

## **The Legal Side of Vaccination Mandates**

Many members have been asking questions about the Corporation's policy on mandatory vaccination. This outlines the some of the legal issues and the answers or likely answers.

A couple of things need to be said to start. The first is that every union in Canada, like every employer, has to look at the issues around vaccination and the workplace as a balancing act. There are interests that seem to be working against each other. Whenever that happens, what is needed is to look at the interests, the risks, the likely outcomes and other factors, and make an informed decision about what to do. It is a judgement call. Not everyone will be happy with the result

Secondly, we are predicting the outcomes of any legal challenges without having a full range of decisions. We have to try to understand the most likely outcome. That may not be perfect, but we can't wait years for everything to be ruled on by the Supreme Court of Canada before we make our decisions.

### **Let's Start at the End – What is the Bottom Line**

It is our view that arbitrators and courts will decide that a properly prepared mandatory vaccination policy is legal and enforceable, as long as it has some limits and exceptions. This would have to include the accommodation of people who, for human rights-related reasons cannot be vaccinated. For anyone else who declines to be vaccinated, the policy would also have to consider other options including leaves with or without pay.

The Policy would also have to make reasonable provisions to protect the privacy of all CPAA members

### **Now, the Details**

#### **The Employer's Authority to Implement a Mandatory Vaccine Policy**

Arbitrators and courts in Canada have been clear that employers have the discretion to make workplace rules that are reasonable. Those same arbitrators are the ones who decide what is reasonable. They give employers a lot of leeway when they are deciding whether a rule is reasonable, and mandatory vaccine rules are no exception. As you can expect with something as new as COVID vaccines, there is nothing explicit in the collective agreement that prevents the employer from putting in a rule about this disease.

From the beginning, CPAA has been pushing Canada post to take every reasonable step to make the workplace safer. That is essential where the risk employees face is severe illness or death. The question is whether to fight a policy that requires individuals to be vaccinated.

CPAA understands that policies requiring vaccination and the disclosure of vaccination status are a significant intrusion on employees' privacy and personal and bodily integrity. On the other hand, arbitrators have typically upheld mandatory vaccination policies in circumstances where there is some reasonable evidence that they would reduce a significant health risk in the workplace. It is our view that the current science about COVID-19 and vaccines would be enough for an arbitrator to find Canada Post had a right to put this policy in place, even if it does not eliminate risk entirely for the vaccinated employees and for the customers of Canada Post

### **Employees who cannot be vaccinated for human rights reasons**

If an employee can't be vaccinated, based on human rights grounds (likely based on disability, and possibly based on religion), the Corporation has to try to accommodate that employee.

The policy recognizes that anyone who has a true human rights issue will have to be accommodated up to the point of undue hardship. Employees will likely have to self-identify and give certain information to their employer before triggering the right to an accommodation. This would include information (including information from their licensed health practitioner) to establish the human rights-related basis for their inability to become vaccinated. This will not be an easy claim.

People who make a proper human rights claim have to be accommodated. If that is not possible in the workplace, they may have to be placed on a leave of absence until there is no longer a need for vaccination. It is unlikely that leave will be paid unless it qualifies for short/long term disability benefits.

### **Employees who decline to be vaccinated for other reasons**

The case law is clear that employees cannot be forced to be vaccinated without their consent. Here, the employer is saying that a person is free to remain unvaccinated, but will not be permitted into the workplace if they make that choice.

Many people have raised creative arguments why they do not have to be vaccinated, including ones based on the Canadian Charter of Rights and Freedoms, international conventions prohibiting medical treatment or experimentation without consent, laws against genetic testing and other legal principles. I have not seen one of these arguments that I believe would successfully prevent Canada Post from requiring people to be vaccinated to be in the workplace and serve customers.

### **Privacy Issues**

Any policy must have measures that deal with privacy issues, including: collecting the information directly from the employee and not a third-party, only collecting the information once, ensuring that information is only formally disclosed internally, and to the minimum number of people who require the information to administer and enforce the policy, then deleting the information at an appropriate time.

### **CONCLUSION**

For the reasons above, it is our view that, even if CPAA challenged it, overall, an arbitrator would likely say most, or all the proposed mandatory vaccination policy is reasonable.

Depending on how it is implemented in individual cases, it might be possible to file a grievance saying that member's circumstances were not handled appropriately.