Is Mandatory COVID-19 Testing For Employees Reasonable?

***Christian Labour Association of Canada v Caressant Care Nursing & Retirement Homes* ("*Caressant*")**

An Ontario arbitrator recently dismissed a grievance challenging a policy which required all staff of a retirement home to undergo COVID-19 testing every two weeks. The retirement home provides care and services to residents who can live independently with minimal to moderate support.

The COVID-19 Testing Policy

The key elements of the retirement home's COVID-19 testing policy were as follows:

- All employees were required to be tested for COVID-19 every two weeks by nasal swab.
- Staff that participated in the testing were paid for one hour of work and parking fees were waived at the hospital.
- Medical accommodations were addressed on a case-by-case basis.

The policy initially stated that employees who refused to participate in testing would not be permitted to work until they took a test. However, after several employees communicated their unwillingness to participate in the COVID-19 testing, management took the position that employees would be permitted to work provided that they wore full PPE for the entirety of their shifts.

The Union's Position

While the union acknowledged that COVID-19 is both a serious and significant matter, the union argued that the introduction of mandatory COVID-19 testing was not reasonable. More particularly, the union argued that the employer's imposition of a nasal swab every two weeks was an intrusion on employees' privacy and a breach of their dignity, which was not justifiable in the circumstances.

To support its position, the union relied on the Supreme Court of Canada's decision in *CEP, Local 30 v Irving Pulp & Paper Ltd., 2013 SCC 34*, which held that an employer's rationale for random alcohol testing by means of a breathalyzer did not outweigh the harmful impact on employees' privacy rights.

The Decision

The arbitrator acknowledged that drug and alcohol testing cases were a reasonable starting point for the analysis. However, the arbitrator distinguished the facts in the *Caressant* case from drug and alcohol testing cases, noting that "clearly controlling COVID[-19] infection is not the same as monitoring the workplace for intoxicants…." In particular, the arbitrator noted that intoxicants are not infectious and that being intoxicated is culpable conduct whereas testing positive for COVID-19 is not.

The arbitrator found that the following factors weighed in favour of the need for COVID-19 testing in the employer's retirement home:

- COVID-19 is novel and public health authorities are still learning about its symptoms, its transmission and its long-term effects;
- COVID-19 is highly infectious and often deadly for the elderly, especially those who live in contained environments; and
- Although an outbreak had not yet occurred in the home, given the seriousness of an outbreak, waiting to act until an outbreak occurred was not a reasonable option.

Weighing the intrusiveness of the test (a swab up the nose every 14 days) against the problem to be addressed (preventing the spread of COVID-19 in the home), the arbitrator held that the policy was reasonable.

Takeaways for Employers

This is one of the first arbitration decisions addressing mandatory employee COVID-19 testing.

Although this decision held that the testing in this workplace was reasonable, it is yet to be determined whether mandatory COVID-19 testing would be reasonable in all workplaces.

The circumstances of this particular workplace, a retirement home housing a vulnerable population, justified the intrusion on employees' privacy. Employers that do not operate in an environment with a particularly vulnerable population may not be justified in imposing on all employees a mandatory COVID-19 testing policy. In addition to the potential legal issues surrounding the potential infringement of employees' privacy, employers could face additional practical challenge associated with testing employees.

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