

COVID-Related Labor Arbitration Awards in the United States and Canada: A Survey and Comparative Analysis

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Abstract

The COVID-19 pandemic of 2020-21 changed working conditions for millions of Americans and Canadians quickly and dramatically. Employers responded by requiring employees to quarantine, implementing workplace COVID policies, disciplining employees who violated those policies, changing work schedules, cancelling leaves or vacations, and furloughing or laying off employees. Unions have challenged many of these actions, raising a variety of novel issues that are now being resolved through labor arbitration. This article surveys the resulting labor arbitration awards and then comparatively analyzes the awards from Canada and the United States.

I. INTRODUCTION

The COVID-19 pandemic arrived in the United States in late January 2020.¹ By mid-March, much of the country had shut down.² In both Canada and the United States, arbitration hearings were postponed as arbitrators and parties to arbitration hoped that the pandemic would be short-lived and that everything would soon return to normal.³ When it became clear that this assessment was overly optimistic, hearings resumed, mostly online.⁴

Working conditions in the U.S. and throughout the world changed quickly and dramatically.⁵ Hospitals, nursing homes, and other healthcare facilities were overwhelmed; many workers worked around the clock and had their vacation and other leave time canceled. Workers in other industries lost their jobs, either temporarily or permanently, as the economy shut down and then slowly reopened, and as consumer demand shifted. For the many workers who could not work from home—often workers with the most precarious of jobs—going to work became much riskier.⁶ Employers cut or shifted working hours, imposed new COVID policies to protect workers' health, furloughed or laid-off workers, canceled employee vacations, and cut benefits.

Where workers were organized in a labor union, these employer actions might sometimes conflict with the terms of a collective bargaining agreement. If so, the employer might be required to bargain with the union for changes to the agreement that would allow the actions. Often, however, employers acted unilaterally or after consulting but not obtaining agreement from unions. Such employers might argue that their actions were justified by a management rights clause or by the need to take immediate emergency action because of the pandemic, or that the language of the collective bargaining agreement permitted the action.

¹ Press Release, Centers for Disease Control & Prevention, *First Travel-Related Case of 2019 Novel Coronavirus Detected in the United States* (Jan. 21, 2020).

² See Elizabeth Wolstein, *Do State Shut-Down Orders Effect a Taking for Which the State Must Pay Just Compensation?*, N.Y.L.J. (Apr. 22, 2020), <https://www.law.com/newyorklawjournal/2020/04/22/do-state-shut-down-orders-effect-a-taking-for-which-the-state-must-pay-just-compensation/>.

³ Richard Bales, *The Current Status of [Online?] Labor Arbitration*, WORKPLACE PROF BLOG (June 12, 2020), https://lawprofessors.typepad.com/laborprof_blog/2020/06/the-current-status-of-online-labor-arbitration.html.

⁴ *Id.*

⁵ See Liz Mineo, *How COVID Turned a Spotlight on Weak Worker Rights*, HARV. GAZETTE (June 23, 2020), <https://news.harvard.edu/gazette/story/2020/06/labor-law-experts-discuss-workers-rights-in-covid-19/>.

⁶ *Id.*

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When unions disagree, often they grieve—expressed grievances. The final step in resolving grievances in nearly every collective labor agreement is binding arbitration.⁷ This has led to arbitration awards, over the past year, of novel issues that have arisen for the first time specifically because of the pandemic. This article surveys those awards in both the U.S. and Canada. The similarity of the two countries' labor laws, as well as the arbitral procedure for resolving disputes that arise between employers and unions under collective bargaining agreements, permits a meaningful comparative analysis of awards from the two countries. Studying arbitration awards on a discrete topic arising in a restricted timeframe offers a unique opportunity to explore how subtle differences in law and practice can affect both the types of disputes that are resolved through arbitration awards and the outcomes of those awards.

II. METHODOLOGY

This article surveys U.S. and Canadian grievance arbitration awards (awards arising from a dispute over the meaning of an existing collective bargaining agreement) that deal in some significant way with issues that arose because of the COVID-19 pandemic in 2020–21. The article describes a representative sample of such awards—it does not attempt to describe every extant award. The article does not include the many interest arbitration awards (awards arising from the negotiation of a new collective bargaining agreement) in which healthcare workers, firefighters, police officers, and other front-line essential workers have requested safer working conditions and premium pay as compensation for the additional hazards they have faced. Nor does the article include employment arbitration awards between employers and individual employees.

I began this project by informally asking members of the National Academy of Arbitrators (NAA) to share their COVID-related arbitration awards with me. Most of the awards that I received in this way were unpublished opinions. I have included a brief discussion of such awards where the issue is novel or the analysis is compelling. However, consistent with the NAA Code of Professional Responsibility, I cannot cite to these cases by name

⁷ LAURA J. COOPER ET AL., *ADR IN THE WORKPLACE* 22 (4th ed. 2020).

or describe the facts in too much detail, because to do so would violate the confidentiality of the arbitration proceeding.⁸

I then turned to published labor arbitration awards. In the United States, publication of labor arbitration awards is fragmented. Three legal publishers have databases containing awards submitted by arbitrators who have chosen to submit an award for publication in one or more of these databases. These databases are Bloomberg BNA Labor Arbitration Decisions, Wolters Kluwer / CCH Labor Arbitration Awards, and Westlaw's Labor and Employment Awards – Arbitrator Submitted. Awards for cases managed by the American Arbitration Association are available in separate databases provided by these legal publishers, as well as Lexis.

However, as described in more detail in Part IV below, few American labor arbitrators submit their awards for publication, and the AAA labor arbitration databases contain only a small fraction of the awards issued each year. Consequently, when I searched the American databases in late 2020 and again in January 2021, there were too few COVID-related awards from which to draw any significant conclusions.

By contrast, both the labor relations Acts of all Canadian provinces (except for Saskatchewan) and the Canada Labour Code require publication of all awards through their respective ministries of labor.⁹ CanLII, the database of Canadian law provided by the Canadian Legal Information Institute, collects the awards from these ministries and uploads them to a public database that is accessible, searchable, and free.¹⁰ Searching CanLII in January and February of 2021 yielded far more COVID-related awards than all three American publishers combined.

Consequently, I started by looking at Canadian awards. I searched CanLII's "Labour Arbitration Awards" database for each province, using only the search term "covid." I then excluded interest arbitration awards and awards that mentioned COVID only in passing, such as in an explanation for why a

⁸ See CODE OF PROF'L RESPONSIBILITY FOR ARBS. OF LABOR-MGMT. DISPUTES §2(C)(1)(b) (Nat'l Acad. of Arbs. et al., eds. 2007) ("Discussion of a case at any time by an arbitrator with persons not involved directly should be limited to situations where advance approval or consent of both parties is obtained or where the identity of the parties and details of the case are sufficiently obscured to eliminate any realistic probability of identification").

⁹ See, e.g., Canada Labour Code § 59, RSC 1958 c L-2 ("A copy of every order or decision of an arbitrator or arbitration board shall be filed with the Minister by the arbitrator or arbitration board chairperson and shall be available to the public . . ."); Labour Relations Act, O. Reg. 482/18 § 1 (Can.), *available at* <https://www.ontario.ca/laws/regulation/070094>.

¹⁰ CANLII, <https://www.canlii.org/en/>; Special thanks to Arbitrators Christopher Albertson and John Stout for alerting me about CanLII's existence.

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hearing was held online instead of in person. I then wrote the article, *Novel Issues in Canadian Labour Arbitration Related to COVID-19*, for publication in the *Arbitration Law Review*, explaining that a follow-on article would survey American awards and comparatively analyze both the subjects and the outcomes of these awards as compared to the Canadian awards.¹¹

This is that article. With the help of two stellar law librarians,¹² I searched U.S. databases again in March and June of 2021, and by then I had found enough cases to both describe the general trends in U.S. awards and to compare the U.S. awards with their Canadian counterparts. A description of the awards is in Part III; the analysis is in Part IV. Part V concludes.

III. COVID-19 RELATED ARBITRATION AWARDS

Part III surveys U.S. and Canadian labor arbitration grievance awards related to COVID-19. It begins by discussing awards on the issue of whether an arbitrator may order an online hearing over a party's objection. It then discusses mandatory returns to work, workplace safety issues, COVID workplace policies (including disciplinary cases), pay issues (including sick pay, premium pay, and pay for schedule changes and hours reductions), and cuts to employee benefits. Ordering Online Hearings Over a Party's Objection

As of June 2021, zero published U.S. arbitration awards address the issue of whether an arbitrator can or should hold a final arbitration hearing online over the objection of one of the parties. This contrasts markedly with the Canadian experience, where there have been literally dozens of awards, a robust discussion of the issue, and a clear evolution in arbitrators' approaches.¹³ I will defer until Part IV any consideration of why the Canadian and U.S. experiences might differ so markedly, and here will only summarize the Canadian approach.¹⁴

In Canada, this issue generated by far more awards than any other COVID-related issue, and nearly as many awards as all other COVID-related issues combined.¹⁵ Before the COVID-19 pandemic, arbitrators had reason to presume that hearings would be in-person—and that all witnesses would testify in-person—absent a compelling contrary reason. Arbitrators reasoned

¹¹ Richard Bales, *Novel Issues in Canadian Labour Arbitration Related to COVID-19*, 13 *ARB. L. REV.* (2021), available at <https://elibrary.law.psu.edu/arbitrationlawreview/vol13/iss1/1/>.

¹² Many thanks to Nancy Armstrong and Dustin Johnston-Green for their help crafting and running these searches.

¹³ See Bales, *supra* note 11 (manuscript at Part III.A.) (on file with author).

¹⁴ For a more detailed description of the Canadian awards, see Bales, *supra* note 11.

¹⁵ *Mem'l Univ. of Nfld. Faculty Ass'n v. Mem'l Univ. Nfld.*, 2014 CanLII 98653 (NL LA) (Oakley, Arb.).

that observation of a witness's demeanor is important to assessing credibility and that demeanor can best be observed in-person rather than by telephone or video.¹⁶ Similarly, arbitrators reasoned that advocates needed to be able to observe a witness's demeanor to conduct an effective cross-examination.¹⁷ Even after the pandemic began, arbitrators frequently referred to in-person hearings as "the gold standard."¹⁸

In early 2020, many people still hoped that the pandemic would be short-lived, so the issue concerning online hearings was whether to delay the hearing in anticipation that an in-person hearing could be held later, or whether instead to move the hearing online. Early awards cited to and discussed pre-COVID cases in which a party had wished to present a witness by telephone or videoconference, as well as to the handful of post-COVID-onset cases that then had been decided.¹⁹ An early and influential case by Arbitrator Gordon F. Luborsky announced a balancing test for determining whether to grant an adjournment or to convert an in-person hearing into a videoconference where the pandemic made it impossible, because of legal restrictions on in-person gatherings, to convene an online hearing.²⁰ This balancing test presumed that a hearing would proceed online absent a showing of compelling reasons otherwise, balancing the interests of the parties with the need to maintain the integrity and fairness of the process, and informed by the specific facts and circumstances of each case.²¹

A subsequent decision by Arbitrator Luborsky expanded the presumption to cover pandemic situations when in-person gatherings were permissible though not advisable, noting that the COVID risk persisted even if legal restrictions on gatherings had been lifted and that some people may be

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *See, e.g.,* Toronto Transit Comm'n v. Amalgamated Transit Union, Local 113, 2020 CanLII 28646 ¶ 14 (ON LA) (Goodfellow, Arb.).

¹⁹ *See, e.g.,* Southampton Nursing Home v. Serv. Emps. Int'l Union, Local 1 Canada, 2020 CanLII 26933 (ON LA) (Luborsky, Arb.) [hereinafter Southampton Nursing Home]; *see also* Nat'l. Acad. Arbs., Advisory Op. No. 26 (2020) (In addition to the awards discussed in the text, the National Academy of Arbitrators—comprised of both U.S. and Canadian labor arbitrators—issued an advisory opinion permitting arbitrators to order online hearings over the objection of a party, and they created a videoconferencing task force to train arbitrators and advocates on using online technology for arbitration hearings; *see Videoconferencing for Arbitrators*, NAT'L. ADAC. FOR ARBS. (Apr. 2, 2020), <https://naarb.org/videoconferencing/>).

²⁰ Southampton Nursing Home, *supra* note 19, ¶ 41.

²¹ Southampton Nursing Home, *supra* note 19, ¶ 41.

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reluctant to disclose their underlying medical conditions or other risk factors.²² He also found, in both this award and in a third award, that arguments about needing an in-person hearing in order to judge witness credibility were unpersuasive; credibility determinations could be made online at least as effectively as in a large conference room with everyone socially distanced and wearing masks.²³

Other Canadian arbitrators similarly have ordered online hearings over party objections. For example, in *Regional Municipality of Waterloo and Canadian Union of Public Employees, Local 5191*, Arbitrator Colin Johnston ordered an online hearing over a union's objection that such a hearing was inappropriate for a termination case.²⁴ He specifically found that the online format had "become the norm for holding labour arbitration hearings since the onset of the Pandemic"²⁵ and that "having conducted multiple hearings, my own experience is that the current technology is very effective in replicating a face to face experience and has not hindered my ability to assess a witness's demeanor."²⁶ Other arbitrators ordering online hearings have rejected arguments based on the security of the online platform,²⁷ a party's general discomfort with online technology,²⁸ and the purported difficulty of using online technology in document-intensive cases.²⁹

Only one Canadian arbitrator, to my knowledge, has ordered an in-person hearing over objection.³⁰ However, because this award was issued only a few days after the second of Arbitrator Luborsky's awards described above, it relied on Arbitrator Luborsky's finding that the presumption applied only when the pandemic made an in-person hearing impossible, and did not reflect

²² *City of Hamilton v. Hamilton Ontario Water Emps. Ass'n (HOWEA)*, 2020 CanLII 59546 ¶ 36 (ON LA) (Luborsky, Arb.) [hereinafter *City of Hamilton*] (citing C.J. Geoffrey B. Morawetz, *Notice to the Profession re: Justice Participants Unable to Attend In-Court Hearings in the Ontario Superior Court of Justice* (July 21, 2020), <https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/in-court-hearings/>).

