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Clarity on vaccine mandates and other issues for employers in 2022

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As we anticipated last year, in 2022 many employers focused their energy and attention on navigating the continued return of their employees to their physical workplaces. This trend caused employers to review their existing vaccination policies or to consider whether to implement new policies. Helpfully, this year we saw some of the first decisions by Canadian judges and arbitrators considering mandatory vaccination policies.

Additionally, provincial governments, most notably in Ontario and British Columbia, continued on the trajectory of making material changes to employment laws for provincially regulated employers. This included the introduction of the new "disconnecting from work" and "electronic monitoring" policy requirements for Ontario employers and the expansion of paid sick leave in British Columbia.

What's going on with vaccine policies?

COVID-19 and issues related to the pandemic continued to provide no shortage of challenges for employers throughout 2022. In 2021, many employers in both unionized and non-unionized workplaces introduced mandatory vaccination policies. In 2022, the first legal disputes regarding the enforceability of such policies came before Canadian judges and arbitrators.

Overall, the initial decisions signal good news for employers who have introduced mandatory vaccination policies. Courts and arbitrators have generally found the mandatory vaccination policies in question to be enforceable, provided that such policies were reasonable at the time they were introduced.

We discuss some of the key mandatory vaccination policy cases of 2022, which were decided in relation to both non-unionized and unionized workplaces.

Vaccination disputes arising in non-unionized workplaces

Three key cases arose in the context of non-unionized workplaces – *Parmar, Costa* and *Graham.*

Parmar

In *Parmar v. Tribe Management Inc.* (*Parmar*),the British Columbia Supreme Court dismissed a claim of constructive dismissal brought by a long-service employee who was put on unpaid leave after failing to comply with the employer's mandatory vaccination policy.

The Court's decision turned on the reasonableness of the mandatory vaccination policy, based on what was known about COVID-19 at the time the policy was implemented and in light of the employer's obligation to protect the health and safety of its employees and clients. The employer's clients included thousands of residents of the buildings to which it provided property management services. The Court found that the employer had appropriately balanced individual employee concerns, such as the right to bodily integrity, against overarching obligations relating to safety.

Notably, the Court in *Parmar* found that enacting a policy that impacted an employee's bodily integrity was an extraordinary measure. However, in the context of the extraordinary challenges posed by COVID-19, the employer's policy was reasonable in the circumstances. The Court recognized that these policies ultimately do not force the employee to be vaccinated, but rather require the employee to decide between getting vaccinated and continuing their employment or remaining unvaccinated and losing employment income.

For a more in-depth review of *Parmar,* please see our Osler Update from October 4, 2022.

Costa and *Graham*

While the *Parmar* case was the first time a mandatory vaccination policy was considered in a non-unionized employment setting, two other decisions that were rendered outside the employment context may be of particular interest to employers and have application in future employment cases.

In *Costa et al v. Seneca College of Applied Arts and Technology (Costa)*, several students sought an injunction to prevent Seneca College from enforcing its mandatory vaccination policy. The students argued that the vaccine they were being required to receive was designed to target the original strain of COVID-19 and would have little efficacy against substantially different strains, such as Omicron.

The Ontario Superior Court of Justice rejected this position, preferring Seneca's expert evidence that, while the vaccines in question were less effective against the Omicron strain than they were against the original strain, there remained significant preventative benefits of current vaccines even against the Omicron strain. For example, the vaccines had been found to prevent infection in a substantial percentage of people and to significantly reduce the risk and impact of the virus, if contracted, in the vast majority of vaccinated patients.

Although the *Costa* case involved students and not employees, it may nevertheless be a useful precedent for employers who are continuing to defend their COVID-19 vaccination policies.

Similarly, in *Graham v. University of Toronto* (*Graham*), the Human Rights Tribunal of Ontario dismissed an application by a University of Toronto lecturer who alleged that the application of the University's mandatory vaccination policy resulted in discrimination based on creed – specifically, the applicant's beliefs in "academic freedom, informed consent and personal autonomy." While argued on the basis of discrimination with respect to goods and services rather than employment, the Tribunal's analysis of whether the applicant's beliefs amounted

to "creed" for the purposes of the Human Rights Code could prove useful for employers.

In its decision, the Tribunal expressly adopted the Ontario Human Rights Commission Policy on preventing discrimination based on creed, which recommends characteristics to consider when determining whether a belief system is a creed under the Human Rights Code. Applying the Commission Policy, the Tribunal found that, even accepting that the applicant's beliefs may be sincerely, freely and deeply held, his beliefs could not be considered a creed because they lacked an overarching systemic component, did not address the question of human existence or that of a Creator, did not contemplate life and death, and did not form a nexus to any organization or community with a shared system of belief.

