

COVID-19 ISSUES IN LABOR ARBITRATION AWARDS

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Texas Labor Management Conference

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COVID-RELATED ISSUES



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Part I: Online Arbitration Hearings

Part II: COVID-Related Issues

Part III: Vaccine Mandate Issues



COVID-RELATED ISSUES

Part I:

Online Arbitration Hearings



ORDERING ONLINE HEARINGS OVER A PARTY'S OBJECTION



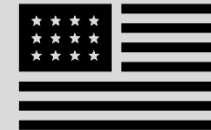
BEFORE VACCINATIONS BECAME AVAILABLE:

Hearings will be held online absent a compelling reason otherwise, even over a party's objection.



DOZENS

Published
awards in
Canada



ZERO

Published
awards in
the U.S.

ORDERING ONLINE HEARINGS OVER A PARTY'S OBJECTION

Rejected Rationales for In-Person

- Advocate doesn't want to learn new technology.
- Witness credibility.
- Witness credibility *in discipline / termination grievance*.
- Hearing might get hacked.
- Hearing will be document-intensive.



ORDERING ONLINE HEARINGS OVER A PARTY'S OBJECTION

Today ...

- Online hearings because of covid much more common on the coasts than in middle-America.
- Online hearings often chosen for convenience/cost rather than covid.
- Greater acceptance of video testimony for particular witnesses.
- More arbitrators adept with online technology.
- Hybrid hearings disfavored.



COVID-RELATED ISSUES

Part II: First-Wave COVID Issues



COVID-RELATED ISSUES

MANDATORY

returns to work



PAY ISSUES

Sick pay for quarantine.
Premium pay for emergency work.
Pandemic-related schedule changes.



SAFETY ISSUES

at workplace



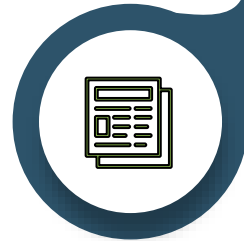
LAYOFFS

and furloughs



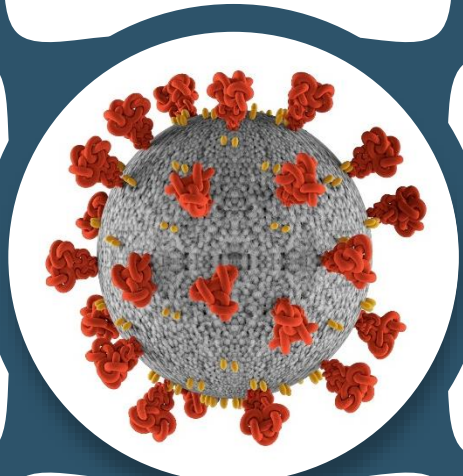
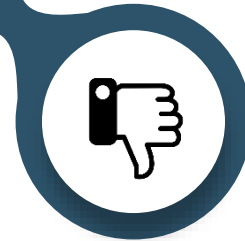
POLICIES