²³ *Id.* at ¶ 35; *Corp. of the City of Belleville v. Belleville Prof. Firefighters' Ass'n*, 2020 CanLII 65743 ¶ 13 (ON LA) (Luborsky, Arb.).

²⁴ *Reg'l Mun. of Waterloo v. Canadian Union of Pub. Emps., Local 5191*, 2020 CanLII 107569 ¶ 3 (ON LA) (Johnston, Arb.).

²⁵ *Id.* ¶ 16.

²⁶ *Id.* ¶ 21.

²⁷ *City of Toronto v. Canadian Union of Pub. Emps., Local 79*, 2020 CanLII 68805 ¶ 11 (ON LA) (Nairn, Arb.).

²⁸ *Cancoil Thermal Corp. v. United Food and Com. Workers Can., Locals 175 & 633*, 2020 CanLII 34521 ¶ 18 (ON LA) (Bernhardt, Arb.).

²⁹ *Reg'l Mun. of Peel (Peel Reg'l Paramedic Servs.) v. Ont. Pub. Serv. Emps. Union Local 277*, 2020 CanLII 48565 ¶ 19 (ON LA) (Waddingham, Arb.).

³⁰ *BC Pub. Sch. Emps.' Ass'n/SD No. 39 (Vancouver) v. BC Tchrs.' Fed'n/Vancouver Elementary Sch. Tchrs.' Ass'n*, 2020 CanLII 76272, 3–7 (BC LA) (Doyle, Arb.).

Arbitrator Luborsky's subsequent decision that the presumption favoring online hearings applies even when in-person awards are legally permissible.³¹ Several arbitrators have adjourned hearings temporarily, particularly when the employer was a hospital or nursing home contemporaneously overwhelmed with COVID cases and there was little or no prejudice to the union.³²

A. *Mandatory Return to Work*

I expected to find a plethora of awards dealing with issues related to mandatory return to work—for example, employees who refused to return to work because of safety or other concerns, requests for accommodation upon returning to work, issues about mask-wearing or social distancing, and the like. Instead, I have found only one award on the topic, arising from an employee who refused to return to work because he was the family's primary child-care provider and his children's school had gone online.³³

The award is *Josephine County and Service Employees International Union Local 503, Oregon Public Employees Union*.³⁴ The Grievant was a truck and heavy equipment mechanic for Josephine County, Oregon.³⁵ He had two children, in eighth and eleventh grades.³⁶ Oregon schools went online in April 2020 because of COVID-19.³⁷ The Grievant's wife had just started a new job, she could not take time off, and they had no family nearby to help, so the family decided that the Grievant would take FMLA leave³⁸ as permitted by the Emergency Family and Medical Leave Expansion Act.³⁹ When the

³¹ BCPSEA/SD No. 68 v. BCTF/Nanaimo Dist. Tchrs.' Ass'n, 2020 CanLII 89909 ¶7 (BC LA) (Rogers, Arb.).

³² Mount Sanai Hosp. v. Nat'l Org. Workers Union, 2020 CanLII 28953 ¶¶14–16 (ON LA) (Misra, Arb.); Extencicare v. Serv. Emps. Int'l Union, 2020 CanLII 36854 ¶¶15–16 (ON LA) (Newman, Arb.).

³³ Josephine Cnty. v. Serv. Emps. Int'l Union Local 503, Or. Pub. Emps. Union (June 4, 2021) (Bonney, Arb.), [https://www.oregon.gov/erb/Documents/Grv-JosephineCounty_SEIULocal503\(Term\)_Bonney_Redacted-LO.pdf](https://www.oregon.gov/erb/Documents/Grv-JosephineCounty_SEIULocal503(Term)_Bonney_Redacted-LO.pdf) [hereinafter Josephine Cnty.].

³⁴ *Id.*

³⁵ *Id.* at 2.

³⁶ *Id.* at 4.

³⁷ *Id.*

³⁸ *Id.* at 4–5.

³⁹ 29 U.S.C. §§ 3101–3106 (reforming Title I of the Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2612(a)(1)(f), 2620(a)(2)(a)–(b) (permitting certain employees of covered employers to take up to twelve (12) weeks of expanded family and medical leave, ten (10) of which are paid, if the employee is unable to work due to a need to care for his or her son or daughter whose school, place of care, or childcare provider is closed or unavailable due to Covid-19 related reasons)).

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children began summer break, the County notified the Grievant that he had four weeks of FMLA leave remaining for the year 2020.⁴⁰

In August 2020, after that learning his children’s school would be online at the beginning of the 2020–21 school year, the Grievant submitted two leave requests: one for the remainder of his FMLA leave, and the other for paid time off (PTO) using the 434⁴¹ hours accrued in his PTO bank.⁴² The County granted the first request, but denied the second because of “Low Staffing Levels.”⁴³ On September 28, the County told the Grievant that he would exhaust his FMLA leave the next day, and that if he did not return to work on September 20 the County would consider him to have resigned.⁴⁴ He did not return.⁴⁵ The County then terminated his employment, paid him for 200 hours in his PTO bank, and deleted the remaining 234 hours from his PTO bank.⁴⁶ The union grieved.⁴⁷

The collective bargaining agreement provided that an employee failing to return from leave “shall be considered as having resigned” unless the employee “has furnished evidence that he/she was unable to return to work by reason of sickness, physical disability, or other legitimate reason beyond his/her control.”⁴⁸ The Grievant’s absence was not because of sickness or disability, and neither party disputed that pandemic-related school closures were “beyond [the Grievant’s] control,” so the issue turned upon whether the Grievant was “unable to return to work by reason of . . . other legitimate reason.”⁴⁹

Arbitrator Stephen Douglas Bonney found that the Grievant had made this showing.⁵⁰ Arbitrator Bonney wrote:

Where, as here, the employee repeatedly told the employer that he faced personal obstacles that prevented him from returning to work and required him to seek additional leave, it was incumbent on the employer to engage the employee in an interactive process to discuss the obstacles that prevented him from returning to work and to find solutions to those problems. Although management witnesses testified that

⁴⁰ Josephine Cnty., *supra* note 33, at 4.

⁴¹ Josephine Cnty., *supra* note 33, at 7.

⁴² Josephine Cnty., *supra* note 33, at 5.

⁴³ Josephine Cnty., *supra* note 33, at 5.

⁴⁴ Josephine Cnty., *supra* note 33, at 6.

⁴⁵ Josephine Cnty., *supra* note 33, at 6.

⁴⁶ Josephine Cnty., *supra* note 33, at 7.

⁴⁷ Josephine Cnty., *supra* note 33, at 7.

⁴⁸ Josephine Cnty., *supra* note 33, at 7.

⁴⁹ Josephine Cnty., *supra* note 33, at 10.

⁵⁰ Josephine Cnty., *supra* note 33, at 11.

they were flexible, there was no evidence indicating that management ever took the initiative in meeting with the [G]rievant or exploring concrete options that would allow him to return to work. 51

As a remedy, Arbitrator Bonney directed the County to reinstate the Grievant and restore his PTO bank to the full 434 hours.⁵²

B. *Workplace Safety Issues*

Another issue upon which I expected to find lots of awards—but have not done so—is whether an employer’s failure to provide safety equipment or to implement safety precautions violates the employer’s contractual duty to provide a safe workplace. Several Canadian awards have addressed this issue. For example, a series of awards by Arbitrator John Stout considered grievances filed by Ontario-area nursing-home nurses alleging, among other things, a general breach of the duty of care to employees, failure to provide adequate personal protective equipment (PPE), and failure to permit employees to self-isolate as needed.⁵³

Another Canadian award, this time by Arbitrator Colin Johnson, involved claims by nurses that an Ontario-area hospital had not adequately provided N95 respirators and other PPE and that the hospital had actively discouraged nurses from using such equipment at times when a precautionary principle would strongly advise it.⁵⁴ All of the foregoing awards ordered the healthcare employers to provide adequate safety equipment.

I have found only one U.S. article on point—an award that, as of the writing of this article, has been submitted but not yet accepted for publication.⁵⁵ In *Michigan Corrections Organization and Michigan Department of Corrections*, a Michigan union representing corrections officers brought a class arbitration against the Michigan Department of Corrections, alleging that the department had violated a collective bargaining

⁵¹ Josephine Cnty., *supra* note 33, at 11.

⁵² Josephine Cnty., *supra* note 33, at 14.

⁵³ *Participating Nursing Homes v. Ont. Nurses Ass’n*, 2020 CanLII 32055 ¶ 5 (ON LA) (Stout, Arb.); *Participating Nursing Homes Sienna Madonna Care Cmty. v. Ont. Nurses’ Ass’n* 2020 CanLII 39641 ¶ 5 (ON LA) (Stout, Arb.); *Blackadar Continuing Care Ctr. v. Ont. Nurses’ Ass’n*, 2021 CanLII 3440 ¶ 5 (ON LA) (Stout, Arb.).

⁵⁴ *Health Sci. N. v. Ont. Nurses’ Ass’n*, 2021 CanLII 35430 ¶ 3 (ON LA) (Johnston, Arb.).

⁵⁵ *See Mich. Corrs. Org. v. Mich. Dep’t of Corrs.*, 2021 BNA LA 168 (June 17, 2021) (Obee, Arb.) [hereinafter *Mich. Corrs.*].

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agreement provision which required the Department to provide “protective clothing and equipment” in accordance with applicable state standards by failing to provide all corrections officers with full PPE.⁵⁶ The Department conceded that its policy had changed over time, reflecting a learning curve with the virus.⁵⁷ Arbitrator John Obee found that the Department had complied with all applicable rules and regulations, both by providing full PPE to officers working in isolation areas or in other areas with direct contact with infected inmates and by developing COVID safety protocols and guidelines for officers working with the general population of inmates.⁵⁸

C. COVID-19 Workplace Policies

Most employers responded to the COVID-19 pandemic by adopting workplace COVID policies which required employees to engage in safety precautions such as wearing masks, socially distancing, washing hands, and the like.⁵⁹ If an employer adopted such policies unilaterally without first bargaining or consulting with the union, the policies were subject to challenge either on duty-to-bargain grounds or on grounds that the policies conflicted with an existing collective bargaining agreement.⁶⁰ If an employee violated the COVID policy and was disciplined, the union might grieve the discipline and challenge the COVID policy in that way.

1. DUTY-TO-BARGAIN AND SUBSTANTIVE CHALLENGES

By mid-2020, most employers had adopted some form of workplace policy designed to protect employees and others from COVID-19.⁶¹ If implemented unilaterally, these policies could be challenged on duty-to-bargain grounds. They also could be challenged substantively as inconsistent with the terms of a collective labor agreement. My earlier article described Arbitrator Augustus M. Richardson’s Award in *Canadian Union of Public Employees, Local 3513 and Breton Ability Centre*, finding that a group home’s implementation of a no-moonlighting policy in an attempt to curb transmission

⁵⁶ *Id.* at *18.

⁵⁷ *Id.* at *19.

⁵⁸ *Id.* at *20.

⁵⁹ See, e.g., *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, U.S. DEP’T LAB.: OCCUPATIONAL SAFETY AND HEALTH ADMIN., <https://www.osha.gov/coronavirus/safework> (last visited Jan. 3, 2022).

⁶⁰ 29 U.S.C. § 158(d); *id.* at 158(b)(3) (imposing a duty to bargain).

⁶¹ See *Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19)*, CTRS. FOR DISEASE CONTROL AND PREVENTION, <https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html#previous> (last visited Jan. 3, 2022).

among healthcare facilities was reasonable because the risk of community spread of COVID was high at the time, the consequences to vulnerable populations such as residents of the employer's facilities were dire, and because the rule was temporary.⁶² However, he found that the employer had violated a provision of the collective bargaining agreement requiring the employer to “engage in meaningful consultation” with the union over “safety and sanitary practices.”⁶³

An example of a direct substantive challenge of a COVID-19 policy is *Caressant Care Nursing & Retirement Homes and Christian Labour Assoc. of Canada*, which also is described in my earlier article.⁶⁴ A nursing home required all staff to receive a nasal-swab test for COVID every two weeks.⁶⁵ The union, analogizing this to a random drug test, argued that the policy was an unreasonable exercise of management rights and an intrusion on employee privacy and dignity.⁶⁶ Arbitrator Dana Randall disagreed, finding that the severe impact of a COVID infection—especially to the vulnerable population living in a nursing home—far outweighed the indignity of a nasal swab.⁶⁷

To date, I have not found any U.S. awards challenging COVID workplace policies on either duty-to-bargain or on substantive grounds. This might be explained in part by early Advice Memoranda from the Trump Administration's General Counsel's Office narrowly construing employers' duty to bargain over “emergency” situations such as the COVID pandemic.⁶⁸ For example, in *Mercy Health General Campus*, issued July 15, 2020, the General Counsel's Office advised that an employer's unilateral modification of an attendance policy was reasonable in an emergency situation such as a pandemic, though the employer would still be required to bargain within a reasonable amount of time over the effects of its unilateral action.⁶⁹

⁶² *Breton Ability Cent. v. Can. Union Pub. Emps., Local 3513*, 2020 CanLII 93886 ¶¶ 93–95 (NS LA) (Richardson, Arb.).

⁶³ *Id.* ¶¶ 101, 104.

⁶⁴ *Caressant Care Nursing & Ret. Homes v. Christian Lab. Ass'n Can.*, 2020 CanLII 100531 (ON LA) (Randall, Arb.).

⁶⁵ *Id.* at 1.

⁶⁶ *Id.* at 6–7.

⁶⁷ *Id.* at 8–9.

