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By email only

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Gil McGowan, President
Alberta Federation of Labour
Edmonton, Alberta

Dear Mr. McGowan:

RE: Mandatory Covid-19 Vaccination Policies

You have asked me to provide you with an opinion regarding unilaterally imposed employer mandatory vaccination policies in unionized workplaces in Alberta.

Background

The Alberta public heard about the first cases of Covid-19 in Alberta in early March 2020 and by March 17, 2020 the Alberta provincial government declared the province to be in a state of public health emergency. Some of the municipalities and first nations followed suit, also declaring local states of emergency. Federally, the government also took steps to acknowledge the urgency of the pandemic.

Over the course of 2020 and 2021, we have seen all levels of government (federal, provincial and municipal) impose restrictions on the actions of citizens and on businesses. The restrictions have significantly impacted on income for many people and we have seen various government programs set up to provide financial and other supports. This summer, the Alberta government ended its state of emergency around July 1, 2021 and lifted many restrictions. Tragically, they were wrong and a new state of emergency for Alberta was declared on September 15, 2021.

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Over the course of the summer and up to today in Alberta, it became increasingly clear that Alberta was in a brutal fourth wave of the pandemic. While the government insisted that schools and post-secondary institutions return to in-person classes, reduced contact tracing and reduced public reporting on the situation, the hospitals filled up. We are now using surge ICU beds (without surge beds the CBC reports today that we would be at 177% capacity of ICU), triage protocols are in place, virtually all non-trauma surgeries have been cancelled, patients are being moved around the province to receive care and plans to airlift patients to Ontario are in place, and the health care workers of all kinds are stretched so far beyond capacity that there is little surge ability left.

The AFL, trade unions, doctors and other health care workers, experts and others have been calling for significantly greater restrictions on the interaction of citizens to be reinstated in Alberta. At the same time, a vocal and sizable anti-vaccination movement has taken to the streets and availed itself of other outlets to protest the current level of restrictions.

To move forward, in late August and the first couple of weeks of September, universities, businesses and private property owners began taking their own steps to make their spaces safe. Several universities unilaterally imposed restrictions regarding vaccination on students, staff and the public before they were permitted entry onto their campuses. The owners of the hockey arenas instituted a policy of requiring proof of vaccination to attend games. Over the last month we have seen these policies become more and more restrictive.

In the recent round of updates the provincial government has now mandated masking in all public spaces, it has set significant gathering limits and has changed the Minister of Health. In-scope businesses are able to enjoy lesser restrictions if they implement the “Restrictions Exemption Program” (as our government cannot bring itself to use the term vaccination passports). This program basically allows businesses that require the public to be vaccinated (or have a valid exemption from vaccination) or to have a negative rapid Covid-19 test in hand, before entry into their establishments. The government has not specifically imposed a vaccination requirement on employees of these businesses.

Many employers have rushed to fill in the gap left by the government, requiring that their employees be vaccinated or have a valid exemption.

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Some employers also allow employees to take regular rapid Covid-19 tests, but that concept appears to be being phased out quickly (and frankly, ongoing quick testing is expensive and raises several privacy concerns).

This opinion will address the rights of unions and employees generally, but I do caution that each collective agreement is different, and each should be consulted specifically on each of the questions answered below.

Can employers unilaterally impose new conditions of employment on employees who are under collective agreements to require vaccination or proof of exemption from vaccination?

Generally speaking, when a trade union is the exclusive bargaining agent for a group of employees, the employer has to negotiate terms and conditions of employment with the union. However, it has also always been the law that employers can unilaterally implement workplace policies.

In 1965, in a case called *KVP Co. Ltd. and Lumber & Sawmill Workers Local 2537, (1965) 16 LAC 73*, the arbitrator held that a union can challenge a unilaterally imposed employer rule and the rule would only be upheld by an arbitrator if the rule met the following tests:

1. It must be consistent with the Collective Agreement;
2. It must be reasonable;
3. It must be clear and unequivocal;
4. It must be brought to the attention of the employee before the employer attempts to enforce it (including through disciplinary measures including termination);
5. Where the rule (or policy) is relied on to justify discharge (or discipline), the employee must be notified prior that a breach of the rule would result in that sanction; and
6. It must be consistently enforced (equitable treatment of employees) since being introduced.

