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Arbitrator Upholds Mandatory Vaccination Policy in Retirement Home

By Irv Kleiner

The Employer in this case is a retirement home that is regulated by the *Retirement Homes Act*.

The issue before the Board in *Extendicare Lynde Creek Retirement Residence and UFCW, Local 175* involved a policy grievance in relation to a COVID-19 Immunization Policy (the “Policy”) that was implemented by the Employer, effective October 2021.

As a condition of employment, the Policy required all new employees to be fully vaccinated, including all booster vaccinations that are recommended by Health Canada. It also required all existing employees to be fully vaccinated, subject to any accommodation requirements that an employee might request, pursuant to the *Ontario Human Rights Code*.

The Policy indicated that employees who are not fully vaccinated in accordance with the Policy would be placed on an unpaid leave and if they persisted in not being fully vaccinated, they “may be subject to additional corrective action, up to and including termination of employment.”

In the arbitration proceeding, the Employer acknowledged that any additional corrective action that might be pursued by the Employer under the Policy, including termination of employment, would be subject to a review of the circumstances that would be assessed based upon the standard of “just cause”, which is often included in collective agreements.

The parties asked Arbitrator Raymond to consider the reasonableness and lawfulness of the Policy, given the recent decision of the Government of Ontario and other public health authorities to reduce or eliminate various vaccination and other COVID-19-related requirements that had been in place for employees, contractors and visitors in the context of retirement homes, long-term care homes, and other facilities and venues.

In spite of the decision made by the Province of Ontario and other public health authorities, Arbitrator Raymond determined that the Policy had been and continued to be a reasonable workplace rule, consistent with the parties' collective agreement, the *Occupational Health and Safety Act* and the *Retirement Homes Act*. He also made this determination irrespective of whether or not the Employer decided, at any given time, to conduct rapid antigen or PCR testing.

Arbitrator Raymond also made it clear that “fully immunized” or “fully vaccinated” within the meaning of the Policy, meant receiving **all booster vaccinations** recommended by health authorities—now or in the future—and that the requirement to receive boosters would also be a reasonable rule for the Employer to include in the Policy.

Finally, Arbitrator Raymond concluded that any additional corrective action or termination of employment in the future concerning an employee who was not “fully vaccinated” in accordance with the Policy, would be subject to a review while applying the “just cause” standard set out in the collective agreement.

This noteworthy Award reflects an important outcome for employers in the long-term care and retirement homes sectors. The decision aligns with several previous arbitration awards that have placed considerable emphasis on the context of any vaccination policy, and have indicated that a policy will be problematic if it includes “automatic termination” as a disciplinary response for employees who fail to vaccinate. Employers in the healthcare sector who continue to provide care to a frail, elderly and vulnerable clientele are, for the time being, well within their rights to establish COVID-19 policies that are sensitive and responsive to the rights of both residents and employees to reside/work in a healthy and safe environment.

For more information about this Arbitration or another employment-related matter as it pertains to your organization, please contact Irv Kleiner or another member of our Employment & Labour Group.

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