Canada: BC Supreme Court Upholds Mandatory Vaccination Policy for Non-Unionized Employees

Insights
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The British Columbia Supreme Court recently sided with an employer in its first civil case determining whether employees may be placed on unpaid leave for failing to comply with a mandatory vaccination policy. The court's fact-intensive analysis in *Parmar v. Tribe Management, Inc.* sheds light on what courts will consider when determining the enforceability of such policies. How can you ensure your company's pandemic-related mandates can be enforced in Canada? Here's a review of the case law and three key takeaways for employers from the BC Supreme Court's recent ruling.

Growing Caselaw on COVID-19 Policies

The *Parmar* decision adds to the growing caselaw and labor arbitration decisions involving mandatory COVID-19 policies in Canada. For example, the following two lower court cases upheld similar employer or provider COVID-19 policies:

- In *Benke v. Loblaw Companies Limited*, the Court of Queen's Bench of Alberta (now known as the Court of King's Bench of Alberta) ruled that an employee who was placed on an unpaid leave of absence for refusing to comply with their employer's mandatory mask policy was not constructively discharged.
- In *Lewis v. Alberta Health Services*, Alberta's Court of Appeal upheld a mandatory vaccination policy (MVP) for transplant candidates. In doing so, the court generally concluded that MVPs are a "reasonable infringement on personal freedoms."

Several arbitration decisions have also upheld MVPs for unionized employees through the context of the collective agreement. In these decisions, the arbitrators found that implementing the policy was reasonable based on what was known about COVID-19. For instance, one arbitrator said the interests that led to the policy "outweigh[ed] the significant intrusion on the interests of the … employees." Policies that contemplated discipline for refusing vaccination beyond simply being placed on unpaid leave, however, were deemed unfair and unreasonable.

The BC Supreme Court's Ruling

In *Parmar*, the employee worked as a controller for Tribe Management. While her position allowed her to work remotely some days, she was periodically required to go into the office. On October 5

her to work remotely some days, she was periodically required to go into the office. On October 6, 2021, the company introduced an MVP in response to the rise of COVID-19 cases. The MVP required employees to be fully vaccinated by November 24, 2021, but it provided exemptions for religious and medical reasons. Employees who did not comply were placed on a leave of absence subject to ongoing review.

Parmar was one of two employees that refused to get vaccinated for reasons unrelated to religious or medical concerns. Instead, she cited concerns about the vaccines being prepared too hastily, the lack of data regarding their long-term efficacy, and their potential negative health implications.

Parmar suggested alternative arrangements that included working from home, rapid testing when coming into the office, strictly controlled in-person office visits to sign checks, and following other safety protocols.

Tribe, however, rejected Parmar's requested accommodations and placed her on a leave of absence for an initial three months (subject to ongoing review). Tribe subsequently extended Parmar's leave indefinitely but left the door open to review her options if there was a change to the MVP or her vaccination status. Parmar resigned the day after her leave was made indefinite, and she subsequently sued, claiming she had been constructively dismissed and was entitled to pay in lieu of notice.

No Constructive Dismissal Found

In considering whether Tribe's enforcement of its MVP constituted constructive dismissal, the court turned to *Devlin v. NEMI Northern Energy & Mining Inc.* for guidance. *Devlin* set forth the following factors to determine whether a unilateral suspension or leave of absence constituted a "fundamental or substantial change" to the employment contract so as to constructively dismiss the employee:

1. The duration of the suspension;
2. Whether someone was appointed to replace the suspended employee;
3. Whether the employee was asked for their keys;
4. Whether the employee continued to be paid and receive benefits;
5. Whether there is evidence that the employer intended to terminate the employee at that time; and
6. Whether the employer suspended the employee in good faith, such as for bona fide business reasons.

The *Parmar* court focused on the last factor – whether Tribe had reasonable business reasons for instituting the MVP. To determine the reasonableness of the policy, the court first considered what was known about COVID-19 at the time and took judicial notice of the following facts about COVID-19:

- The virus was transmissible and potentially deadly;

- Vaccines were safe; and
- Vaccines were effective in limiting the severity of COVID-19 symptoms.

The court also looked to the prior civil cases and arbitral awards referenced above that upheld COVID-19 policies.

Similar to the prior cases, the court found that Tribe's policy was a "reasonable and lawful response" to the uncertainties of COVID-19 at the time. While recognizing Tribe's MVP was an extraordinary response to the COVID-19 pandemic, the MVP did not need to be perfect and struck the appropriate balance between business interests, employee rights, and the interests of Tribe's clients and the larger community.

The court noted the following:

- Personal beliefs did not undermine the reasonableness of the MVP in light of health and safety concerns;
- Vaccines were required for participation in many other aspects of daily life;
- The MVP did not contemplate discipline beyond the leave of absence; and
- The MVP and unpaid leave allowed for modification, considered religious and medical exceptions, and was not selective or arbitrary in application.

Thus, the court concluded that Parmar was not constructively dismissed but rather her refusal to comply with the MVP constituted a repudiation of her employment contract with Tribe.

3 Key Takeaways for Employers

Employers doing business in Canada and wanting to implement an MVP or other mandatory policy in response to a pandemic should consider the following three key takeaways from the *Parmar* decision:

1. **Consider Safety and Efficacy.** Canadian courts have taken judicial notice of the safety and effectiveness of COVID-19 vaccinations. Employers can also count on more courts in the future to look to the consensus of medical experts regarding the efficacy of vaccines to protect against COVID-19 or other transmissible diseases, which would support employer vaccination policies.
2. **Weigh the Circumstances at the Time.** MVPs and other policies to protect against transmissible diseases, such as COVID-19, are judged based on the particular circumstances at the time when the policy is created and enforced. A policy that was permissible in 2021 may no longer be valid where vaccination restrictions have lifted. Of note, in June 2022, Canada announced the suspension of vaccination requirements for travel due to the improvement of public health. Additionally, the government terminated proposed regulations under Canada's Occupational Health and Safety law to make vaccination mandatory in all federally regulated workplaces.

3. **Carefully Draft Policies.** You should carefully draft the provisions of an MVP or other policy to protect against transmissible diseases such as COVID-19. Be sure to include religious and medical exemptions, allow for modifications, and avoid arbitrary or selective application.

Conclusion

If your organization does business in Canada, please contact your Fisher Phillips attorney, the authors of this Insight, or any attorney in our International Practice Group to learn more about the implications of this decision. We will monitor these developments and provide updates as warranted, so make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information direct to your inbox.

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