⁶⁸ Memorandum from Peter B. Robb, Gen. Couns., N.L.R.B., to Reg'l Dir., Officers-in-Charge, and Resident Officers, N.L.R.B. (Mar. 27, 2020) (on file with N.L.R.B.); E-mail to Sean R. Marshall et al., Reg'l Dir., N.L.R.B. (June 30, 2020) (on file with N.L.R.B.); E-mail to Terry A. Morgan et al., Reg'l Dir., N.L.R.B. (June 10, 2020) (on file with N.L.R.B.) [hereinafter E-mail to Terry A. Morgan].

⁶⁹ Howard Bloom & Jonathan Spitz, *Labor Board General Counsel Provides Employer-Friendly Advice During COVID-19 Pandemic*, JDSUPRA (July 20, 2020), <https://www.jdsupra.com/legalnews/labor-board-general-counsel-provides-89304/>; E-mail to Terry A. Morgan, *supra* note 68.

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Even so, such guidance from the General Counsel’s Office addresses only the issue of whether such unilateral actions are unfair labor practices under the National Labor Relations Act, but not whether such actions are contractual violations of collective bargaining agreements. I would not expect these Memoranda to have significantly curtailed union grievances. Perhaps those grievances are still in the pipeline.

2. *DISCIPLINARY CASES*

Several awards—both U.S. and Canadian—involve union challenges to disciplinary action employers have taken against employees for violating COVID policies. Canadian examples include:

- A hospital transporter (who moved things from one part of the hospital to another) threw a pizza party in violation of a hospital’s COVID policy restricting communal social gatherings in the hospital and the sharing of food. Arbitrator Norm Jesim agreed that discipline was appropriate but held that discharge was disproportionate compared to the other employees who had participated in the party.⁷⁰
- A maintenance worker at a nuclear plant who had symptoms of COVID was told not to come to work. He came to work anyway and, when asked at the gate if he had symptoms, said no. Arbitrator Joseph D. Carrier upheld his discharge.⁷¹
- A laborer in a city’s Works Department called in sick in March 2020. When a human resources representative called to ask COVID screening questions, the Grievant became hostile and refused to answer the questions. In a second incident, he said loudly, “[t]his is bullshit!” and walked out of a meeting called to discuss new COVID safety policies. In a third incident, he arguably threatened a human resources representative who had called a meeting to discuss the prior two incidents. Arbitrator Michel Doucet found that the first incident did not warrant discipline because although the COVID screening questions are commonplace now, they

⁷⁰ Trillium Health Partners v. CUPE Local 5180, 2021 CanLII 127 (ON LA) (Jesin, Arb.).

⁷¹ Lab.’s Int’l Union of N. Am., Ont. Provincial Dist. Council & Lab.’s Int’l Union of N. Am., Local 183 v. Aecon Indus., a Div. of Aegon Constr. Grp. Inc., 2020 CanLII 91950 (ON LA) (Carrier, Arb.).

were not at the time, so the Grievant's reluctance to answer them was understandable. The other two incidents, however—particularly the threat—justified the employer's imposition of a three-day suspension.⁷²

- A gardener at an elementary school recently had returned from quarantining because of COVID symptoms. While working on the grounds, he flagged down a co-worker driving a delivery van, opened the passenger-side door, and deliberately coughed several times into the van. When the van reached the school, he approached the driver and said, “[y]ou will be my science experiment. Don’t make me use my biological weapons.” Arbitrator Paul Love sustained the school’s imposition of a ten-day suspension for violating its COVID-safety policy, noting that the gardener was lucky the school did not fire him.⁷³

Reported U.S. cases—though fewer in number—are consistent with the Canadian ones in showing little sympathy for workers who knowingly violate reasonable COVID safety policies. For example, in the Connecticut case of *AAA Labor Arbitration Award No. AA-1 ARB ¶ 8801*, a fire department issued COVID-19 Operational Directives to all personnel which, among other things, established designated entrances to all fire department buildings, required temperature checks and COVID screening questions each time someone entered a building, and required the wearing of surgical masks at all times while on duty.⁷⁴

On the morning of April 9, 2020, the Grievant was off duty, having just finished his shift at a firehouse.⁷⁵ He received a text from a fellow firefighter and childhood friend, on duty at the time at Fire Headquarters, that made him upset.⁷⁶ The Grievant entered Fire Headquarters through a door that was not the COVID-designated entrance.⁷⁷ He was not wearing a mask and

⁷² Can. Union of Pub. Emp., Local 3226 v. Town of Quispamsis, 2021 CanLII 43139 (NB LA) (Doucet, Arb.).

⁷³ Bd. of Educ. Sch. Dist. No. 39 (Vancouver) v. Canadian Union of Pub. Emp., Local 407, 2021 CanLII 43175 (BC LA) (Love, Arb.).

⁷⁴ See *City v. Fire Fighters Ass’n Loc.*, 2021 BNA LA 107 (Feb. 22, 2021) (Celentano, Arb.) As seen in this example, the American Arbitration Association redacts all identifying information from its published awards. To help distinguish the awards, I will put in the text the citation information that I otherwise would put in a footnote.

⁷⁵ *Id.* at *3.

⁷⁶ *Id.*

⁷⁷ *Id.*

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did not present himself for COVID questioning or a temperature check.⁷⁸ He approached his ostensible friend, and the two engaged in a brief shouting match.⁷⁹

The fire department imposed as discipline the forfeiture of fifteen vacation days and a requirement that the Grievant take an anger management course.⁸⁰ The union grieved, arguing that the COVID protocols were still new, so it would be unfair to impose discipline for their violation.⁸¹ Arbitrator Joseph M. Celentano disagreed.⁸² He found ample evidence that the Grievant had knowingly violated important safety requirements for the sole purpose of pursuing a personal dispute with a fellow firefighter.⁸³ He, therefore, denied the grievance.⁸⁴

In an unpublished case,⁸⁵ a manufacturing plant was shut down because of COVID. The Grievant, who had been furloughed, texted two co-workers and a supervisor who had not been furloughed and asked them to move N95 masks to the Grievant's work area. After the co-worker had done so, the Grievant returned to the plant and stole several masks, then suggested that the others do the same. The arbitrator upheld the discharge.⁸⁶

An arbitrator rejected the imposition of discipline in the Michigan case of *2020 AAA LEXIS 216 (July 14, 2020)*. The employer had unilaterally promulgated a No-Fault Attendance policy establishing a point system for absences; six points would result in discharge.⁸⁷ When COVID hit, however, the company made several statements to employees which tended to indicate that absences for COVID-related symptoms would not be counted under the policy.⁸⁸ For example, during shop meetings about COVID, management officials told employees not to worry about absences during the pandemic.⁸⁹ The General/Plant manager told employees at a shop meeting that absences during the pandemic would be handled on a "case by case" basis.⁹⁰ The

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* at *4.

⁸² *Id.* at *5–6.

⁸³ *Id.*

⁸⁴ *Id.* at *7.

⁸⁵ As described in Part II, *supra*, I cannot cite to unpublished cases by name or describe the facts in too much detail because to do so would violate the confidentiality of the arbitration proceeding.

⁸⁶ The arbitrator of this award requested that his name be withheld.

⁸⁷ 2020 AAA LEXIS 216 at *3–5 (July 14, 2020) (Bommarito, Arb.).

⁸⁸ *Id.* at *13–16.

⁸⁹ *Id.* at *15.

⁹⁰ *Id.*

company posted a document, entitled “Protective Measures to Lessen the Spread of COVID-19,” which told employees they should “stay home and not come to work until they are free of signs of fever for at least 24 hours.”⁹¹

On March 20, 2020, the Grievant, a Crane Operator, called in sick because he had chills and a headache.⁹² The company assessed him one “point” toward the attendance policy, which put him at six points and therefore at the threshold for discharge.⁹³ On April 8, he came to work 20 minutes late, for which the company assessed one-half point, putting his total at 6.5.⁹⁴ The company then fired him.⁹⁵

The union grieved, arguing that the company should not have counted the March 20 absence for COVID symptoms.⁹⁶ Arbitrator Michael J. Bommarito agreed.⁹⁷ He found the absence policy to be insufficiently specific about which absences would be excused, especially in light of the statements about COVID symptoms, and that the company had administered the policy inconsistently.⁹⁸ He, therefore, found that the Grievant lacked notice about what he could be disciplined for or what the discipline would be.⁹⁹ Arbitrator Bommarito, therefore, ordered that the Grievant be reinstated with back pay and with 5.5 points under the company’s attendance policy.¹⁰⁰

D. Pay Issues

A large proportion of published U.S. COVID-related awards to date have been on pay issues. Many of these have focused on how to apply sick or vacation pay to employees who are under quarantine. Other pay-related issues include whether employees are entitled to premium pay when workplaces are “closed” because of the pandemic, how to calculate pay and overtime when an employer changes employees’ work schedules because of pandemic-related shifts in demand for the employer’s goods or services, whether employees are entitled to callback pay for online meetings, and other similar issues.

1. SICK PAY

⁹¹ *Id.* at *11–12.

⁹² *Id.* at *12.

⁹³ *Id.* at *16–17.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.* at *17.

⁹⁷ *Id.* at *21–22.

⁹⁸ *Id.*

⁹⁹ *Id.* at *22.

¹⁰⁰ *Id.* at *28.

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A persistent issue in both the United States and Canada is how to apply sick pay and vacation pay provisions when employees are under quarantine. Employees generally would likely prefer to receive full regular pay without having to deplete their sick or vacation days. However, under most labor contracts, an asymptomatic, untested employee under quarantine is not “sick.” Absent full regular pay, employees generally would likely prefer the option of receiving sick or vacation pay while in quarantine. Employers have generally been receptive to this preference but may run into trouble if they require employees to use sick or vacation days when, under the labor contract, employees are neither sick nor electing to take a vacation.

a. Quarantines: Sick Leave or Unpaid Leave of Absence?

An easy place to start is with a couple of Canadian awards because in many ways they are the most straightforward. An early award was *Participating Nursing Homes and Ontario Nurses’ Assoc.*, by Arbitrator John Stout.¹⁰¹ A union representing nurses filed grievances against several Ontario-area nursing homes alleging failure to pay compensation when nurses had to quarantine.¹⁰² The union’s position was that nurses under quarantine were “sick” and therefore were entitled to sick-pay compensation.¹⁰³ The nursing homes argued that only nurses who had exhibited symptoms or tested positive are “sick” and therefore entitled to sick pay.¹⁰⁴

Arbitrator Stout agreed with the nursing homes.¹⁰⁵ The language of the collective bargaining agreement creating an entitlement to sick time covered only “legitimate personal illness or injury which is not compensable under the [workers’ compensation statute].”¹⁰⁶ Employees are entitled to sick time, Arbitrator Stout found, when they test positive for or are symptomatic for COVID, continuing until their symptoms subside and they are legally permitted to return to work.¹⁰⁷ Asymptomatic employees who have not tested positive or who have not been tested likewise are not contractually entitled to sick pay.¹⁰⁸

¹⁰¹ *Participating Nursing Homes v. Ontario Nurses’ Ass’n*, 2020 CanLII 36663 (ON LA) (Stout, Arb.).

¹⁰² *Id.* ¶ 2.

¹⁰³ *Id.* ¶ 4.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* ¶ 43.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* ¶¶ 55–56.

¹⁰⁸ *Id.* ¶ 59.

A similar case is *Municipality of Chatham-Kent and Canadian Union of Public Employees, Local 12.2*.¹⁰⁹ The Grievant, a municipal librarian, took an ill-timed vacation to Mexico and returned to Canada in March 2020 just as the pandemic was arriving.¹¹⁰ Upon her return, the Grievant's employer directed her to self-isolate at home for fourteen calendar days and to use sick time for the ten working days that she missed work as a result.¹¹¹ The union grieved, arguing, among other things, the Grievant's quarantine period was an effective "layoff" for which she was due either prior notice or pay in lieu of notice, that the employer had improperly changed the Grievant's work hours without notice, and that the employer improperly required the Grievant to draw from her sick bank when she was not sick.¹¹²

Arbitrator Colin Johnston, citing Arbitrator Stout's award described above, ruled that the Grievant was not entitled to wages for the time spent in quarantine.¹¹³ He found that the Grievant's quarantine was not a "layoff" within the meaning of the collective bargaining agreement because that would have given her the right to "bump" junior employees, which would have defeated the purpose of the quarantine.¹¹⁴ He also found that the quarantine was not a change in work hours because the associated provision of the collective agreement was premised on changes to the posted schedule, and the posted schedule for employees was not changed during the Grievant's quarantine.¹¹⁵

However, Arbitrator Johnson found that the employer violated the labor agreement by requiring the employee to draw from her sick bank when she was under quarantine.¹¹⁶ The agreement provided that payment under this provision was for "absences due to illness or non-work-related injury including dental and medical appointments"¹¹⁷ Grievant's quarantine was not an illness or injury and did not require any medical appointments.¹¹⁸ Instead, the employer should have treated it as an unpaid leave of absence.¹¹⁹

Together, these two Canadian awards stand for the general proposition that, under a labor contract defining "sick" in the typical way, an employee

¹⁰⁹ *Mun. Chatham-Kent v. Canadian Union of Pub. Emps., Loc. 12.2*, 2021 CanLII 37778 (ON LA) (Johnston, Arb.).

¹¹⁰ *Id.* ¶ 7.

¹¹¹ *Id.* ¶¶ 12–13.

¹¹² *Id.* ¶¶ 16–23.

¹¹³ *Id.* ¶¶ 52–53.

¹¹⁴ *Id.* ¶ 58.

¹¹⁵ *Id.* ¶ 67.

¹¹⁶ *Id.* ¶¶ 77–81.

¹¹⁷ *Id.* ¶ 79.

¹¹⁸ *Id.* ¶¶ 71–81.