The KVP case and the test that it established has been followed and cited consistently over the last 56 years. Employers can impose workplace policies unilaterally – that is, without bargaining them with the union – and unions can challenge those rules if the union feels that it can establish that any of the KVP requirements are not met. Arbitrators can then order that

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the whole policy is void, or make orders about which parts of the policy offend the KVP rules and how those parts of the policy can be changed to bring them into compliance with the KVP rules. A union can challenge a unilateral policy when it is first implemented, or it can wait and challenge a unilateral policy when an employee is actually impacted by it. Clearly, a vaccination policy impacts employees immediately, not just when they are disciplined for failing to adhere to it.

Do unilaterally imposed policies requiring that employees are vaccinated for Covid-19 unless they can establish an acceptable exemption meet the KVP test?

The short answer to this question in September 2021, in Alberta, Canada is, in my opinion, yes, in almost all cases.

As there are many different details in each mandatory vaccination policy, I am answering this question while making some assumptions about the mandatory vaccination policy. My assumptions are that the policy was put in place with a goal to maintain the safety of the workplace, of workers, and of others who interact with that workplace; that the policy requires all staff to be fully vaccinated on a timeline that is possible in light of current vaccine availability; that if a worker refuses to be vaccinated they may be disciplined and ultimately face termination of employment; and that a worker who can establish a valid human rights reason for not being vaccinated (eg. a medical reason/disability, a religious reason, or other human rights ground) the employer will accommodate that worker to the point of undue hardship.

These assumptions are less favorable than most of the policies I have heard about to date because many policies published so far allow workers to take unpaid leaves of absence rather than being fired if they do not wish to comply. Some policies are limited to only part of the work force. Some policies allow for employees who do not want to be vaccinated to participate in regular rapid testing or to work from home. Each of these differences make it less onerous for those employees who simply do not want to be vaccinated. There are several other individual differences in the policies as well and each policy needs to be specifically examined.

If the workplace does not involve interaction with the public and if the work can all be done remotely such that employees do not need to come to work,

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then, for those few workplaces, a mandatory vaccination policy would likely not be reasonable.

As time passes and the danger to Alberta citizens caused by Covid-19 is significantly reduced or eliminated and, at the same time, as the overall vaccination rate increases and vaccines are made available for children, we will likely reach a time where mandatory Covid-19 policies in many workplaces would no longer meet the KVP reasonableness test. It is also possible that other factors over time may impact on the reasonableness of such policies, such as the rate of infection, or the danger of serious health consequences or death from new variants of Covid-19. Trade unions need to continue to monitor the public health and scientific information on a daily and weekly basis for the time being.

To date, a significant amount of scientific information has been made available in Alberta, in Canada, in the USA, in Europe and other countries regarding Covid-19, approaches to dealing with the pandemic, and the successes and failures of different approaches taken. This level of transparency has made it relatively simple to anticipate and to evaluate the evidence that may be called by an employer to justify a mandatory vaccination policy.

There is an established body of jurisprudence in Canada, including in Alberta, regarding mandatory vaccination which has directly informed my opinion in this matter. There are also many cases regarding the conditions under which an employer can unilaterally impose other policies intrusive to personal choice and personal privacy. For example, drug and alcohol testing policies which raise these issues. The many cases which evaluate all kinds of unilateral employer policies are also instructive.

Most of the cases about unilateral policies focus on the question whether the policy is unreasonable and that is the main question to consider in this situation. While each union should examine the relevant collective agreements to look for inconsistencies, it is unlikely that any standard collective agreement has terms which prevent a unilateral imposed mandatory vaccination policy with the assumed terms set out above.

The requirement for employees to undergo a vaccination is a significant imposition on the employee's right to make their own choices regarding their health and the need to disclose their vaccination history is an intrusion

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into their right to privacy. The *Charter of Rights and Freedoms* does not create any additional actionable right for employees against their employer in these circumstances. Employee rights to make their own health care decisions and to privacy are given a great deal of weight under the arbitral jurisprudence but they are not absolute rights.

