to be of no force an effect, effective June 25, 2022. It seems that the Employer could revise the Policy and amend the definition of "fully vaccinated" to be more consistent with the definition as defined by the Ontario Science Advisory Table.

For employers, this case highlights the importance of periodic reviews and amendments to vaccine policies. The science surrounding COVID-19 has changed. In this case, an outdated definition of "fully vaccinated" resulted in the Policy being declared of no force and effect. Despite this, the arbitrator expressly recognized that the pandemic is not over and the evidence "*overwhelmingly supports a conclusion that vaccination against COVID-19 has been and continues to be key in reducing serious outcomes from infection by the virus, regardless of the variant.*" This statement is difficult to reconcile with the final decision to strike down the Policy, but it does serve as a reminder to keep vaccination policies updated.

Federal Government suspends Mandatory Vaccine Policy

As of June 20, 2022, the federal government suspended its Policy on COVID-19 Vaccination for Core Public Administration employees (the "Policy").

The Policy initially came into force on October 6, 2021. The Government of Canada release states that vaccines continue to provide strong protection against serious illness, and provide a level of protection against infection and transmission of COVID-19, and those other measures such as staying home when sick, improving ventilation, wearing a mask and proper hand hygiene are effective barriers against the spread of COVID-19 and remain in place, but the Policy is suspended.

As of June 20, 2022, the government states that those federal public servants who were subject to leave without pay (LWOP) (less than 2% of the workforce) as a result of declining to disclose their vaccination status or refusing to get vaccinated, may resume their duties with pay, per the statement. Accommodation measures and requests that were put in place in response to the Policy will also be suspended.

Non-Compete Agreement Declared Invalid by Ontario Court of Appeal

In *M & P Drug Mart Inc. v. Norton*, 2022 ONCA 398, the Ontario Court of Appeal reviewed a non-competition agreement involving a pharmacy and its employee. This case occurred prior to the coming into force of the *Working for Workers Act, 2021*, S.O. 20221, c. 35 (the "*WWA*"), and thus, the decision considered the common law principles surrounding the enforceability of non-competition provisions.

Mr. Norton, a pharmacist, was employed by Hometown IDA in Huntsville, Ontario. He began working at the IDA in 1980, and worked continuously until 2014, when M & P acquired the pharmacy. At the time, he was the pharmacy manager. M & P negotiated the terms of a new employment agreement, which included a non-competition provision, which stated:

> "The Employee agrees that during the Employee's employment with the Company and during the one-year period following the termination of the employee's employment with the Company, for any reason whatsoever, the Employee shall not carry on, or be engaged in, concerned with, or interested in, directly or indirectly, any undertaking involving any business the same as, similar to or competitive with the business within a fifteen (15) kilometer radius of the business located at 10 Main Street East, Huntsville, Ontario, P1H 2CP".

Mr. Norton had legal advice and negotiated the agreement, which only came into force after a period of time, and he specifically acknowledged the necessity and reasonableness of the provision for the protection of the legitimate business interests of M & P. On September 25, 2020, after the non-compete provision came into force, Mr. Norton resigned from his employment and before one year had elapsed, went to work for another pharmacy within three (3) kilometers from the Hometown IDA.

Litigation ensued. The applications judge found that the non-competition provision was unenforceable because it was ambiguous or the scope of prohibited activities was too broad. The applications judge reviewed the common law principles:

- Covenants in restraint of trade, such as a non-compete provision, are *prima facie* unenforceable for public policy reasons;
- Non-competition provision will only be upheld if (a) the employer had a legitimate business interest to protect; (b) the scope of prohibited activities, the length of the restriction and the geographical scope are not overly broad or ambiguous.

The trial judge acknowledged that had the business restriction been limited to "working as a pharmacist at a pharmacy". The clause may have withstood judicial scrutiny, but the restriction to any involvement whatsoever in any business that was competitive was overly broad. Words such as "concerned with" and "similar to" and "indirectly" were ambiguous.

M & P appealed to the Ontario Court of Appeal. M & P argued that the covenant was not ambiguous or overly broad, and that it was the product of a negotiated agreement through legal counsel. The Court reaffirmed the basic principle that in order to be enforceable under the common law, a non-competition agreement must be clear and precise as to activity, time and geography. A covenant that is unclear or overly broad on any of these factors will be unenforceable. On appeal, M & P argued that the clause restricted his activities as a pharmacist and that such a restriction was reasonable. The difficulty is that the provision did not say that – it said much more and included any business that was competitive and extended far beyond pharmacy related activities. As such, the appeal was dismissed.

Review of Statutory Amendments

By way of background, last Fall, the Ontario government enacted the *WWA* which amended the *Employment Standards Act, 2000,* which prohibited employers from entering into any employment contracts or other agreements with an employee that includes a non-compete agreement, as of October 21, 2022. A "non-compete agreement" is defined as any agreement that prevents an employee from engaging in business, work, occupation, profession, project or other activity that is in competition with the employer's business, after the employment relationship ends. There are two notable exceptions:

- Where there is a sale of business and where immediately following the sale, the seller become an employee of the purchaser, an agreement that prohibits the seller from competition with the purchaser's business after the sale; and
- Where the employee is an executive, such as a Chief Executive Officer, President, Chief Financial Officer, or any other executive position.

There is no statutory prohibition against non-solicitation agreements or non-disclosure agreements. A non-solicitation agreement prohibits an employee from soliciting or actively pursuing clients, customers, vendors, business partners, or other employees of their employer, during the employment relationship or after the employment relationship has ended. A non-disclosure agreement prohibits an employee from sharing confidential information such as pricing, marketing strategies, trade secrets, and other internal methods. Had the decision been argued after these provisions been in force, the result would have likely been the same for the reasons explained by the Ontario Court of Appeal, but given that the provision did arise in the context of a sale of business, M & P may have validly claimed an exemption from the statutory protections.

For employers, the use of non-competition provisions should only be used in the clearest of cases, when required for the protection of legitimate business interests following a sale of business, or for executives of an organization. Non-solicitation provisions and non-disclosure agreements remain effective tools to protect business interests after an employee departs, but these too, must be carefully and clearly drafted. Please reach out to us if you require a review of any existing employment agreements, or if you require any of these provisions for your employment agreements.

Ontario Extends COVID-19 Sick Leave until March 2023

On July 21, 2022, the Ontario Government announced that the Worker Income Protection Benefit program will be extended to March 31, 2023. Eligible workers are entitled three (3) paid sick days up to $200/day. The program was set to expire on July 31, 2022. Employers may seek reimbursement of the paid leave through the Workplace Safety and Insurance Board.

We have previously reported on the circumstances that will give rise to the paid infectious disease leave, but as a refresher, eligibility arises in the following circumstances:

- going for a COVID-19 test;
- staying home awaiting results of a COVID-19 test;
- being sick with COVID-19;
- getting medical treatment for mental health reasons related to COVID-19;
- going to get vaccinated;
- having been advised to self-isolate by any employer, medical professional, or other specified authority; and
- providing care or support for children and certain relatives when they are home sick with COVID-19, or related symptoms.