¹¹⁹ *Id.*

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under quarantine who is asymptomatic and has not tested positive is not “sick” and therefore is not entitled to sick pay. Instead, the quarantine period should be treated as an unpaid leave of absence. During this period, employees might *prefer* to receive sick or vacation pay, but an employer who unilaterally deducts sick or vacation pay when a quarantine does not fit the labor contract’s definition of those types of absences, does so at its peril. A better option would be for the employer and union to agree on a policy—ideally, one giving employees the option of taking unpaid leave or of using their sick/vacation days so that their paycheck continues.

A U.S. award consistent with this approach is *Michigan Corrections Organization and Michigan Department of Corrections*.¹²⁰ The Michigan Department of Corrections required corrections officers to use their paid sick leave and then their paid annual leave (vacation) when officers were required to quarantine because of close contact with a COVID-positive person or with a person suspected to be COVID-positive.¹²¹ The Michigan Department of Corrections required corrections officers to use their paid sick leave, and then their paid annual leave (vacation), when officers were required to quarantine because of close contact with a COVID-positive person or a person suspected to be positive.¹²²

The Department argued the collective bargaining agreement’s management rights clause gave it the authority to create policies and procedures for employees’ use of sick and annual leave.¹²³ Other specific articles in the collective bargaining agreement, however, made the use of sick and annual leave permissive: “Sick leave *may* be used . . .”, and “An employee *may* request . . . annual leave . . .”¹²⁴ Arbitrator Obee found that this language indicated that the process for using both sick and annual leave “originates and is activated by the employee, not the employer,”¹²⁵ and that the employer violated the collective bargaining agreement by mandating their use by quarantining employees.¹²⁶ In doing so, Arbitrator Obee cited to the award of Arbitrator Colin Johnson in *Municipality of Chatham–Kent* (discussed above),¹²⁷ the award of Arbitrator Glenn Newman in *Int’l Ass’n of Machinists*

¹²⁰ See Mich. Corrs., *supra* note 55.

¹²¹ Mich. Corrs., *supra* note 55, at *3.

¹²² Mich. Corrs., *supra* note 55, at *14.

¹²³ Mich. Corrs., *supra* note 55, at *14.

¹²⁴ Mich. Corrs., *supra* note 55, at *15 (emphasis in quoted part of award, but not in original contract language).

¹²⁵ Mich. Corrs., *supra* note 55, at *15.

¹²⁶ Mich. Corrs., *supra* note 55, at *16.

¹²⁷ See *supra* notes 109–19 and accompanying text.

and *Aerospace Workers and Glory Global Solutions Inc.*¹²⁸ (discussed below),¹²⁹ and to a draft of this article.¹³⁰ Consistent with *Glory Global*, Arbitrator Obee found that corrections officers who had been required to use paid sick and annual leave while on quarantine should not receive additional sick or annual leave, because that would give them a windfall of more sick and annual leave than the collective bargaining agreement provided.¹³¹ Instead, he issued a cease and desist order.¹³²

Another U.S. award, arising under very different circumstances, is *3M Co. and United Steelworkers, Local 11-75*.¹³³ In March 2020, 3M Company and the Steelworkers Union negotiated a Memorandum of Understanding giving 80 hours of paid “pandemic leave” to employees who, among other things, had been “instructed to self-quarantine by a public health official or 3M”¹³⁴ This pandemic leave policy distinguishes this award from the others described in this section, none of which involved such a policy.

On March 26, 2020, Grievant contacted 3M’s medical department and reported he had a sore throat, cough, and stuffy nose.¹³⁵ 3M instructed him to quarantine and contact his health care provider. It gave him pandemic leave for the first two days, then applied sick pay to the remaining five days, deducting those days from his sick bank.

The Steelworkers grieved, arguing 3M should have applied pandemic leave to all seven days and should return five days to the Grievant’s sick bank. Arbitrator A. Ray McCoy agreed.¹³⁶ The collectively bargained sick pay plan required an employee to be (a) unable to work (b) because of illness, injury, or pregnancy, and (c) to provide 3M with objective medical evidence of such condition.¹³⁷ Grievant never reported an inability to work; was not ill, injured, or pregnant; and had not supplied medical documentation.¹³⁸ Instead, he had simply reported cold-like symptoms, and 3M had ordered him to quarantine.¹³⁹

¹²⁸ See *Int’l Ass’n of Machinists & Aerospace Workers v. Glory Glob. Sols. Inc.*, 2020 BNA LA 1264 (Oct. 13, 2020) (Newman, Arb.).

¹²⁹ See *infra* notes 315–22 and accompanying text.

¹³⁰ Mich. Corrs., *supra* note 55, at *15.

¹³¹ Mich. Corrs., *supra* note 55, at *17–18.

¹³² Mich. Corrs., *supra* note 55, at *32.

¹³³ *3M Co. v. United Steelworkers, Loc. No. 11-75*, 21-1 Arb 7747 (2020) (McCoy, Arb.).

¹³⁴ *Id.* at 3.

¹³⁵ *Id.* at 10.

¹³⁶ *Id.* at 13.

¹³⁷ *Id.* at 5–6.

¹³⁸ *Id.* at 7.

¹³⁹ *Id.*

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Therefore, 3M had improperly applied the sick leave policy, and instead should have applied the pandemic policy.

Another (unpublished) U.S. award illustrating the importance of looking to the collective bargaining agreement's definition of "sick" involved an Illinois elementary school. A kindergarten teacher requested that he be allowed to teach from home for three days so he could quarantine before scheduled surgery. The school granted the request. Days one and two went fine. The evening of day two, however, his home modem began to fail. He called the principal and requested it assign a substitute teacher for day three. The school did so and counted only that day as a sick day. The teacher protested being docked a sick day, arguing that in lieu of teaching he had performed non-teaching duties such as grading papers. The school countered that it was standard practice to apply a sick day any time it had to call a substitute for a teacher. The union grieved.

Arbitrator Martin H. Malin denied the grievance. This collective bargaining agreement defined "sick leave" as including "quarantine at home." Arbitrator Malin thus found it was perfectly consistent with the collective bargaining agreement for the school to charge the teacher with a sick day while he quarantined at home in preparation for his surgery, since his failed modem made it impossible to perform his regular job duty of teaching. Arbitrator Malin continued:

The Union's argument essentially is that a teacher who is unable to perform his instructional duties, thereby necessitating the hiring of a substitute, may avoid being charged a sick day by performing alternate services of the teacher's choice without obtaining authorization from his principal. Neither the collective bargaining agreement nor the memorandum of understanding confer such power on the teachers. Accordingly, the grievance must be denied.¹⁴⁰

b. Awards Interpreting the FFCRA

The Families First Coronavirus Response Act (FFCRA) requires certain employers to provide their employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19, including when the employee is quarantined under a government order or advice of a

¹⁴⁰ On file with author (Apr. 19, 2021) (Malin, Arb.). Note that any award I have labeled as "unpublished" is an award for which the arbitrator has not received permission to publish and is therefore confidential.

health care provider.¹⁴¹ It was in effect from April 1 through December 31, 2020,¹⁴² and its implementing regulations exempted employees who are “health care providers.”¹⁴³

Two U.S. awards—one published and one not—consider the applicability of the FFCRA to pandemic leave. In one, an unpublished, confidential award from New York,¹⁴⁴ an employer paid several employees during their quarantines and docked them for a commensurate number of sick and vacation days.¹⁴⁵ The union grieved, asking the arbitrator to return those days.¹⁴⁶ Arbitrator Richard Adelman found the union had not identified any provision in the collective bargaining agreement that the employer had violated by applying sick/vacation days to pandemic leave.¹⁴⁷ He then considered the applicability of the FFCRA. He found the employees were not entitled to most of the days the union was disputing for two reasons: many of those days had occurred before the effective date of the FFCRA, and many of the employees were quarantined but not, as required by FFCRA, quarantined under a government order or advice of a health care provider.¹⁴⁸ Arbitrator Adelman required the employer to return three days to two employees for days when the employees were seeking medical diagnoses for possible COVID-19 infection.¹⁴⁹

The published FFCRA award is *Squirrel Hill Wellness and AFSCME District Council 84, Local 1807*.¹⁵⁰ A rehabilitation and long-term care facility required a certified nurse assistant to self-quarantine after learning she had worked at another facility that had reported positive COVID cases.¹⁵¹ The employer apparently put her on an unpaid leave of absence.¹⁵² The union grieved, arguing she was entitled to pay under the FFCRA.¹⁵³ Arbitrator John

¹⁴¹ Families First Coronavirus Response Act, Pub. L. No. 116–27 (2020) (amended Apr. 7, 2021).

¹⁴² *Id.*

¹⁴³ 29 C.F.R. § 826.30 (2020) (excluding health care providers).

¹⁴⁴ On file with author (Apr. 15, 2021) (Adelman, Arb.).

¹⁴⁵ *Id.* at 3.

¹⁴⁶ *Id.* at 6–7.

¹⁴⁷ *Id.* at 11.

¹⁴⁸ *Id.* at 11–12.

¹⁴⁹ *Id.* at 13–14.

¹⁵⁰ See *Squirrel Hill Wellness & Rehab. Ctr. v. AFSCME Dis. Council 64, Local 1607*, 2021 BNA LA 27 (2021) (Felice, Arb.).

¹⁵¹ *Id.* at *2.

¹⁵² *Id.* at *1.

¹⁵³ *Id.*

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M. Felice disagreed, finding that as a certified nurse assistant,¹⁵⁴ she was a “health care provider” excluded by the statute.¹⁵⁵

c. Other Sick- and Vacation-Pay Issues

One other unpublished, confidential award deals with sick and vacation pay issues. In a New York case,¹⁵⁶ the collective bargaining agreement contained a *force majeure* clause entitling the employer to cease operations and furlough workers in the event of, among other things, an epidemic.¹⁵⁷ When COVID hit, the employer invoked this clause, ceased operations, and furloughed most of its workers.¹⁵⁸ The employer also refused to allow furloughed employees to use their accumulated vacation days to keep their paychecks coming during the furlough and stopped paying sick leave to employees whose leave had started before the employer invoked the *force majeure* clause.¹⁵⁹ The union grieved.

On the vacation issue, the employer argued a vacation is “respite from work.”¹⁶⁰ Because the employer had ceased operations, there was no work for employees to take a respite from, and the employees therefore could not use their vacation days.¹⁶¹ On the sick pay issue, the employer argued that sick pay is for employees who are sick and are missing work.¹⁶² Unlike the quarantine cases described above in which the issue was whether employees were “sick,” here the issue was whether the employees were “missing work” when no work was available.

Arbitrator Richard Adelman found for the union on the vacation pay issue. He noted that nothing in the collective bargaining agreement prevented employees from using their banked vacation time when the employer was not operating.¹⁶³ Equitably, the employees had earned this banked vacation time and should be entitled to use it.¹⁶⁴ Moreover, the employer had frequently encouraged employees to use their vacation time during layoff periods,

¹⁵⁴ FFCRA’s implementing regulations defined “health care providers” as including “[n]urses, nurse assistants” 29 C.F.R. § 826.30(c)(1)(ii)(A) (2020).

¹⁵⁵ Squirrel Hill Wellness & Rehab. Ctr., *supra* note 150, at *4.

¹⁵⁶ On file with author (Dec. 29, 2020) (Adelman. Arb.).

¹⁵⁷ *Id.* at 4.

¹⁵⁸ *Id.* at 4–5.

¹⁵⁹ *Id.* at 5, 12.

¹⁶⁰ *Id.* at 8.

¹⁶¹ *Id.*

¹⁶² *Id.* at 14.

¹⁶³ *Id.* at 10.

¹⁶⁴ *Id.*

undercutting its argument that vacation time could be taken only when the employer was operating.¹⁶⁵

On the sick pay issue, however, Arbitrator Adelman found for the employer. Unlike vacation days, sick days were not banked, but instead were available to be used only when an employee was ill or disabled at a time when work would be available.¹⁶⁶ Moreover, Arbitrator Adelman found it was “not likely the parties intended that employees on sick leave be paid during a pandemic while employees who were able to work would go without pay.”¹⁶⁷

2. PREMIUM PAY

Some collective bargaining agreements entitle employees to premium pay when they work during times when the place of employment is “closed” (or some variation on this theme). The intent of such a provision is to compensate employees for working during an emergency situation, such as a major weather event, when other employees are paid but not expected to work. But is the place of employment “closed” during a pandemic-related lockdown when the physical workplace is closed but work is still being done, perhaps from home? Is a pandemic lasting for more than a year analogous to a major weather event that may last for a week at most? And does premium pay continue indefinitely throughout the pandemic, or is there some point in which employees revert to their regular pay rate? These issues are addressed in the awards below.

*Northmont City Schools and Teamsters Local Union No. 957*¹⁶⁸ arose when an Ohio school district refused to pay calamity pay—essentially, double time pay—for periods when non-teacher school employees worked while the school buildings were closed because of COVID-19. On March 9, 2020, the governor of Ohio ordered all kindergarten – 12th grade schools closed for several weeks effective the end of business March 16.¹⁶⁹ Notwithstanding closure of the physical school buildings to students, teaching continued online,¹⁷⁰ and many teachers taught from the school buildings.¹⁷¹ Starting March 17, the district required some bargaining unit members, such as custodians, to report to work as usual while other members were told they had

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 15.

¹⁶⁷ *Id.* at 15–16.

¹⁶⁸ *Northmont City Sch. Dist. v. Teamsters, BNA LA 1918* (Dec. 11, 2020) (Paolucci, Arb.).

¹⁶⁹ *Id.* at *8.

¹⁷⁰ *Id.* at *10.

¹⁷¹ *Id.* at *9.