Employers would be expected to bring evidence to an arbitration on a vaccination policy to show their obligations under the *Occupational Health and Safety Act* (as well as the obligations of employees) to protect employees from catching an illness that can seriously and permanently disable or kill them. Employers will also point to their obligations under the collective agreement to maintain a safe workplace. Employers may bring forward evidence to explain the negative impact on their ability to run their business if employees and/or members of the public that the business interacts with become ill with Covid-19, the losses to production from employees being absent, the impact on their business if they are perceived to not have a safe environment, and the impact on their business if any employee or client becomes seriously ill or dies because of a lack of safety policies.

It is also worth noting that many employees in Alberta are already required to be vaccinated with all the usual vaccines we get during childhood and many additional vaccines. Many jobs require regular intrusive medical examinations. Other jobs require significant intrusions into employee privacy - consider health care, transportation, law enforcement, the military, and many other sectors. The difference with Covid-19 is that different sectors where there is significant interaction with the public, or which involve employee interactions in small spaces are newly and additionally impacted – consider schools, universities/colleges, meat packing operations, any business which has customers/client regularly line up for services, and many other businesses.

An arbitrator's analysis of reasonableness of a Covid19 vaccination policy would involve balancing these interests. The arbitrator would also evaluate evidence regarding the danger that Covid-19 poses. The arbitrator would look for a reasonable balance to keep the workplace safe while at the same time intruding least into employee privacy and choice.

Many of those who oppose vaccination have put forward scientific arguments and cited other evidence to suggest that vaccinations for Covid-

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19 are ineffective or dangerous. However, to date there has been significant transparency about the Covid-19 situation worldwide. In my opinion, an arbitrator in Alberta would accept that evidence that has been generally accepted by the mainstream public health and general medical communities in Canada, the United States, the World Health Organization, Europe and many other countries. That evidence has led to universal acceptance of the safety and effectiveness of the current vaccines and vaccination protocols, especially in comparison to the risks of Covid-19 infection.

We also now have considerable evidence of the actual impact of unchecked or minimally checked Covid-19 spread in Alberta. That evidence is that our health care system that is falling apart. Care for patients with serious, life-threatening conditions such as cancer has been suspended while the hospitals overflow with Covid-19 patients. We have no readily available data about how many of those people are dying or who develop far more serious long-term conditions than they would if they had received timely treatment. ICUs are full. Alberta Health Services has plans to airlift patients to other provinces far away from their loved ones, with little chance that those patients will return alive. The Province of Alberta has again declared a state of emergency.

In my opinion, after analyzing all this evidence and the relevant jurisprudence, there is virtually no chance an arbitrator in Alberta would find vaccination policies are unreasonable, provided that the vaccination policies include an opportunity for accommodation to the point of undue hardship for those employees who can properly establish human rights reasons to not be vaccinated.

As I mentioned earlier, in future if the circumstances change and there is less evidence to support the need for vaccinations to protect the workforce from transmission of Covid-19, unions should re-evaluate the chance of challenging any continuing vaccination policies.

Is it constructive dismissal to add a unilateral vaccination policy?

One of the questions frequently asked is whether the imposition of a unilateral employer policy requiring vaccinations for existing employees is constructive dismissal. In a collective agreement environment, the simple

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answer to the question is no. Provided the KVP tests are all met, the employer can change the rules during employment.

What if the employees do not comply with mandatory vaccination policies and what are the union's responsibilities to represent such employees?

Many of the employer policies that have been made public allow for employees who do not wish to share their vaccination status or to be vaccinated to take rapid tests on a regular basis. Another alternative is to arrange for such employees to work off site or to take an unpaid leave of absence until the policy is no longer needed. It appears that most employers are working under the assumption that these policies are going to be for a short term and therefore they are not in a hurry to terminate employees who refuse to comply.

However, I also expect that eventually some employees who will not comply with the policies and who do not have a human rights basis for their actions, will face termination of employment. Failure to follow a safety policy is both insubordination and a breach of the occupational health and safety laws.