Vaccination disputes arising in unionized workplaces

Before considering the findings in cases involving unionized workplaces, it is important to keep in mind that unions have a well-recognized right to challenge the reasonableness of an employer's policy. Non-unionized employees do not have an equivalent free-standing right. Three important decisions – *Bunge, Toronto District School Board* and *Coca Cola* – consider vaccination policies in unionized environments.

Bunge

In *Bunge Hamilton Canada, Hamilton, Ontario v. United Food and Commercial Workers Canada, Local 175*, Arbitrator Herman determined one of the earliest policy grievances involving the reasonableness of a mandatory vaccination policy in a unionized setting. The workplace consisted of two separate but integrated worksites – a north worksite, located within the Hamilton-Oshawa Port Authority (HOPA) and a south worksite, located across the street but outside of HOPA's control. HOPA, as a member of Transport Canada, required that its tenants and its tenants' employees be fully vaccinated. In response, the employer instituted a mandatory vaccination policy for employees at both properties, requiring that employees attest to HOPA that they were fully vaccinated. Employees who refused to attest or become vaccinated were placed on unpaid leave. The Union grieved the imposition of the policy on both worksites, arguing that the employer could not justify the implementation of the policy in the south worksite – located outside of HOPA's and Transport Canada's jurisdictions.

Arbitrator Herman found that it would unreasonably impede the employer's business for it to have separate vaccination requirements for employees at the two sites. The arbitrator further held that sequestering unvaccinated employees at the south site would breach terms of the collective agreement between the parties in the areas of job postings, transfers and seniority rights. Ultimately, Arbitrator Herman found that the employer's mandatory vaccination policy was reasonable, concluding that employee privacy rights were considerably outweighed by the minimal intrusion on those rights and the "enormous public health and safety interests at issue."

This decision is notable because of the significant notice taken by the arbitrator of the serious public health and workplace safety concerns at play. Interestingly, the arbitrator appeared to take these considerations as common knowledge and self-evident, and did not require expert evidence to demonstrate the seriousness of the COVID-19 pandemic.

Toronto District School Board

In *Toronto District School Board v. CUPE, Local 4400*, Arbitrator Kaplan found that the school board's mandatory vaccination policy was a reasonable exercise of management rights. Notably, the decision turned on Arbitrator Kaplan's assessment of competing expert

evidence regarding whether the employer should be required to provide rapid antigen testing (RATs) as an alternative option to vaccination under the mandatory vaccination policy. The union's medical expert, while supportive of vaccination, promoted RATs as a comparable and highly effective alternative to vaccination. The employer's expert took a less optimistic view of the effectiveness of RATs, highlighting the inefficiencies of RATs, the ease at which a testing regime can be subverted and the high potential for user error.

Arbitrator Kaplan preferred the evidence of the employer's expert and concluded that mandatory vaccination was preferrable to using RATs, as it provides a higher level of protection from transmission of COVID-19 for the staff and students of the employer. Moreover, the arbitrator found that rapid testing should only be relied on in cases of absolute necessity, such as to facilitate essential and otherwise justified exemptions to the policy.

Coca Cola

In *Coca Cola Canada Bottling Inc. v. Teamsters, Local 213*, Arbitrator Noonan considered a mandatory vaccination policy implemented by the employer after experiencing serious COVID-19 outbreaks across its national bottling operations. Arbitrator Noonan ultimately found the implementation of the policy was a reasonable exercise of the employer's management rights.

Arbitrator Noonan gave considerable weight to the employer's statutory duty to provide a safe workplace using every precaution reasonable in the circumstances. A precautionary approach, as opposed to a reactive approach, was reasonable in the face of the unprecedented COVID-19 pandemic. Arbitrator Noonan agreed with the employer, holding that employers should not have to wait until the negative consequences of COVID-19 are clearly apparent before implementing an appropriate policy to counteract the virus's spread.

Arbitrator Noonan further found that it was reasonable for the employer to follow the guidance of the public health authorities in implementing its policy. At that time, the guidance of the public health authorities was that vaccination was the primary safeguard against the spread of COVID-19 variants and against serious illness or death to those individuals who contract the disease. This confirmation that it is reasonable for an employer to rely on the guidance of public health authorities is particularly helpful and reassuring for employers that monitored such guidance and followed it in responding to COVID-19, including by implementing a mandatory vaccination policy.