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to be available to work and would be called in as needed.¹⁷² This continued through June 30, 2020,¹⁷³ though most employees returned to their regular work schedule after a general order to return to work was made on May 4, 2020.¹⁷⁴ The collective bargaining agreement provided:

“If schools are closed by the Superintendent due to inclement weather or other calamity, [certain employees] are to report to work (unless specifically excused by their supervisor) as soon as it is possible to do so. Other employees shall report if requested to do so by their supervisor. All employees who work on a calamity day/energy day will be granted the option of receiving either [comp time or double time].¹⁷⁵

The union grieved the district’s refusal to provide calamity pay for all days in which bargaining unit employees were required to work but schools were otherwise closed.¹⁷⁶

Arbitrator Michael Paolucci found that the COVID pandemic qualified under the phrase “other calamity,” and that therefore calamity pay applied.¹⁷⁷ However, he also found that by using the term “inclement weather” and then expanding to include “other calamity,” the parties intended for calamity pay to apply only to temporary circumstances such as weather-related events.¹⁷⁸ He reasoned that the most logical endpoint for calamity pay was May 4, 2020, when most employees returned to work as usual.¹⁷⁹ This was consistent, he found, with the purpose of calamity pay, which is to compensate employees who must work during an emergency when other employees are paid but do not work:

[Premium pay] is often justified since it is unequal to those employees who must work during a “Calamity Day”, but are only paid the same amount as others who are not required to report for work. To provide fairness, those who work are paid twice - once for actually working and then again to compensate them the same as the rest of the bargaining unit

¹⁷² *Id.* at *10.

¹⁷³ *Id.* at *11.

¹⁷⁴ *Id.* at *20.

¹⁷⁵ *Id.* at *6.

¹⁷⁶ *Id.* at *12.

¹⁷⁷ *Id.* at *18.

¹⁷⁸ *Id.* at *19.

¹⁷⁹ *Id.* at *20.

who are not actually working. In this way, double pay, an otherwise extraordinarily large benefit, can be justified.¹⁸⁰

This policy of fairly compensating employees required to work when others are not was likewise critical to the award in *City of Portland, Oregon and District Council of Trade Unions*.¹⁸¹ The mayor of the City of Portland issued a local state of emergency on March 12, 2020 in response to the pandemic.¹⁸² On March 15, city buildings were closed with only “critical” employees allowed access.¹⁸³ Other employees were ordered to stay at home and telework if possible.¹⁸⁴

A coalition of six city unions filed a class grievance complaining the city failed to provide “holiday pay” pursuant to the collective bargaining agreement.¹⁸⁵ Article 9.12 of the collective bargaining agreement provided:

Any employee who is designated by management as an Essential Employee and is required to report to work when the Mayor or his designee announces a Citywide closure and directs non-essential employees to stay home, will be compensated with one deferred holiday for every full shift they work during such an event. The deferred holiday will be equal to the number of hours the essential employee was regularly scheduled to work on the day of the event.¹⁸⁶

The unions argued that city workers who physically reported to work at a city office or in the field—not teleworkers—should receive holiday pay while the city was closed and most employees were sitting at home and paid for not working.¹⁸⁷

Arbitrator Stephen D. Bonney noted that Article 9.12 was negotiated to address the inequity, which frequently arose during snowstorms, of requiring essential employees to commute to work in dangerous conditions while other employees were paid to stay home.¹⁸⁸ He interpreted Article 9.12 as being triggered when three things occurred: (1) a citywide closure, (2)

¹⁸⁰ *Id.* at *19.

¹⁸¹ *City of Portland, Org. v. Dist. Council of Trade Unions*, 2021 BNA LA 12 (Feb. 18, 2021) (Bonney, Arb.).

¹⁸² *Id.* at *6.

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at *8.

¹⁸⁶ *Id.* at *5 (citing Collective Bargaining Agreement Article 9.12, Essential Employees).

¹⁸⁷ *Id.* at *9.

¹⁸⁸ *Id.* at *14.

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essential employees required to report to work as usual, and (3) non-essential employees directed to stay home with pay but without being required to work.¹⁸⁹ He found all three conditions satisfied on March 17, 2020, when City offices were closed, essential employees were ordered to report to work, and other non-essential employees were paid too, despite being directed to stay at home and not work.¹⁹⁰

The unions argued the holiday pay should continue through mid-May.¹⁹¹ However, Arbitrator Bonney found that by April 1, most city workers had obtained laptops and VPNs and were able to telework from home.¹⁹² He therefore found April 1 the appropriate date for ending the holiday pay.¹⁹³

An award raising the same issue of premium pay during emergencies—but containing very different contract language—is an unpublished, confidential award from New York by Arbitrator Howard G. Foster.¹⁹⁴ A collective bargaining agreement between a city and its highway and sanitation workers contained a section on “Overtime Callouts and Emergencies,” which provided, in relevant part, that overtime work was voluntary, “except in cases of emergency.”¹⁹⁵ This section further provided that if the city declared an emergency, the city would “pay time and one-half (1–1/2) for all hours worked during the emergency.”¹⁹⁶ The union argued this language required that, if an emergency is declared, its members are entitled to overtime pay for all hours worked during the emergency, regardless of whether any overtime was actually worked.¹⁹⁷

Arbitrator Foster found that the title of the relevant section suggested that everything in the section referred to overtime callouts, including those occasioned by an emergency.¹⁹⁸ He also interpreted the reference to the subparagraph as indicating that the city would provide premium pay only if an emergency required the workers to work overtime—i.e., to work hours exceeding the employees’ normal workweek.¹⁹⁹ Finally, reading the language of the collective bargaining agreement as a whole, he described the bargain between the city and the union as this:

¹⁸⁹ *Id.* at *16.

¹⁹⁰ *Id.* at *16–17.

¹⁹¹ *Id.* at *18.

¹⁹² *Id.* at *19.

¹⁹³ *Id.*

¹⁹⁴ Award on file with author (Dec. 28, 2020) (Foster, Arb.).

¹⁹⁵ *Id.* at 2.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 3–4.

¹⁹⁸ *Id.* at 7.

¹⁹⁹ *Id.*

The primary rule is that overtime is voluntary, with an exception carved out for emergency situations, in which case overtime may be mandated. However, the quid pro quo for allowing management to mandate overtime is that employees forced to work overtime during an emergency get extra pay for not only their overtime hours but also their regular hours. But the antecedent to all this is that there is an overtime callout and overtime is worked. The idea is not simply to pay additional money to employees, but to compensate them for the extra burdens they are asked to shoulder, on behalf of the citizens of [the city], during an emergency.²⁰⁰

He therefore denied the grievance.²⁰¹

Finally, the award in 2020 AAA LEXIS 302²⁰² turned on whether the employer was “closed.” A town in Massachusetts responded to the pandemic by closing most of its buildings to the public on March 20, 2020.²⁰³ However, the town continued to provide most regular municipal services.²⁰⁴ Though the doors to Town Hall were locked, employees continued to work either in-person in the building or remotely from home.²⁰⁵ Section 23.4 of the collective bargaining agreement between the town and its airport employees provided:

Overtime will be compensated at a rate of time and one-half (1-1/2) If Town Hall is closed during normal working hours due to a weather emergency or other unforeseen circumstance, bargaining unit members who remain at work shall be paid overtime in addition to their regular compensation for all hours worked during their regular shift. This shall only apply to hours worked during the normal hours of Town Hall operation.²⁰⁶

The union argued Section 23.4 entitled its bargaining unit, who had reported to work during this time, to overtime for all hours worked.²⁰⁷ Arbitrator Marcia L. Greenbaum disagreed. The difference between “open” and “closed,” Arbitrator Greenbaum found, turns not on whether the doors

²⁰⁰ *Id.* at 8.

²⁰¹ *Id.* at 9.

²⁰² Mass. Town v. Int’l Brotherhood of Teamsters, 2020 BNA LA 1428 (Nov. 27, 2020) (Greenbaum, Arb.).

²⁰³ *Id.* at *23–24.

²⁰⁴ *Id.* at *48.

²⁰⁵ *Id.* (citing Collective Bargaining Agreement, Section 23.4).

²⁰⁶ *Id.* at *56.

²⁰⁷ *Id.* at *34–35.

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were locked, but on whether the town is “conducting its usual business and there is access [to the town’s services] by the public.”²⁰⁸ Here, employees were still conducting town business in the Town Hall as well as from home, and the public could enter the building and conduct their business there by making an appointment.²⁰⁹ Arbitrator Greenbaum, therefore, found that the Town Hall was not “closed” within the meaning of Section 23.4, and the airport employees were not entitled to overtime.²¹⁰

3. SCHEDULE CHANGES AND HOURS REDUCTIONS

The pandemic caused significant shifts in demand for various products and services. Employers often reacted by either shifting employees’ workdays to meet new patterns of demand or reducing employees’ hours to reflect decreased demand. Both U.S. and Canadian awards have consistently held that employers cannot unilaterally change schedules or reduce guaranteed hours absent a contractual right to do so.

Two cases illustrate employer attempts to unilaterally reduce guaranteed hours. In *International Brotherhood of Teamsters Local 682 and Sysco St. Louis, Inc.*,²¹¹ a food service distributor experienced a 65% drop in demand for its products as the pandemic closed restaurants, office buildings, and schools.²¹² The employer laid off about 25% of its workforce and reduced its delivery schedule from six days to four days per week.²¹³

The collective bargaining agreement guaranteed a group of employees a workweek of either five consecutive eight-hour days or any four ten-hour days.²¹⁴ When the employer changed its delivery schedule, it re-scheduled these employees to work four non-consecutive eight-hour days.²¹⁵ The union agreed the layoff was permitted by the contract but grieved the changed work schedule and lost hours.²¹⁶ The employer argued the pandemic was a “true emergency” entitling it to take action that would “technically” violate contract language.²¹⁷ Arbitrator Freeman Bosley, Jr. disagreed, and ordered the

²⁰⁸ *Id.* at *57–58.

²⁰⁹ *Id.* at *58.

²¹⁰ *Id.* at *60.

²¹¹ *Int’l Brotherhood of Teamsters Local 682 v. Sysco St. Louis, LLC*, 2020 BNA LA 1367 (Dec. 28, 2020) (Bosley, Arb.).

²¹² *Id.* at *5.

²¹³ *Id.* at *5–6.

²¹⁴ *Id.* at *6.

²¹⁵ *Id.* at *8–9.

²¹⁶ *Id.* at *9.

²¹⁷ *Id.* at *7.

employer to make the employees whole for the loss of the fifth eight-hour day.²¹⁸

A second case involving a reduction in hours involved New Jersey crossing guards.²¹⁹ The collective bargaining agreement provided minimum daily salaries and that guards would receive “their normal full day’s pay” during school closures.²²⁰ In fall 2020, the school adopted a hybrid model of remote and in-person learning, where the school building would close on Fridays and students would learn remotely.²²¹ Crossing guards were not paid for most of those Fridays.²²² From November 24, 2020, through December 14, 2020, the school was closed.²²³ Crossing guards were reassigned but received fewer hours and reduced pay.²²⁴ Arbitrator Ira Cure found that absent a *force majeure* clause, the crossing guards were entitled to their full pay.²²⁵

Separately, an example of an employer changing shift schedules in response to changing customer demand is provided by an unpublished, confidential New York award.²²⁶ The company at issue installed, maintained, and serviced imaging equipment at hospitals and imaging centers in and around New York City.²²⁷ The pandemic hit New York City early and hard.²²⁸ Hospitals cut or reduced non-essential operations such as routine equipment-servicing or shifted it to later in the day to help minimize exposure to COVID-19.²²⁹ As a result, requests for services, and thus the Company’s business revenue, decreased substantially, while overtime costs increased.²³⁰ The Company analyzed the effects of these business trends and decided to reduce its overtime costs by shifting its employees to the second and third shifts and reducing standby coverage.²³¹

The collective bargaining agreement provided for three shifts, for staggered start times for these shifts, and for shift differential pay of either 10% or 20% depending on the starting time of the shift.²³² It also stated that the

²¹⁸ *Id.* at *8.

²¹⁹ Award on file with author (Mar. 15, 2021) (Cure, Arb.).

²²⁰ *Id.* at 4–5.

²²¹ *Id.* at 7.

²²² *Id.*

²²³ *Id.*

²²⁴ *Id.* at 7–8.

²²⁵ *Id.* at 14–15.

²²⁶ See generally award on file with author (Nov. 23, 2020) (Adelman, Arb.).

²²⁷ *Id.* at 2.

²²⁸ *Id.* at 2–3.

²²⁹ *Id.* at 3.

²³⁰ *Id.*

²³¹ *Id.*

²³² *Id.*

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company would give four weeks' notice before changing the starting hours of an employee's shift.²³³ Similarly, the collective bargaining agreement entitled employees to 25% of their regular hourly pay for standby hours and required 60 days' notice before changing this part of an employee's schedule.²³⁴

The company, after discussing these issues with the union but not reaching an agreement, unilaterally moved many employees from first shift to second and third shifts and significantly reduced standby hours.²³⁵ The union grieved. The company argued the notice periods "should be excused in light of the unprecedented pandemic that resulted in an adverse financial impact which required an immediate response."²³⁶

Arbitrator Richard Adelman found the collective bargaining agreement entitled the company to change the shift assignments and reduce the standby hours but only after providing the required notice.²³⁷ Regarding shift assignments, he found no evidence the employees had been harmed economically because they received a shift premium for working the later shifts, so he issued a go-and-sin-no-more order.²³⁸ Regarding standby hours, he ordered the company to compensate the employees who had lost those hours during the 60 days' notice period.²³⁹

A final example of an employer unilaterally changing work schedules is *AA-1 ARB ¶8731*.²⁴⁰ This employer managed a regional transit authority's municipal bus service operations. The collective bargaining agreement provided that drivers would bid on routes by seniority four times per year, and that the employer must consult with the union before posting bidding packages to consider its recommendations.

When the pandemic hit, bus ridership and revenues fell precipitously. Moreover, whereas Saturdays had always been staffed by drivers willing to volunteer for overtime, drivers stopped volunteering after one of their fellow drivers reported COVID-like symptoms. The employer wanted to respond by ending weekday service an hour early, eliminating Sunday service, changing Saturdays to a Sunday schedule, and including Saturdays as part of the job-bid process so Saturdays would be fully staffed.²⁴¹

²³³ *Id.*

²³⁴ *Id.* at 6, 18–19.