COVID workplace policies



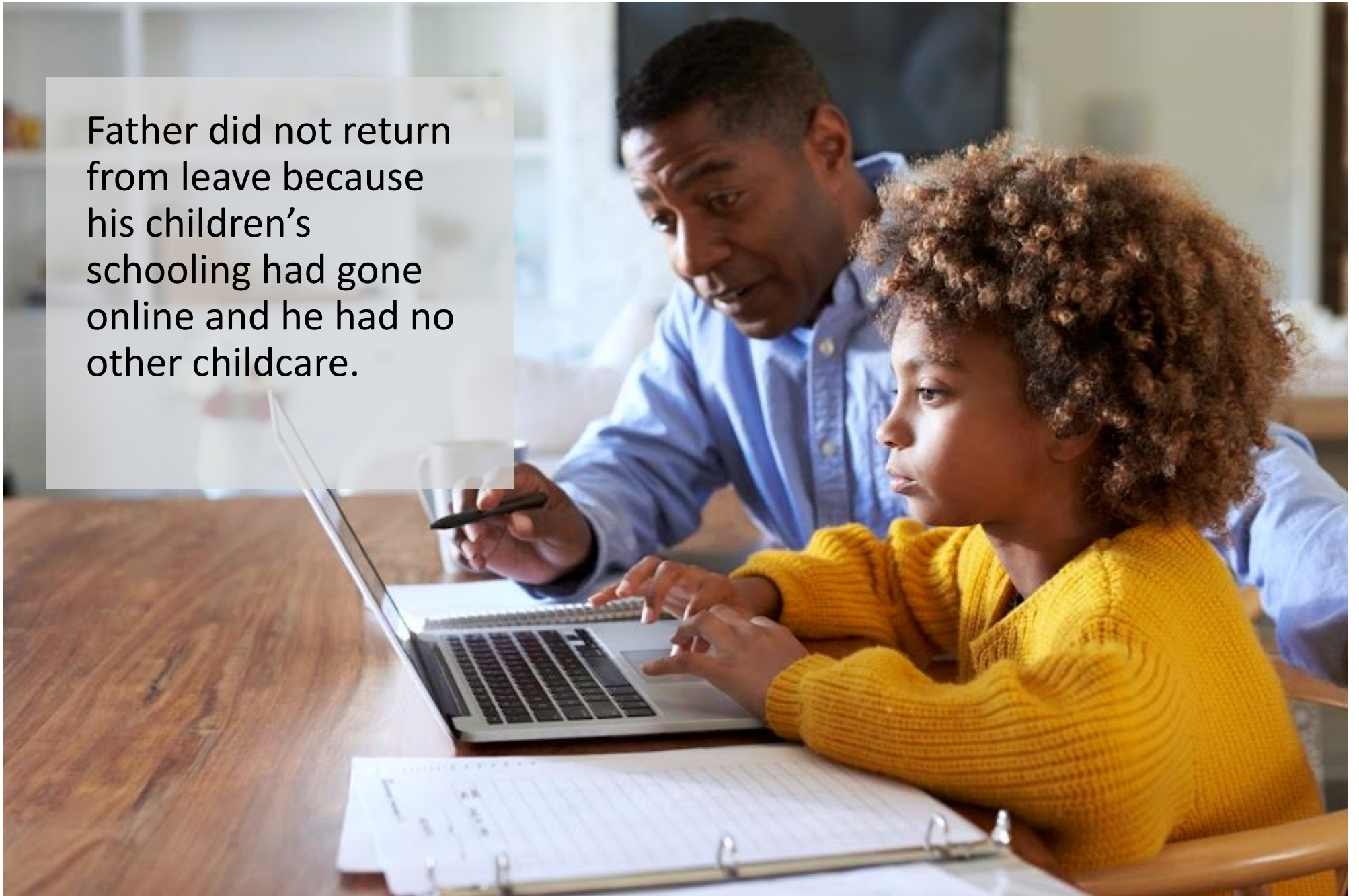
CUTS

to employee benefits



MANDATORY RETURN TO WORK

Father did not return from leave because his children's schooling had gone online and he had no other childcare.



PREMIUM PAY



01

Is place of employment “closed” during pandemic-related lockdown when physical workplace is closed but work still being done, perhaps from home?