Numerous legislative changes enacted in 2022

Ontario

As we discussed last year, the Ontario legislature passed Bill 27, *Working for Workers Act, 2021* (Bill 27) in 2021, which amended employment-related legislation, including the *Employment Standards Act, 2000* (Ontario ESA) and the *Occupational Health and Safety Act* (OHSA), to mandate disconnecting from work policies. Specifically, Bill 27 amended the Ontario ESA to introduce a new requirement for certain employers in Ontario to have a written policy on disconnecting from work. Due to the way this topic has been covered by certain media outlets, there has been some confusion among employers regarding whether this requirement creates a "right to disconnect" for employees. It does not create such a right. As clarified by the Ministry of Labour in its guidance issued in 2022, employers are *not* required to have a policy that provides a *new right* for employees to disconnect from work. Rather, the new requirement simply reinforces existing rights under the Ontario ESA.

The Ontario ESA does not require the policy to contain any specific content. The contents of a disconnecting from work policy are determined by the employer.

This year, the Ontario government continued making legislative amendments and passed Bill 88 [PDF], *Working for Workers Act, 2022* (Bill 88). Bill 88 received royal assent on April 11, 2022 and further amends the Ontario ESA and the OHSA. Bill 88 involved a number of new statutory provisions, including requirements for electronic monitoring policies, new rights for digital platform workers and the exclusion of consultants from the Ontario ESA.

Effective October 11, 2022, the Ontario ESA now requires employers in Ontario with 25 or more employees to have a written policy on electronic monitoring of employees. The Ministry of Labour published guidance on the new requirement to have a written electronic monitoring policy, which clarifies that the intent of the requirement is *not* to create any new employee privacy rights or a right not to be electronically monitored. For details regarding what employers need to do to comply with this new requirement, please see our Osler Update.

Bill 88 also enacted the *Digital Platform Workers' Rights Act, 2022.* The new legislation establishes certain rights for workers who provide platform-facilitated labour, such as ride share, delivery work or courier work, regardless of whether the worker is classified as an employee or contractor. These rights include, among other things, a right to a minimum wage and a requirement to provide notice of, and a reason for, the removal of the worker from the digital platform. Additional details on the key changes are summarized in our Osler Update.

Effective January 1, 2023, "business consultants" and "information technology consultants" will be expressly excluded from the application of the Ontario ESA if they meet prescribed criteria, including, among other things, where they are paid a base rate of at least $60 per hour pursuant to a written consulting agreement. Those who fall under either of these new consultant categories, as defined in the Ontario ESA, are not entitled to the minimum standards or protections provided under the legislation. On its own, the amendment does not necessarily affect consultants' rights at common law, including the right to reasonable notice of termination if they are found to be employees.

In addition to the changes already discussed, Bill 88 made a number of amendments to the OHSA, including increased fines for occupational health and safety violations and requirements for naloxone kits in high-risk workplaces.

Prior to Bill 88, directors, officers and individuals could be fined a maximum of $100,000 for OHSA violations. Pursuant to Bill 88, the maximum fine for directors and officers has been increased to $1,500,000 and the fine for individuals has been increased to $500,000. According to the Ontario government, these are "the highest fines in Canada for companies that fail to follow workplace health and safety laws."

In addition, Bill 88 created a new OHSA requirement for employers to make naloxone kits available in any workplace in which the employer is aware, or ought to reasonably be aware, that there is a risk of a worker experiencing an opioid overdose. According to the Ontario government's announcement, the intent of this new rule is, in part, to "help reduce the stigma around opioid abuse, raise awareness about the risks of accidental overdoses, and potentially save hundreds of lives a year." The Ontario government suggested that such workplaces might include construction sites, bars and nightclubs, though employers will need to undertake their own assessments of the risk of opioid overdoses in their workplaces. Bill 88 also requires employers to provide training that is directed at recognizing an opioid overdose, administering naloxone and understanding the hazards related to the administration of naloxone.

British Columbia

Bill 13, *Employment Standards Amendment Act (No 2.), 2021*, received royal assent on May 11, 2021, and the paid sick leave provisions contained in this Bill came into force on January 1, 2022. Bill 13 and the resulting Order in Council 637/2021 amended the *Employment Standards Act* (British Columbia) (BC ESA) and its regulations to replace the COVID-19 sick leave regime with a permanent paid personal illness or injury leave of up to five days, for any illness. The amendment increases available leave from the three paid days related to COVID-19 that were previously mandated.

The new requirement is imposed on all employers unless there exists a collective bargaining agreement that meets these minimum sick leave requirements, as well as requiring the employer to pay the employee full wages for the five statutory sick days. Under the amended BC ESA, employees are also permitted to take an additional three unpaid sick days over and above the paid sick days.