²³⁵ *Id.* at 3–5.

²³⁶ *Id.* at 13.

²³⁷ *Id.* at 16–18.

²³⁸ *Id.* at 18.

²³⁹ *Id.* at 21–23.

²⁴⁰ Wolters Kluwer AAA Labor Arbitration Awards (Dec. 28, 2020) (Cenci, Arb.).

²⁴¹ *Id.* at 2.

Without consulting the union, the employer notified employees that it would re-bid all routes. The union grieved both the failure to consult and the reduction in total work hours. Arbitrator Eileen A. Cenci agreed with the union that the employer had violated the consultation clause. Though the collective bargaining agreement gave the employer the authority to set schedules and shifts, that authority was tempered by the requirement that the employer's actions be "consistent with this Agreement," and the agreement required consultation. Regarding the reduction in work hours, Arbitrator Cenci found the union had failed to show that any bargaining unit members suffered a reduction in hours or wages. Though total work hours had definitively been reduced, drivers had also stopped volunteering for Saturday shifts, so the net effect might have been a wash and the union had failed to show otherwise.²⁴²

Canadian awards similarly require employers to honor the scheduling and pay terms of collective bargaining agreements, notwithstanding challenges posed by the pandemic. For example, in *Heritage Green Nursing Home and Service Employees Int'l Union, Local 1*,²⁴³ the collective agreement set 7.5-hour shifts and required the nursing-home employer to pay time and one-half for work exceeding this.²⁴⁴ When COVID hit, the nursing home moved many employees to twelve-hour shifts, to reduce movement in and out of the home and limit the spread of the virus.²⁴⁵ Employees still worked and were paid for the same total number of hours each week.²⁴⁶ The home did not pay overtime for the daily hours exceeding a 7.5-hour shift.²⁴⁷

The home argued it was excused from paying overtime by a Provincial emergency order²⁴⁸ authorizing nursing homes to "develop, modify and implement redeployment plans, including ... changing the scheduling of work or shift assignments."²⁴⁹ The union did not challenge the home's authority to implement the shift changes but argued the employer violated the collective agreement by failing to pay overtime.²⁵⁰

Arbitrator Bram Herlich agreed with the union.²⁵¹ He found the emergency order authorized the nursing home to schedule employees to regularly work twelve-hour shifts, even if that required overriding the

²⁴² *Id.* at 5–6.

²⁴³ *Heritage Green Nursing Home v. Serv. Emp. Int'l Union, Local 1*, 2020 CanLII 50475 (ON LA) (2020) (Herlich, Arb.) [hereinafter *Heritage Green Nursing Home*].

²⁴⁴ *Id.* at 2.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 4.

²⁴⁷ *Id.* at 2.

²⁴⁸ *Work Deployment Measures in Long-Term Care Homes*, O. Reg. 77/20, (Can.).

²⁴⁹ *Id.*

²⁵⁰ *Heritage Green Nursing Home*, *supra* note 243, at 4.

²⁵¹ *Id.* at 10–11.

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provision of the collective agreement setting 7.5-hour shifts.²⁵² However, the order said nothing about compensation issues, and therefore did not authorize the employer to override those provisions of the collective agreement.²⁵³

4. CALLBACK PAY FOR ONLINE MEETINGS

Callback pay typically provides premium pay, or a guaranteed minimum number of compensable hours, to compensate an employee who is called into the workplace at a time the employee is not usually working. An employee who normally works regular office hours would find it highly inconvenient to be called into the office at midnight to fix a five-minute problem if the employee is paid for only five minutes of work. Do online meetings trigger a requirement that the employer pay callback pay?

That issue arose in *AFSCME, Council 56, Locals 34, 2822, and 2864 and Hennepin County, Minnesota*.²⁵⁴ Hennepin County moved many of its meetings online in Spring 2020 in response to the COVID pandemic.²⁵⁵ In May, the County held two online meetings with employees to review COVID plans and in late May and early June, it held two additional meetings to discuss the County's response to civil unrest related to the death of George Floyd.²⁵⁶ Employees attended these meetings virtually from home.²⁵⁷ They were paid straight time for attending these meetings and received overtime pay if the meetings caused the employees to work more than forty hours that week.²⁵⁸

The 'Call Back Pay' provision of the collective bargaining agreement negotiated before videoconference technology existed provided: "Employees called to the work site by the EMPLOYER shall be paid for hours actually worked at their BASE PAY RATE but not less than three (3) hours. Such payments shall be in cash."²⁵⁹

The union grieved, arguing this provision entitled employees to be paid three hours for each meeting notwithstanding that each meeting lasted one hour or less.²⁶⁰ Arbitrator Gerald E. Wallin disagreed, finding the phrase "to the work site" excluded work performed virtually from an employee's home.²⁶¹

²⁵² *Id.* at 10.

²⁵³ *Id.*

²⁵⁴ *AFSCME v. Hennepin Cnty.* Wolters Kluwer Labor Arb. Awards, 20-2 ARB ¶ 7696 (2020) (Wallin, Arb.).

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.*

5. PAID LEAVE FOR LAPTOP MALFUNCTION

At issue in an unpublished, confidential Indiana award²⁶² was whether an employee was entitled to be paid when she was unable to work because an employer-provided laptop malfunctioned. Grievant worked in the field office of a federal agency.²⁶³ In March 2020, the field office was closed because of the pandemic, and Grievant was given a laptop and told to work from home.²⁶⁴ On April 8, 2020, her laptop died.²⁶⁵ Her supervisor instructed her to bring her laptop to the field office so she could exchange it for a new one.²⁶⁶ Grievant, however, was unable to do so immediately because she had three young children at home whose school was closed because of the pandemic.²⁶⁷

Grievant drove to the field office the next day and exchanged the laptop.²⁶⁸ She requested paid administrative leave for the 6.5 hours she was unable to work on April 8 because of her malfunctioning laptop.²⁶⁹ The agency denied the request and the union grieved.²⁷⁰

The applicable provision of the collective bargaining agreement incorporated a federal statute that provided that “[a]n agency may approve the provision of [paid administrative] leave if ... the employee is prevented from ... performing work at an approved location...”²⁷¹ Arbitrator Richard N. Block held that the word “may” gave the agency discretion in deciding whether to grant Grievant’s request for paid leave.²⁷² He therefore denied the grievance.²⁷³

E. Layoffs and Furloughs

Many employers experienced profound COVID-related reductions in demand for their goods and services and responded by laying off or furloughing workers. This led to conflict over whether such actions were permitted under existing collective bargaining agreements. Often, the furlough or layoff itself was not at issue, but rather its implementation. The issues underlying union grievances included whether the employer followed

²⁶² On file with author (Mar. 2, 2021) (Block, Arb.).

²⁶³ *Id.* at 6.

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 7.

²⁶⁶ *Id.* at 8.

²⁶⁷ *Id.* at 8, 12.

²⁶⁸ *Id.* at 9.

²⁶⁹ *Id.* at 8.

²⁷⁰ *Id.* at 9.

²⁷¹ *Id.* at 17.

²⁷² *Id.*

²⁷³ *Id.* at 24.

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seniority provisions in the collective bargaining agreement when choosing employees for layoff or recall, or whether the employer provided adequate notice or complied with other procedural requirements.

1. LAYOFFS

Most collective bargaining agreements contain provisions describing the circumstances under which an employer may lay off bargaining-unit members and the procedures the employer must follow when doing so. These provisions often were drafted in consideration of any long-term declines in demand for which an employer could plan in advance. The pandemic, however, caused many workplaces to shut down abruptly. Some employers have invoked management-rights clauses or *force majeure* clauses in efforts to avoid restrictions in the collective bargaining agreement on layoffs.

Two Canadian awards illustrate employers' invocations of management-rights clauses. One is *BC Ferry Services Inc. and BC Ferry and Marine Workers Union*.²⁷⁴ The employer was a ferry operator in British Columbia that began laying off employees in April 2020 because of a profound decline in ferry traffic caused by the COVID-19 pandemic.²⁷⁵ Article 12 of the parties' collective labor agreement specifically governed layoffs and established an elaborate procedure the employer was required to follow with multiple steps, including several notice periods, a "pre-adjustment canvas" of employees, cascading bumping rights, and severance pay.²⁷⁶

The employer argued it would be "absurd" to apply Article 12 to a temporary layoff or to hold it to a 60 days' notice requirement,²⁷⁷ asserting instead it was entitled to invoke management rights to effectuate an immediate layoff.²⁷⁸ Arbitrator John B. Hall agreed with the employer that the unprecedented nature of the pandemic made it "not possible" for the employer to comply with the 60 days' notice requirement – but that the employer was nonetheless obligated to uphold the purpose of this provision by ensuring "the Union had an opportunity for input through good faith discussions."²⁷⁹ Arbitrator Hall agreed with the Union that Article 12's detailed description of layoff procedures foreclosed the employer from asserting a "retained" residual management right to temporarily lay off employees.²⁸⁰

²⁷⁴ *BC Ferry Servs. Inc. v. BC Ferry & Marine Workers Union*, 2020 CanLII 89913 (BC LA) (2020) (Hall, Arb.).

²⁷⁵ *Id.* at 2.

²⁷⁶ *Id.* at 3, 7–11.

²⁷⁷ *Id.* at 3.

²⁷⁸ *Id.*

²⁷⁹ *Id.* at 49.

²⁸⁰ *Id.* at 36, 43.

Arbitrator Paul Love reached a similar conclusion in *District of Summerland and Local 213 of the Int'l Brotherhood of Electrical Workers*.²⁸¹ The employer, an electric utility, laid off thirty-five workers because of a COVID-induced reduction in demand for electricity.²⁸² The union challenged the layoff as to a particular employee who had seniority over other employees not laid off.²⁸³ The employer invoked a management-rights clause giving the employer the right to lay off employees at its discretion.²⁸⁴ An article in the collective agreement required layoffs to occur in reverse order of seniority by classification.²⁸⁵ Arbitrator Love held that a general management-rights clause permitting layoffs does not entitle the employer to disregard specific language elsewhere in the collective agreement specifying that layoffs are governed by seniority.²⁸⁶

Though I have not yet found any published U.S. awards on point, I expect that U.S. arbitrators would similarly rule that general management-rights language does not override specific provisions in a collective bargaining agreement about layoffs.

Some, but far from all, collective bargaining agreements contain a *force majeure* clause. Two U.S. awards illustrate employers' invocation of such clauses in imposing layoffs. In *American Association of University Professors – University of Akron Chapter and The University of Akron*,²⁸⁷ the University of Akron invoked a *force majeure* clause in its layoff of nearly 100 faculty members.²⁸⁸ This clause provided:

The parties recognize that catastrophic circumstances, such as a *force majeure*, could develop which are beyond the control of the University and would render impossible or unfeasible the implementation of procedures set forth in the Article.²⁸⁹

Arbitrator John F. Buettner held the COVID pandemic qualified as a “catastrophic circumstance” triggering this clause because of the financial impact the pandemic had on University finances.²⁹⁰ He held this provision overrode other provisions in the collective bargaining agreement governing

²⁸¹ Dist. Summerland v. Local 213 Int'l Bhd. Elec. Workers, 2020 CanLII 108144 (BC LA) (2020) (Love, Arb.).

²⁸² *Id.* at ¶¶ 1–4, 7, 90, 91.

²⁸³ *Id.* at ¶ 192.

²⁸⁴ *Id.* at ¶ 195.

²⁸⁵ *Id.* at ¶ 212.

²⁸⁶ *Id.* at ¶ 295.

²⁸⁷ Am. Ass'n Univ. Professors – Univ. of Akron Chapter v. The Univ. Akron, Wolters Kluwer Lab. Arb. Awards, 20–2 ARB ¶ 7678 (2020) (Buettner, Arb.).

²⁸⁸ *Id.* at 1.

²⁸⁹ *Id.* at 15.

²⁹⁰ *Id.*

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layoffs, such as an advance-notice requirement, because these requirements were “not feasible” given the expediency with which the University needed to effectuate the layoffs to balance its budget.²⁹¹ However, he held the *force majeure* clause would not justify overriding recall provisions in the collective bargaining agreement, because fiscal exigency then would not require immediate action and there would be adequate time for study, planning, and consultation.²⁹²

An arbitrator reached a different conclusion in *Alaska Airlines, Inc. and Aircraft Maintenance Fraternal Association, Local 32*.²⁹³ The parties had negotiated a letter agreement containing limited layoff protections in Paragraph 1 and a *force majeure* clause in Paragraph 2.²⁹⁴ The parties subsequently negotiated more extensive layoff protections which became Paragraph 4.²⁹⁵ The *force majeure* clause provided that “the Company shall be excused from compliance with the above ‘no-layoff’ provision ...” under certain extenuating circumstances.²⁹⁶ Arbitrator Frederic R. Horowitz held the language “with the above ‘no-layoff’ provision” indicated in plain language that the parties intended the *force majeure* clause to apply to the protections in Paragraph 1 but not Paragraph 4.²⁹⁷

Both of these awards illustrate that an employer’s ability to invoke a *force majeure* clause to effectuate a layoff will often turn on the language of the clause itself. Such contract-interpretation issues may include whether the COVID pandemic is the type of unforeseen event that triggers the *force majeure* clause and the extent to which the *force majeure* clause overrides other language in the collective bargaining agreement.

2. FURLOUGHES

Some employers faced with a covid-related reduction in demand have avoided layoffs and instead furloughed workers temporarily. Furloughs raise many of the same issues as layoffs, such as whether the employer has the contractual right to furlough, and even if so, whether the employer followed the contract in effectuating it.

²⁹¹ *Id.*

²⁹² *Id.* at 15–16.

