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## Being Placed On An Unpaid Leave of Absence Is Not A Denial of Seniority Rights

By Irv Kleiner and Shreya Patel

A recent arbitration award by Arbitrator Norm Jesin has affirmed an employer's ability to enforce a vaccination policy that requires employees to disclose their vaccination status. Arbitrator Jesin found that this is a reasonable aspect of a mandatory vaccination policy. Arbitrator Jesin's award also held that the decision to place an employee on an unpaid leave of absence as a result of the employee's failure to disclose vaccination did not constitute a violation of his seniority rights under the collective agreement, as alleged by the Union in the grievance.

The Employee was employed at the Employer's Scotiabank Arena in Toronto where two sports teams owned by the Employer practise and/or play. The Employee was employed in a position that required him to work closely with other employees and to come into contact with the players while working.

Following the provincial government's mandate to require patrons attending events at the arena to be fully vaccinated, the Employer implemented a policy that required its employees to be fully vaccinated.

The Union's position was that the Employer denied the Employee his seniority rights by placing him on an unpaid leave of absence, which, in turn, deprived him of work opportunities. Specifically, the Union argued that the failure to disclose his vaccination status did not affect whether the employee had the skills and ability to work, and that the imposition of the mandatory unpaid leave offended the collective agreement that guaranteed the employee 80 hours of pay per pay period.

The Employer's position was that the Employee's right to work was subject to his ability to perform the work in question. Given that the Employee failed to disclose his vaccination status, the Employer asserted that he did not have the ability to work, and accordingly, was not denied his seniority rights.

Arbitrator Jesin agreed with the Employer's position and held that the Employee's seniority rights were not being denied, as the Employer had established that being vaccinated in this work environment was a necessary qualification for the performance of work within the bargaining unit.

Arbitrator Jesin relied on arbitral authority to conclude that employers are entitled to seek disclosure of an employee's vaccination status, and without knowing this information, employers cannot properly administer their vaccination policy in the workplace.

Given the ongoing spread of COVID in the community and in workplaces, Arbitrator Jesin's award provides further reassurance that an employer's right to implement vaccination policies arises from not only their management rights, but also their duty to implement necessary health and safety measures for the protection of workers in the workplace, and particularly in workplaces where the risk of infection is greater.

Employers should consult with their legal counsel when developing, introducing or implementing a mandatory vaccination policy, so as to ensure compliance with their collective agreements, and reduce the risk of their policies being successfully challenged.

Should you have any questions, please contact any member of our Labour and Employment Group.

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