A union does not need to pursue a grievance to arbitration for every employee negatively impacted by vaccination policy violations. However, a union cannot just refuse to look at such situations because it supports vaccination or because it has decided that it will not challenge a mandatory vaccination policy.

If an employee is disciplined or dismissed for failure to comply with a mandatory vaccination policy, the union will be required to evaluate each situation individually for the possibility of a successful grievance. The evaluation is no different than what is done in any other case of discipline or discharge. It may be possible that an investigation may lead to a conclusion that the circumstances for any particular employee do not amount to just cause for discipline or discharge or the situation may provide facts to support a lesser penalty.

If a union decides to not carry a grievance forward for an employee negatively impacted by a mandatory vaccination policy, it may have to defend its decision in the context of a duty of fair representation complaint. If the union has investigated each individual situation in a reasonable

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manner and then assessed each case on its unique facts, it is highly unlikely that the Labour Relations Board would find that the union has breached its duty of fair representation.

The notices of liability

Recently, a document called “notice of liability” has been sent to unions and management in several Alberta workplaces. In my opinion, this document has no value or place in a unionized workplace in Canada. Our workers compensation laws prevent an employee for suing an employer for damages due to workplace injury or illness. Unions cannot be sued for this either, instead unions can be charged with a failure to comply with the duty of fair representation under the *Labour Relations Code*. It may be possible for an employee to claim workers compensation benefits for any time lost from work due to any adverse consequences they suffer from undergoing an employer mandated vaccination, but I do not know if the WCB has ruled on that possibility yet. Also, if an employee misses work due to illness caused from vaccination, the sick leave policies, STD, and LTD benefits provided under a collective agreement would apply if WCB does not provide coverage.

Any other action that an employee may take against the employer would be by way of a grievance under the collective agreement. The Supreme Court of Canada, in *Weber v. Ontario Hydro* and several subsequent cases has mandated that almost all legal claims arising out of the employment relationship in unionized workplaces must be by way of grievance under the collective agreement. A court does not have jurisdiction to hear such claims. My opinion regarding challenges to the policies is set out above, as are the obligations of the union to assess each individual case regarding a specific employee that may raise. Again, the union cannot refuse to evaluate any claims out of hand simply because an employee has not been vaccinated – the circumstances of each case must be carefully considered.

Human Rights accommodation

Employees who cannot be vaccinated due to medical, religious or other protected human rights grounds will need to have solid evidence to support their claim that a human rights ground prevents them from being

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vaccinated. The unions can assist those members who have valid claims to gather that evidence – for example to get clear medical reports if the issue is related to a disability. The unions can also assist the employee to work with the employer to determine a reasonable accommodation for the employee. If the employer is not properly addressing a human rights issue, the union can file a grievance regarding the human rights issues. An arbitrator considering a grievance can provide remedies under the *Alberta Human Rights Act*.

Private information

The information that employers gather under their Covid-19 vaccination policies must be kept confidential and private under PIPA (the *Personal Information Protection Act*) or FOIPP (*Freedom of Information and Protection of Privacy Act*), depending on the employer. Unions can inquire about the employer's processes and can challenge any parts of the policies that fail to protect employee privacy. Unions should make efforts to work with employers to solve any privacy concerns. If necessary, the union could challenge that part of a policy that fails to maintain employee privacy under the KVP test. The possibility of success of such a grievance will depend on the specifics of each individual workplace and the concerns about privacy in that specific workplace.

Conclusion

In summary, in my opinion, grievances challenging Covid-19 policies that fall within the assumptions set out above have virtually no chance of success at arbitration. The Duty of Fair Representation requires Unions to represent and assist members who are seeking human rights accommodation regarding such policies. Unions must also evaluate all individual cases brought forward where a member faces discipline or discharge or other negative consequences due to their failure to follow a mandatory vaccination policy. Unions can assist their membership by working with employers, or file grievances regarding any concerns about the handling of employee private information under these policies.

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Trade unions must also continue to monitor the public health situation in Alberta to ensure that mandatory vaccination policies remain reasonable. At some point in the future, it is expected that these policies will no longer be needed and will be rescinded by Alberta employers.

Yours truly,



Leanne Chahley