²⁹³ *Alaska Airlines, Inc. v. Aircraft Maint. Fraternal Ass’n, Local 32*, Wolters Kluwer Lab. Arb. Awards, 20–2 ARB ¶ 7677 (2020) (Horowitz, Arb.).

²⁹⁴ *See id.* at 2.

²⁹⁵ *See id.*

²⁹⁶ *Id.* at 4.

²⁹⁷ *Id.* at 5.

An example is an unpublished, confidential U.S. award by Martin Malin.²⁹⁸ A city's tax revenue plummeted as a result of the pandemic, causing a significant tax shortage.²⁹⁹ The city negotiated a wage freeze with most of its unions in return for no layoffs, but the union representing public works employees refused.³⁰⁰ The city then implemented a furlough, reducing the hours of every bargaining unit member by 50%.³⁰¹ The union argued that because the collective bargaining agreement contained procedures for layoffs but not furloughs, furloughs were prohibited.³⁰² The city argued that the language in the agreement stating that "nothing in this Agreement shall be construed as a guarantee of hours of work per day or per week" gave the city the unfettered right to reduce working hours. Arbitrator Malin agreed with the city.³⁰³

F. *Cuts to Employee Benefits*

The COVID pandemic caused real economic hardship to many employers, and often employers sought to shift much of this hardship to employees. One way of doing this was to cut employee benefits.

1. *CUTS TO DEFINED-CONTRIBUTION RETIREMENT PLANS*

Many U.S. employers offer defined-contribution retirement plans such as 401(k)s (for private-sector employees) or 403(b)s (for educators and tax-exempt organizations). Many of these retirement plans contain an employer-matching provision designed to encourage employees, especially lower-income employees, to participate. If the employees are members of a union, the matching provision is likely a term of their collective bargaining agreement. Three awards—one published and two unpublished—deal with this issue. All three awards held that the language of the applicable collective bargaining agreement did not permit the employer to unilaterally cut its matching contribution.

The published award is *AA-1 ARB ¶ 8803*.³⁰⁴ In this award, the parties negotiated a Memo of Understanding that provided:

²⁹⁸ On file with author (Dec. 30, 2020) (Malin, Arb.).

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ Wolters Kluwer Lab. Arb. Awards, ARB ¶ 8803 (2021) (Cooper, Arb.) (party names and other identifying information are redacted).

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The Company agrees to maintain the 401(k) plan for all employees.... The plan allows the employee to save ... and to provide [sic] a 50% Company match of each employee's contribution up to a cap [of 6% of the employees' annual salary]. If the Company chooses to change 401(k) plans it will provide the Union with reasonable prior notice.³⁰⁵

The employer argued the word “allowed” in the second sentence, and the employer's ability to change plans in the last sentence, gave the employer the discretion to unilaterally terminate the match.³⁰⁶

Arbitrator James S. Cooper disagreed. He interpreted the second sentence as giving employees discretion to participate in the plan and obligating the employer to provide the match to employees who opted to participate.³⁰⁷ He interpreted the last sentence as giving the employer the ability to change 401(k) plans, but not as giving the employer the ability to unilaterally suspend its matching contributions.³⁰⁸

Two unpublished, confidential awards by Arbitrator Richard Bales (the author of this article) presented different contract language and employer arguments but contained the same outcome. The collective bargaining agreement provided:

Effective June 1, 2020, all Union employees will be transitioned to the 401(k) plan offered by the Company. The Company reserves the right to adjust benefits and networks. ... [T]he 401(k) plan shall include the following terms:.... [The Company] will match 50% of each dollar you contribute on the first 8% of pay that you defer to the Plan.

The union argued the “shall include” and “will match” terms made the employer's matching contribution mandatory. The company argued the reservation of rights language gave the employer the right to adjust or eliminate the match.

Arbitrator Bales acknowledged that both sides presented compelling plain-language arguments, but ultimately sided with the union, finding that the language in the 401(k) provision of the contract was almost identical to language in the contract on the company's health insurance plan. That language was clearly intended to give the employer discretion to change the

³⁰⁵ *Id.* at 2–3.

³⁰⁶ *Id.* at 3.

³⁰⁷ *Id.* at 4.

³⁰⁸ *Id.*

plan's provider and to adjust coverage. The language did not, however, give the employer discretion to stop paying into the plan. Similarly, Arbitrator Bales ruled the language on the 401(k) plan gave the employer the ability to change the plan provider and investment choices but not discretion to discontinue the employer match.

The employer also raised two additional arguments. First, it argued that its 401(k) summary plan description (SPD) explicitly made matches discretionary. Arbitrator Bales, however, found that this SPD was not part of the collective bargaining agreement and therefore applied only to the employer's employees who were not members of the bargaining unit. Second, the employer argued its revenue crisis sparked by the pandemic gave it a valid business justification for temporarily suspending its 401(k) match. Arbitrator Bales disagreed, finding that under the contract, the employer "did not have the right to make such a change unilaterally, any more than it could unilaterally suspend other terms of the CBA such as pay rates or just-cause termination."

The second unpublished, confidential award involved an educational institution that had suspended contributions to its 403(b) plan. The employer had recently terminated a previous 403(b) plan that applied only to bargaining-unit members and rolled the members into an all-college 403(b) plan. The collective bargaining agreement provided:

Regular employees shall be entitled to participate in the College's Defined Contribution Plan according to its terms, except that a) it will not be mandatory for employees to contribute to it by deferring wages into the Plan, b) if an employee contributes at least 2% of wages to the Plan, the College will contribute an amount equal to 8% of the employee's wages, and c) the College's contributions will vest two years after contributed.

The employer argued first that the "according to its terms" language incorporated-by-reference the terms of the plan's summary plan description, which gave the employer unilateral authority to suspend the matching contribution. Arbitrator Bales disagreed, finding, among other things, that the SPD itself made the employer's matching contribution mandatory for bargaining-unit (but not other) employees.

Second, the employer argued that the "except that" language created exceptions to the bargaining-unit members' right to participate in the all-college plan. Arbitrator Bales again disagreed, finding this phrase preceded terms in the all-college plan that would apply differently to bargaining-unit members as compared to non-bargaining-unit members. One of those terms

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was that, according to the collective bargaining agreement, the employer “will” match contributions by bargaining-unit members, whereas the employer had discretion to match contributions by other employees.

2. *OTHER NEGOTIATED BENEFITS*

An award that is analytically similar to the awards above, albeit regarding a different type of benefit, is the Ohio award of *2020 AAA LEXIS 192*.³⁰⁹ In this example, the collective bargaining agreement between a city and a police union contained a tuition reimbursement program.³¹⁰ The city, however, failed to fund the program, citing lost revenue because of COVID, and the union grieved.³¹¹ Arbitrator Thomas J. Nowell held the tuition reimbursement program was a negotiated benefit, and the employer could not unilaterally terminate its funding without violating the collective bargaining agreement.³¹²

3. *DENYING OR REQUIRING LEAVE*

The COVID pandemic left many employers—especially health-care providers—insufficiently staffed. Many responded by cutting vacations and other leaves-of-absence for employees. For example, in the Canadian award of *THK Rhythm Automotive Canada and the Thompson Products Employees’ Association*,³¹³ a collective bargaining agreement entitled employees to two paid personal holidays per year. During the pandemic, the employer denied three employees’ requests for such holidays, explaining the holidays would leave the employer short-staffed on those days.³¹⁴ The union grieved, arguing the employer had a longstanding practice of routinely granting employee requests for the holidays.³¹⁵ Arbitrator William Kaplan found the employees’ right to choose their holidays was not absolute and that the employer could deny a request for “valid business reasons” after providing an explanation as to the operational reasons why the request could not be granted.³¹⁶

Similarly, in an unpublished American award,³¹⁷ a state psychiatric hospital sent an announcement to all employees stating it would temporarily

³⁰⁹ Tuition Reimbursement, 2020 AAA LEXIS 192 (2020) (Nowell, Arb.).

³¹⁰ *Id.* at *1.

³¹¹ *Id.* at *1–2, 10–11, 18–19.

³¹² *Id.* at *25.

³¹³ THK Rhythm Auto. Canada and the Thompson Prods. Emps’ . Assoc., 2020 CanLII 77149 (ON LA) (2020) (Kaplan, Arb.).

³¹⁴ *Id.* at 2, 3–4.

³¹⁵ *Id.* at 2.

³¹⁶ *Id.* at 6.

³¹⁷ On file with author (Jan. 5, 2021) (Malin, Arb.).

suspend the granting of all vacation requests and that already-approved vacations could be retracted “due to critical staffing needs.”³¹⁸ A provision of the collective bargaining agreement required that the union receive 30 days’ notice of policy and rules changes and, where 30 days was not possible, “notice as soon as possible.” The hospital argued it did not consider the suspension as a change because it was only temporary, and that 30 days’ notice was not possible because of the need to act quickly.³¹⁹ Arbitrator Martin H. Malin found the contract entitled the hospital to implement its policy immediately on an emergency basis but found that the employer was nonetheless obligated to give the union both notice and an opportunity to “meet and confer” as soon as practicable.³²⁰ He found no employee had been harmed by the policy but granted the union’s request for a remedy, concluding that the employer did not properly notify the union of the annual leave suspension.³²¹

The mirror-image of these two awards is *International Association of Machinists and Aerospace Workers and Glory Global Solutions Inc.*³²² The employer, which manufactured coin sorting and counting machines, required employees to use their vacation/paid time off days during a one-week temporary closure of a manufacturing plant while the plant was deep-cleaned in response to the COVID pandemic.³²³ The employer argued that it should be allowed to dictate its employees’ vacation times, citing a company policy which stated that the company would schedule the vacation at the time desired by the employee only “if this can be done without interfering with efficient operations.”³²⁴ Arbitrator Glenn D. Newman disagreed, finding this provision merely entitled the company to reject specific requests that would interfere with operations.³²⁵ He instead focused on a provision stating that “vacation time will be taken at a time as agreed upon between the Company and each employee” as giving each employee the ability to select vacation days, subject to the employer’s approval or disapproval based on operational needs.³²⁶

Arbitrator Newman then turned to the issue of remedy. He noted that the union was not requesting paid time off equal to the number of days members had been forced to take paid leave because that would provide a

³¹⁸ *Id.* at 5.

³¹⁹ *Id.*

³²⁰ *Id.* at 10.

³²¹ *Id.* at 11.

³²² Int’l. Assoc. of Machinists and Aerospace Workers, AFL-CIO v. Glory Glob. Sols. Inc., 2020 BNA LA 1264 (Oct. 13, 2020) (Newman, Arb.).

³²³ *Id.* at *1.

³²⁴ *Id.* at *3.

³²⁵ *Id.* at *7.

³²⁶ *Id.* at *6–7.

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greater remedy than had been negotiated in the collective bargaining agreement.³²⁷ Instead, the union requested, and Arbitrator Newman ordered, that each affected employee should receive a number of unpaid days off equal to the number of paid-time-off days the employee was required to use during the facility closing.³²⁸ This is consistent with the remedy ordered by Arbitrator Obee in *Michigan Corrections Organization and Michigan Department of Corrections*.³²⁹

IV. ANALYSIS: COMPARING CANADIAN AND U.S. AWARDS

Studying arbitration awards on a discrete topic issued in a restricted timeframe offers a unique opportunity to compare and contrast the approaches taken to similar issues in two countries with similar labor laws. However, significant differences in the way awards are selected for publication in each country constrain the conclusions that can be drawn from a comparative analysis. This Part will begin by describing those differences and the consequences that flow from them, then will analyze the similarities and differences in Canadian and U.S. awards.

A. *Selecting Awards for Publication*

As described in Part II above, the process of publishing labor arbitration awards differs considerably in Canada and the U.S. In Canada, the various labor relations acts of all Canadian provinces, except Saskatchewan, as well as the Canada Labour Code, require publication of all awards through their respective Ministries of Labour. These awards are available on CanLII's provincial databases and are accessible, searchable, free, and unredacted. If COVID-related awards are representative of all awards generally, far more Canadian awards are published than American awards. Moreover, because all awards are published, the published awards are by definition representative of all Canadian awards.

By contrast, in the United States, publication of labor arbitration awards is fragmented. Three subscription-only legal publishers maintain databases containing awards submitted by arbitrators who have chosen to submit an award for publication in one or more of these databases. Though the American Arbitration Association says it publishes all labor awards in which no party objects to publication, other awards are published only after (1) an arbitrator has decided to seek publication, (2) the arbitrator then has asked for and received permission from the parties, (3) the arbitrator has submitted the

³²⁷ *Id.* at *9.

³²⁸ *Id.* at *9–10

³²⁹ Mich. Corrs., *supra* note 55.

award to one or more of the legal publishers, and (4) the legal publisher has decided the award is worthy of publication (based on unknown and perhaps idiosyncratic criteria) and adds it to the publisher's database.

Several consequences flow from the U.S. publication process. First, relatively few awards are published, thanks to several major roadblocks in the publication process. One such roadblock is the antipathy many U.S. arbitrators have to publication. It is not that U.S. arbitrators are lethargic or complacent. On the contrary, informal discussions on the National Academy of Arbitrators listserv demonstrate a deeply engrained philosophy against publication that goes beyond confidentiality. Confidentiality could be preserved easily enough by removing identifying names and locations and the like. The aversion to publication seems to stem more from a conviction that the parties own the award in fee simple absolute and that once the arbitrator sends the award out, s/he has no right to use it for any purpose (other than, perhaps, to borrow a paragraph for use in a future case). While COVID cases may not be a representative sample of all awards, if they are assumed to be such, it appears the same handful of arbitrators are contributing a disproportionate number of awards.

A second major roadblock in the publication process is the parties' ability to veto publication. The losing party almost always has an incentive to exercise this veto. Some employers and unions have blanket policies against publication or may want to discourage arbitrators from prolixly writing for publication and billing accordingly.