Employers should review their employment contracts and sick leave policies for employees in British Columbia to ensure that they comply with the new sick leave requirements. For further analysis of this bill and the impacts on employers, see our Osler Update.

Québec

In May 2022, the Québec government adopted Bill 96, *An Act respecting French, the official and common language of Québec*, which introduced new French language requirements in that province and new rights for Québec-based employees. At a high level, on the employment side, Bill 96 imposes new obligations on employers with respect to job postings, agreements with employees and written employee communications. It also creates several new rights and protections for Québec-based employees, including a significantly more robust enforcement regime and private rights of action. Details of Bill 96 can be found in our article, *Québec makes sweeping changes to its French language law*.

Notable case law in 2022

Courts in several jurisdictions have also issued a number of key employment decisions over the course of 2022.

Ontario

In Ontario, courts continued to set aside termination provisions and assess higher damages in connection with a failure to discharge termination obligations.

In *Maynard v. Johnson Controls Canada*, an Ontario court refused to enforce the terms of an incentive plan in connection with the termination of an employee. The incentive plan purported to preclude terminated employees from receiving the value of their restricted share units that would have vested during their contractual notice period. In its decision, the court affirmed the need to bring forfeiture provisions to employees' attention for such terms to form part of the employment contract. The court further held that the termination provision was ambiguous (and therefore not enforceable) as a committee retained the discretion to waive such provisions.

British Columbia

In *Shalagin v. Mercer Celgar Limited Partnership*, a British Columbia Supreme Court judge held that an employer had just cause to terminate the employment of an employee who, over a number of years, had made various secret recordings of coworkers. The assessment does not require that the underlying conduct be illegal, but rather requires consideration of whether such conduct fundamentally erodes the trust at the heart of an employment relationship.

Alberta

Several decisions in Alberta addressed a number of employment matters, including findings that mandatory unpaid leave for refusing to wear a mask does not constitute constructive dismissal, that employees are required to act promptly in the face of a constructive dismissal and that an ambiguous termination provision providing for 60 days' notice "or more" does not limit common law entitlements.

In *Benke v. Loblaw Companies Limited*, Osler Alumnus Justice Colin Feasby held that an employee was not constructively dismissed when the employee was placed on unpaid leave for refusing to wear a face mask at work. In 2020, due to the COVID-19 pandemic, the employer adopted a mandatory mask policy for employees and customers in all of its stores across Canada. Justice Feasby found that the imposition of the policy was not a substantial change to the employee's employment nor was it a breach of the employment agreement. Justice Feasby further concluded that the employee made a voluntary choice based on personal preference not to wear a mask at work and the employer acted reasonably by placing the employee on unpaid leave.

This decision marked one of the first times that an unpaid leave for failure to comply with a COVID-19 safety measure reached the courts. It sets a strong precedent for employers who use unpaid leave as a consequence of non-compliance with their masking policies. The employee in this case was unable to demonstrate that his failure to comply with the policy was related to a protected characteristic under human rights legislation, which meant that no accommodation was required.

In *Kosteckyj v. Paramount Resources Ltd.*, the Alberta Court of Appeal found that employees must object in a timely manner to their employer enacting a unilateral reduction in compensation to preserve their right to bring an action for constructive dismissal. In this case, the employee continued to work without objection after the employer imposed a 10% compensation reduction, taking several months to bring an action against their employer. The court found that the employee consented to the change and forfeited their cause to sue for constructive dismissal.

In the decision, Justice Wakeling identified the employee in this case as "a professional engineer and a healthy, knowledgeable and informed person." He held that the employee had 10 days to dispute the reduction in their compensation. Failing this, the employee would be assumed to have consented to the change. Less informed employees are expected to object within 15 days. Together these time periods constitute a new "bright line" test for when an employee will be deemed to consent to unilateral reductions in compensation.

In *Bryant v. Parkland School Division*, the Alberta Court of Appeal held that an employment agreement that provided the employer with the right to terminate the employee's employment with 60 days' "or more" written notice was ambiguous and could not be relied on to limit common law entitlements. A majority of the Court found that if the agreement had fixed the notice period at 60 days alone, it would have been enforceable and it would

have precluded the employees from receiving common-law notice. In its decision, the Alberta Court of Appeal identified the longstanding principle that employment agreements are presumed to contain an implied term requiring the employer to provide common law notice of termination (or payment in lieu) for without cause termination, which presumption can only be rebutted through "clear and unambiguous language."

We anticipate that these important developments in the labour and employment sphere in 2022 will continue to have meaningful impacts in 2023 and beyond.