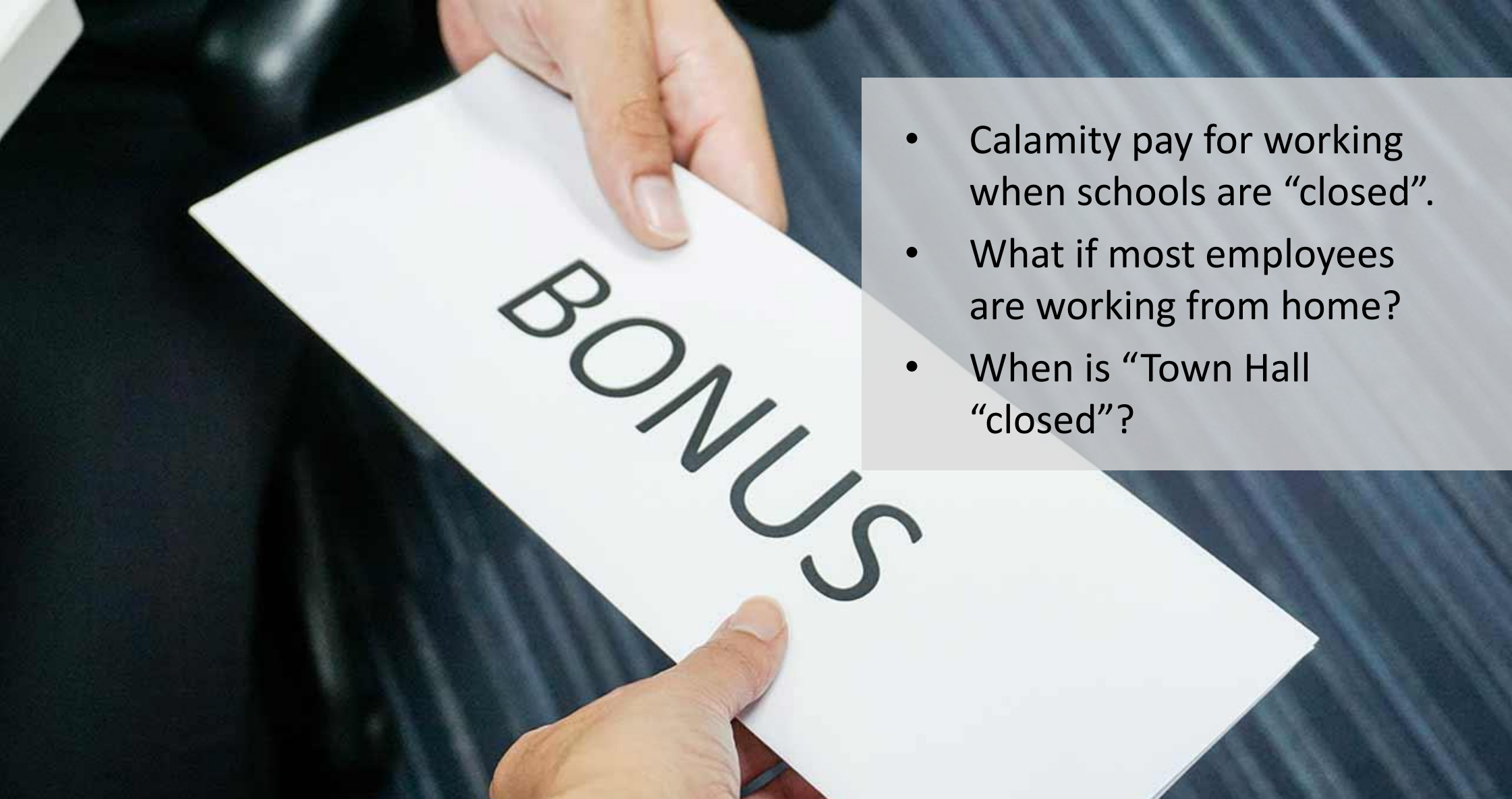
02

Is pandemic lasting over a year analogous to major weather event that may last for a week at most?

03

If premium pay is owed, when does it end?

PREMIUM PAY AWARDS



- Calamity pay for working when schools are “closed”.
- What if most employees are working from home?
- When is “Town Hall “closed”?”

SCHEDULE CHANGES & HOURS REDUCTIONS

ISSUES

Employer unilaterally reduces guaranteed hours in response to reduced demand.

Employer changes shift schedules in response to changed demand.



