It’s Not Me It’s The Landlord..



It’s Not Me It’s The Landlord: Third-party Vaccination Requirements May Justify The Employer’s Adoption Of A Mandatory Vaccination Policy Labour, Employment & Humans Rights Law Bulletin

In *Bunge Hamilton Canada, Hamilton, Ontario v United Food and Commercial Workers Canada, Local 175,* 2022 CanLII 43, Arbitrator Herman concluded that a vaccination policy was reasonable since it was necessary to comply with the vaccination requirements set out by the Hamilton Oshawa Port Authority and the Government of Canada. A vaccination policy viewed as necessary to operate a business is most likely to be deemed reasonable.

What Happened?

On November 2, 2021, Bunge Hamilton was informed by its landlord, the Hamilton Oshawa Port Authority (“HOPA”), a federally regulated entity, that its employees would have to be fully vaccinated by January 24, 2022. This was a direct result of the Government of Canada’s decision to require employers in the federally regulated marine transportation sector to establish vaccination policies for their employees in October.

As a result, on November 9, 2021, Bunge Hamilton introduced a vaccination policy to comply with the HOPA’s requirement. Bunge Hamilton’s policy required all employees to be fully vaccinated, and to provide proof of that status, by January 24, 2022, or they would “not be allowed on site and put on unpaid leave pending a final determination of their employment status (up to and including termination of employment)”. The policy also included provisions on accommodations, confidentiality, and privacy.

The union filed a policy grievance alleging that the new vaccination policy issued by Bunge Hamilton was an unreasonable exercise of management rights because it: (i) required employees to disclose their personal health information, (ii) placed unvaccinated employees on unpaid leaves of absence, and (iii) warned employees that they could be disciplined or terminated for failing to become fully vaccinated.

What did the Arbitrator Decide?

The requirement to disclose vaccination status was deemed reasonable since it was required by the HOPA. Arbitrator Herman further explained that the policy did not violate the employees’ privacy rights because employers generally require the

production of an employee's medical information to protect the health and welfare of other employees, that the intrusion upon the employee's privacy with respect to the disclosure of personal health information was relatively minimal, and that employees were given almost three months to disclose their status.

The requirement to be fully vaccinated or put on unpaid leave was deemed reasonable since the policy did not stipulate that employees would be disciplined but only that a final determination would subsequently be made as to their employment status, and that may include discipline or termination. Arbitrator Herman noted that had Bunge Hamilton failed to adopt a vaccination policy, it would not have been able to operate and would have had to place its employees on leave.

Finally warning employees of potential consequences was also reasonable. Arbitrator Herman concluded that it was reasonable, if not required, for Bunge Hamilton to put employees on notice of potential consequences of non-compliance with the policy.

Lessons for Employers

As the vaccination requirements change across Canada, this remains an interesting decision in the context where third parties maintain vaccination requirements. Had Bunge Hamilton not implemented its own vaccination policy, it would not have been able to properly operate its business at HOPA sites. This was determinative in the decision of Arbitrator Herman. This also allowed Arbitrator Herman to conclude that the employer was justified in choosing not to allow a testing requirement as an alternative to vaccination since it would have breached its obligations to the landlord.

Vaccination policies remain a subject matter to watch closely, and some businesses have already publicly announced their decision to maintain vaccination requirements for staff and patrons. This may continue to impact the vaccination requirements of employers.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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