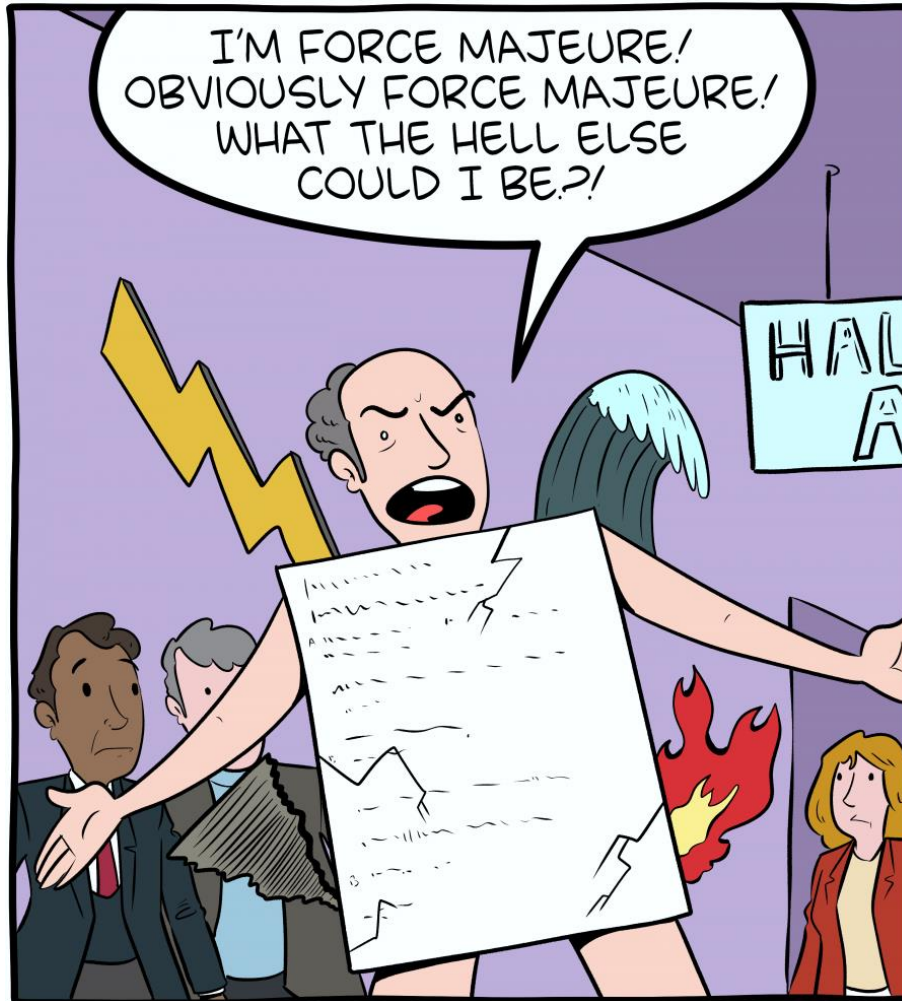
REDUCTIONS IN GUARANTEED HOURS

COVID-RELATED PAY ISSUES



- Cutting guaranteed work hours.
- Not paying school crossing guards during school closures.

LAYOFFS & FORCE MAJEURE CLAUSES



To his horror, Steve realizes he is the only cosplayer at the corporate labor conference.

EXAMPLES



University of Akron



Alaska Airlines

SAFETY PROTOCOLS: TOO FEW



ONTARIO NURSES
allege failure to adopt reasonable
safety measures.



U.S. PRISON GUARDS
argue all guards should
have full PPE.

SAFETY PROTOCOLS: TOO MANY



No-moonlighting policy.
Mandatory nasal-swab tests.

DISCIPLINE FOR VIOLATING COVID SAFETY POLICIES



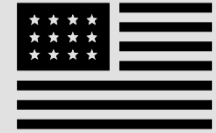
CANADA

Hospital pizza party.

Symptomatic employee
came to work.

School gardener
purposefully coughed on
co-worker.

DISCIPLINE FOR VIOLATING COVID SAFETY POLICIES



U.S.

Angry firefighter

N95 thief


Disclosure of others'
COVID+

DENYING OR REQUIRING LEAVE

- Request for paid personal leave denied because hospital short-staffed.
- Employees required to use vacation days while workplace disinfected.



SICK PAY FOR WORKERS UNDER QUARANTINE

A man in a grey sweater and blue jeans is sitting on a windowsill, looking out at a city skyline. The scene is dimly lit, suggesting an overcast day. The man is positioned on the right side of the frame, with his back to the camera and his head turned towards the window. The window is large and occupies the central part of the image, providing a view of a dense urban landscape with various buildings and a prominent skyscraper in the distance. The overall mood is contemplative and somewhat somber.

Are quarantining employees “sick”?

CUTS TO EMPLOYEE BENEFITS



AWARD #1

The Company “will match” employee contributions up to 8% of salary.
The Company “reserves the right to adjust benefits and networks”.

AWARD #2

Custodial workers are entitled to same 403b as everyone else [no other ees were unionized] “according to its terms, except that...the College will contribute” an employer match.

EMPLOYER VACCINATION REQUIREMENTS

Part III: Vaccination Cases



VACCINE-MANDATE ISSUES

DISCIPLINE
Appropriate discipline for
noncompliance.



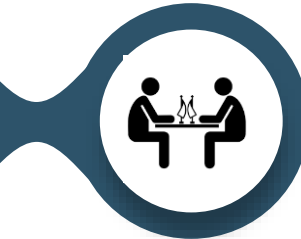
DUTY TO BARGAIN
over the vaccine mandate itself.



EXCLUSION
from work areas.



DUTY TO BARGAIN
over the effects of the
vaccine mandate.

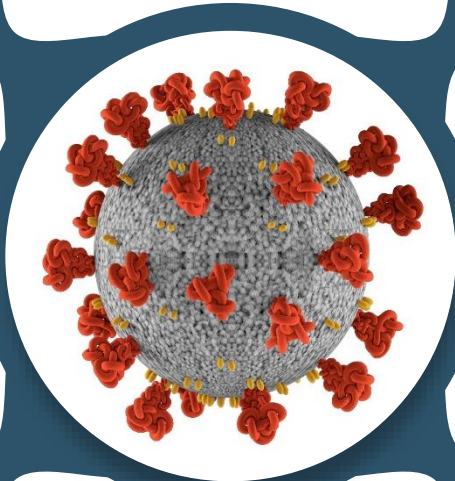


WHO PAYS
for testing?



PROVIDE ALTERNATIVES?

- Testing
- Isolation at workplace
- Remote work



DO VACCINE-REPORTING REQUIREMENTS VIOLATE A MEDICAL RIGHT TO PRIVACY?



Not a major issue in U.S., because:

- HIPAA does not apply.
- Medical right to privacy less protected in the employment context in the U.S. as compared to Canada.

Issue attracts more discussion in Canada.

DUTY TO BARGAIN

Generally, no duty to bargain over vaccine requirements:

- Management right.
- Consistent with employer's duty to provide safe workplace.
- Consistent with employer's right to implement "reasonable workplace rules & policies".



DUTY TO BARGAIN: EFFECTS

City of Pittsburgh & Pittsburgh FF:

Mandating vaccines may be a management right, but employer must bargain over:

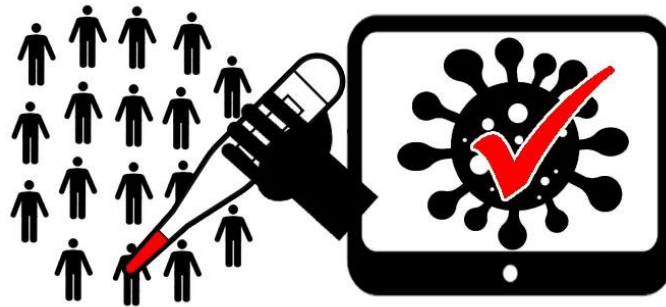
- Deadlines for becoming vaccinated.
- Reporting requirements.
- Exemptions.



REQUIRED ALTERNATIVES? TESTING

Generally, a testing option is not required, especially where:

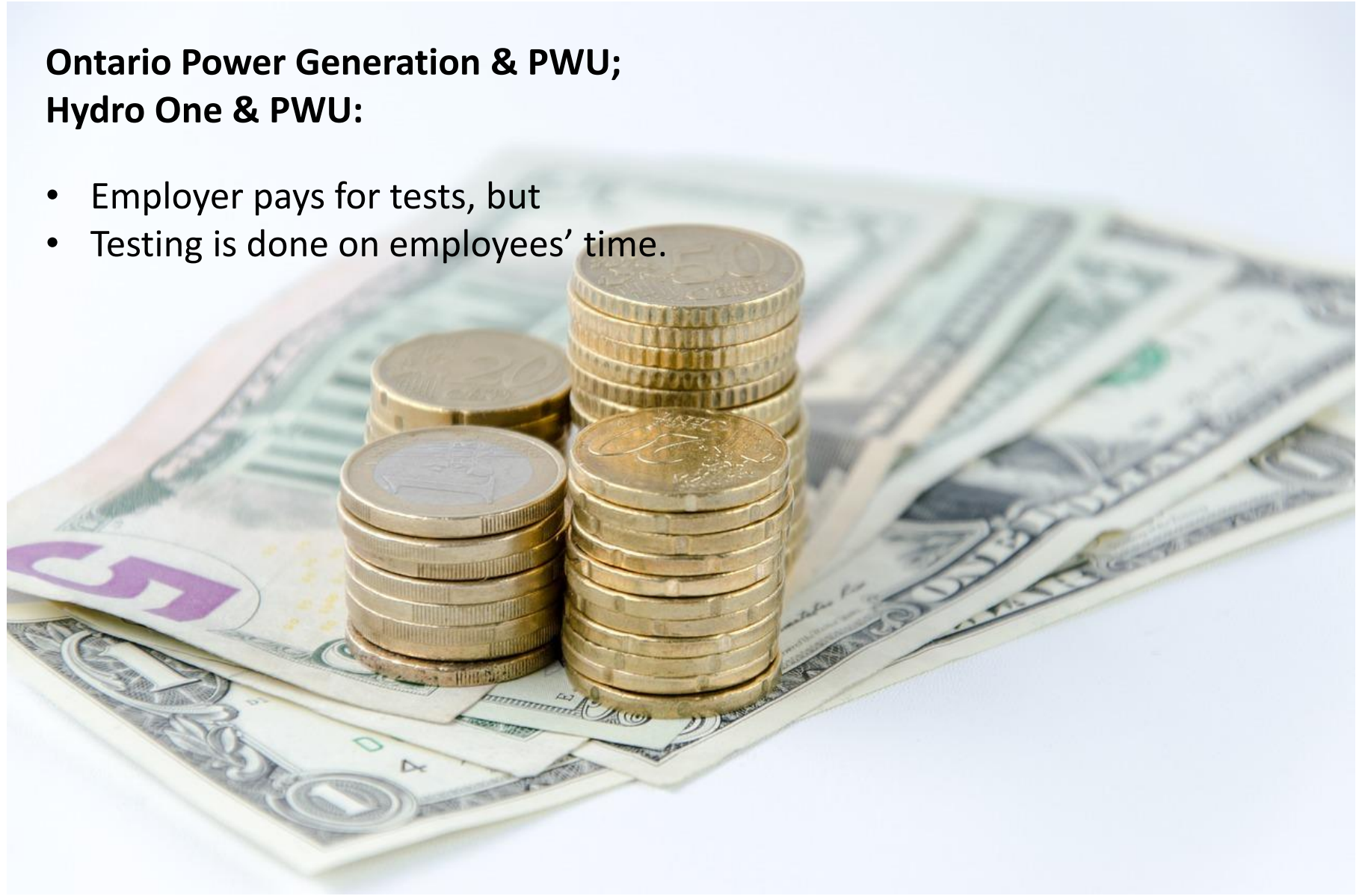
- Employer can show testing has been used and has led to infections.
- Most work is indoors, close quarters, etc.
- Third parties require or prefer vaccinations:
 - Customers coming onto employer's premises
 - Employer's employees going onto premises of other companies.



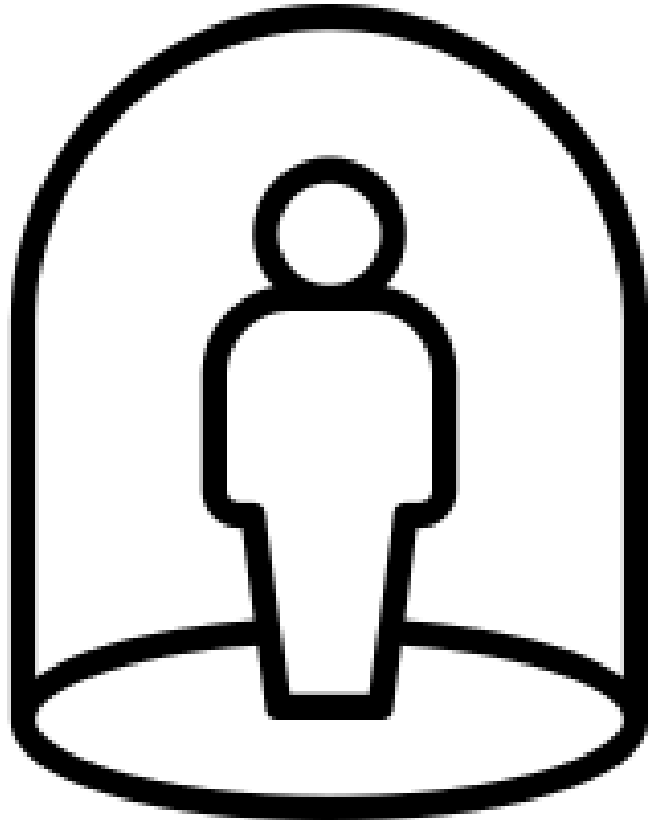
IF VM PROVIDES TESTING OPTION, WHO PAYS?

**Ontario Power Generation & PWU;
Hydro One & PWU:**

- Employer pays for tests, but
- Testing is done on employees' time.



REQUIRED ALTERNATIVES? ISOLATION



IS EMPLOYER REQUIRED TO PROVIDE ISOLATED WORK AREA FOR UNVACCINATED?

CAN EMPLOYER EXCLUDE UNVACCINATED EMPLOYEES FROM CERTAIN COMMON AREAS, SUCH AS LUNCH OR BREAK ROOMS?

Does/should it matter whether ee is unvaccinated by choice, v. because of valid medical exemption?

DISCIPLINE: WHAT CAN THE VM POLICY SAY?

Cannot:

- *Automatically* result in ULOA or discharge. That would violate just cause provision of CBA by precluding consideration of individual or mitigating circumstances.

Can:

- Require mandatory training (e.g., vaccine-education videos).
- Provide for discipline “up to and including discharge.”



DISCIPLINE: APPLICATION TO INDIVIDUAL GRIEVANTS



Lake Shore Central Schools (NY)

- Bus driver's discharge upheld; School District's policy was both reasonable and consistent with state mandate.

Fraser Health Authority

- Hospital substance abuse counselor's discharge upheld; Provincial order legally prohibited counselor from working unvaccinated. CBA's layoff and ULOA provisions did not apply and therefore were not reasonable alternatives to discharge.

Metropolitan Transit

- Where employer promulgated reasonable vaccination policy, unvaccinated employee was **unqualified** for the job and could be discharged.

RELIGIOUS EXEMPTION ISSUES



THAT'S ALL FOLKS!

FOR AWARD CITATIONS OF PUBLISHED AWARDS
OR MORE-DETAILED DISCUSSIONS OF THE TOPICS

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Visit my website at:
<https://balesarbitration.com/>