A third major roadblock in the publication process are the publishers. Fee-based publishers have a disincentive to publish awards that are consistent with myriad previous awards and strong incentives to publish awards that push the boundaries of precedent, take novel approaches to once-settled issues, or otherwise are so far out of the mainstream that parties may want to read the award before selecting the arbitrator for their own cases.³³⁰ Aberrant, not mainstream, awards drive readership.

These roadblocks result in a second major consequence of the U.S. publication process: published awards are unlikely to be representative of awards as a whole. This, in turn, generally diminishes the value of awards as persuasive precedent. In Canada, an hour's worth of research will demonstrate that a consensus has formed among Canadian arbitrators that during the COVID-19 pandemic, arbitration hearings are presumed online absent a compelling reason to hold them in-person.³³¹ In the U.S., even if a comparable number of on-point awards existed, it would be impossible to say with any

³³⁰ Email from John Sass, Arbitrator, to Professor Richard Bales, Ohio Northern University (Mar. 15, 2021, 8:14 p.m.) (on file with author).

³³¹ See *supra* Part III.A.

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degree of certainty that these awards represent a consensus, because they may or not be representative due to publication roadblocks and trends.

The third consequence of the U.S. publication process is that U.S. awards are difficult to research. They are scattered among three different, expensive subscription-only databases. Academics generally have access, as do big law firms (mostly representing employers). Many union-side firms have access to one of the databases but seldom all three, and often unions are represented in arbitration by nonlawyers who do not have access to any of them. Many arbitrators—even National Academy arbitrators at the top of the professional hill—subscribe to none of these databases. All this combines to make access to awards limited and inequitable and discourages arbitrators from looking to previous awards as guidance.

Because published U.S. awards are not necessarily representative of all U.S. awards, this article generously supplements the discussion of published U.S. awards with a discussion of unpublished U.S. awards. As described above in Part II, I have done so by requesting awards through the listserv of the National Academy of Arbitrators. These unpublished, confidential awards may not be perfectly representative either because membership in the NAA is restricted to arbitrators with significant arbitration experience and reputations, and the types of cases for which these awards are assigned may not be a representative sample of all cases. However, including these awards significantly increases the total number of U.S. awards available to analyze and therefore is more likely to be representative than the smaller subset of published U.S. awards.

B. *Unique Features of Canadian Awards*

Comparing Canadian and U.S. COVID-19 pandemic-related arbitration awards suggests two major differences between the two sets of awards. First, Canadian awards are much more likely than U.S. awards to cite to previous arbitral awards as persuasive authority, resulting in the evolution of and consistency of arbitral “law” in much the same way that common law has evolved over time. Second, Canadian arbitrators appear much more likely than their U.S. counterparts to issue awards on preliminary or procedural matters. I suspect these two differences are related.

Exemplifying both differences is the issue of whether an arbitrator would order an online hearing over the objection of one of the parties.³³² Throughout 2020 and into 2021, Canadian arbitrators issued literally dozens of written awards on the issue, whereas U.S. arbitrators issued none. The Canadian awards demonstrate that when COVID-19 hit, the arbitral

³³² See *supra* Part III.A.

presumption shifted quickly from a strong presumption favoring in-person hearings to a presumption favoring online hearings absent a showing of compelling reasons why the hearing should be delayed until it could be held in-person. When it became clear the pandemic would last for months instead of weeks, the presumption favoring online hearings became much stronger, as successive arbitrators rejected parties' various arguments for delaying or holding the hearing in-person. Nearly every award cited one or more preceding awards from different arbitrators, and a consensus standard arose by Fall 2020.

1. *AWARDS ON PROCEDURAL OR PRELIMINARY MATTERS*

As described above, one of the most striking differences between the Canadian and U.S. sets of awards is that Canadian arbitrators issued dozens of decisions on the issue of online versus in-person hearings, and U.S. arbitrators issued none. U.S. arbitrators likely were confronted with this issue at least as often as Canadian arbitrators. The National Academy of Arbitrators listserv and webinars presented by various arbitration organizations demonstrated a robust discussion of the issue informally among U.S. arbitrators—but no written awards. Why might this be?

Three explanations come to mind. First, the roadblocks to the publication of U.S. arbitration awards generally, discussed in Part IV.A, may have prevented the publication of some written awards. But the large proportion of Canadian awards devoted to the issue, and the absence of any U.S. awards on the issue notwithstanding the existence of a significant number of awards on other COVID-related issues, suggests this is not the entire story.

Second, U.S. arbitrators, unlike Canadian arbitrators, may have seen little point in issuing a written award on a preliminary procedural issue. A Canadian arbitrator, knowing their written award will be published, would see the value (both to themselves and to the profession) of writing an award providing guidance to future arbitrators. A U.S. arbitrator, knowing their award is unlikely to be published, might see little value in expending the extra time and effort to craft a well-written award on a preliminary procedural issue—and any such value might easily be outweighed by the possibility the parties might believe the arbitrator is unnecessarily padding their bill.

Third, Canadian arbitrators have authority to issue interim decisions and orders, such as reinstatement of a discharged employee pending arbitration.³³³ Though most Canadian arbitrators, like their U.S. counterparts, usually issue procedural and preliminary rulings informally (such as by email), they may be somewhat more likely than U.S. arbitrators to issue formal rulings

³³³ Kenneth P. Swan, *Labour Arbitration in Canada and Canadians in the NAA*, in *THE ACADEMY 75* (forthcoming 2022) (draft on file with author).

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on such matters. This may have been particularly true on the issue of in-person versus online hearings, where arbitrators may have realized that a reasoned ruling would be useful to other arbitrators and parties.

2. CITATIONS TO ARBITRAL AUTHORITY

Arbitration awards are not precedential in the way that published judicial opinions are under common law.³³⁴ This is because arbitrators are independent of each other rather than part of a hierarchical structure such as a court system.³³⁵ A prior award will control a subsequent decision (if at all) only when the parties, issues, facts, and contract language are substantially identical,³³⁶ which is rare. Prior awards that do not meet these criteria may be cited as persuasive authority.³³⁷ Arbitrators cite to prior awards far less frequently than judges cite to prior cases, and many arbitration awards cite to no authority at all, except for the collective bargaining agreement itself.³³⁸

The Canadian awards described above on the issue of online versus in-person hearings nearly all cited to at least one, and often several, preceding awards on the same topic. Consistent with the above paragraph, the citations were used as persuasive authority rather than mandatory precedent. Similarly, Canadian awards on other COVID-related topics were much more likely than their U.S. counterparts to cite to previous awards raising similar issues.³³⁹ A notable exception is Arbitrator Obee's award in *Michigan Corrections Organization and Michigan Department of Corrections*, citing to both U.S. and Canadian awards and to a draft of this article.³⁴⁰

Because of the limited sample size, it is impossible to extrapolate a general conclusion that Canadian arbitrators are more likely than their

³³⁴ See generally LAURA COOPER ET AL., *ADR IN THE WORKPLACE* 287–96 (4th ed. 2020); DENNIS R. NOLAN & RICHARD A. BALES, *LABOR & EMPLOYMENT ARBITRATION IN A NUTSHELL* 309–19 (4th ed. 2020).

³³⁵ NOLAN & BALES, *supra* note 327, at 310.

³³⁶ COOPER ET AL., *supra* note 327, at 291.

³³⁷ NOLAN & BALES, *supra* note 327, at 316.

³³⁸ The collective bargaining agreement provides both the arbitrator's authority to resolve the dispute and the contract language that the arbitrator must interpret to resolve the dispute. See *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 567–68 (1960) (arbitration clauses in collective bargaining agreements must be interpreted expansively); *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580–81 (1960) (collective bargaining agreements create a system of industrial self-governance, with the arbitrator analogous to a judge); *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960) (arbitration awards that draw their essence from the collective bargaining agreement are broadly enforceable).

³³⁹ See, e.g., discussion *supra* Part III.E.1.a (discussion on whether employees should receive sick pay when they are quarantining).

³⁴⁰ *Mich. Corrs.*, *supra* note 55.

American counterparts to cite to arbitral precedent. But where, as here, arbitrators are faced with a (1) new, (2) important, (3) identical, and (4) frequently recurring issue, given the relative ease with which Canadian arbitrators can search for prior awards on the same issue, it is perhaps not surprising that Canadian arbitrators would look to these awards for guidance. Because, as described above, U.S. awards are far less accessible, it is perhaps not surprising that U.S. arbitrators would be less likely to do the same. This could result in U.S. awards that are less consistent with each other than Canadian awards. However, many U.S. arbitrators—especially National Academy of Arbitrators members—talk informally, on the organization’s listserv, at conferences, or over participatory webinars (especially during the last two years). Even if U.S. arbitrators lack simplified access to each other’s awards, many of them nonetheless have other ways of “crowdsourcing” a consensus approach to contentious issues.

C. *What’s Hot and Not Among COVID Cases in the U.S. and Canada*

During the pandemic, one hot topic among both U.S. and Canadian awards was whether employees were entitled to sick pay for time spent in quarantine. An early Canadian award ruled such employees were not “sick” and therefore not entitled to sick pay.³⁴¹ Later awards in both countries, however, turned on the specific language in each contract, rather than on generally applicable policies.³⁴² Informal discussions among arbitrators on both sides of the border indicate that many arbitrators are sympathetic to the plight of workers forced to quarantine and will generously interpret ambiguous contract language to this end.

Arbitrators in both Canada and the U.S. demonstrated little sympathy for employees who violated reasonable COVID-related workplace safety rules and often remarked that such violations would have justified even harsher discipline than the employer had imposed.³⁴³ Arbitrators were consistently deferential toward employers who, early in the pandemic when little was known for certain about COVID transmission, disciplined employees for violating safety rules that, in hindsight, may have been unnecessary or ineffective.³⁴⁴

An issue that was hotly contested in the U.S. but not as much in Canada was whether employees who remained working when their workplace

³⁴¹ See *supra* text accompanying notes 101–08.

³⁴² See *supra* Part III.E.1.a.

³⁴³ See *supra* Part III.D.2.

³⁴⁴ See *supra* Part III.D.2.

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was “closed” were entitled to premium pay.³⁴⁵ I do not have an explanation for why this might have been a popular issue in the U.S. but not in Canada.

Most surprising to me were the issues I expected to arise frequently on both sides of the border, but which arose rarely or not at all. I expected to see lots of awards in which unions challenged an employer’s unilateral imposition of COVID-related safety measures, such as mask-wearing, social distancing, and the like. Instead, the only two awards on this topic were two Canadian awards, one in which a nurses’ union unsuccessfully challenged the use of COVID nasal-swab tests, and another which challenged a no-moonlighting policy at a healthcare facility. Similarly, I expected to see a plethora of awards in both countries involving union allegations that employers had failed to provide adequate safety equipment or procedures but instead found only one series of Canadian awards raising this issue.³⁴⁶ Likewise, I expected to see lots of awards involving employers who had disciplined employees for engaging in off-duty conduct that might have exposed the employees themselves or their co-workers to COVID, such as social media posts of employees engaged in non-socially-distanced partying. I saw no such awards on either side of the border. I also expected to see, but did not, awards challenging employers’ return-to-work policies. Finally, I did not see any awards related to vaccination policies, such as employers requiring employees to be vaccinated as a condition of employment. I suspect, however, that awards on this issue are still in the grievance-resolution pipeline. Because vaccinations did not become widely available until Spring 2021, there has not yet been sufficient time for these disputes to result in published awards.

D. *An Overarching Theme of Consistency*

Both Canadian and U.S. awards were more consistent than I expected, in several respects. First, there were no radical departures from prior arbitral principles and approaches—instead, arbitrators simply applied established principles and approaches to new fact situations. For example, on the issue of whether employees were entitled to sick or vacation pay for quarantining,³⁴⁷ arbitrators applied existing contract language notwithstanding a showing of sympathy for the employees (and often employers) caught in difficult situations. On the issue of premium pay for COVID-related emergency work, arbitrators generally applied the same interpretation of contract language that often had been drafted with short-term emergencies such as snowstorms in mind.³⁴⁸

³⁴⁵ See *supra* Part III.E.2.

³⁴⁶ See *supra* Part III.C.

³⁴⁷ See *supra* Part III.E.1.a.

³⁴⁸ See *supra* Part III.E.2.

One exception to this general consistency with prior principles and approaches was the abrupt transition away from the strong presumption favoring in-person arbitration hearings to a strong presumption favoring online hearings. This trend was both well-documented in Canadian arbitral awards and definitively occurred in the U.S. as well, even if not memorialized in published awards. This presumption-shift already seems to be waning in many parts of the U.S., and it is still an open question as to what proportion of post-pandemic hearings will be in-person versus online now that arbitrators, advocates, and parties are familiar with the technology supporting online hearings.³⁴⁹

A second I noticed was that the remedies found in both U.S. and Canadian awards were mostly consistent with each other. For example, neither Canadian nor U.S. arbitrators showed much sympathy for employees who violated COVID-related safety rules,³⁵⁰ nor did these arbitrators apply 20/20 hindsight to safety rules that seemed reasonable early-on in the pandemic but that became less defensible as the pandemic became more thoroughly understood.³⁵¹

A third finding was that both sets of arbitrators were reasonably consistent in their awards by issue. For example, arbitrators consistently held that the pandemic alone would not justify wholesale cuts to employment benefits promised in a collective bargaining agreement.³⁵² This did not necessarily mean, however, that the outcomes on each issue were the same. For example, on issues of premium pay,³⁵³ layoffs,³⁵⁴ and furloughs,³⁵⁵ arbitrators often reached different outcomes, but did so because of differing contractual language. Such overall consistency should not be surprising. If arbitrators adhere to first principles, such as tying their awards to contract language instead of making up “new rules for new times,” awards should remain roughly consistent with each other over time. This, in turn, gives the parties some degree of confidence in the stability of their labor contracts and in their expectation that the labor contract they negotiated yesterday will not be upended by unexpected events tomorrow.

³⁴⁹ See Richard A. Bales, *Zoom v. In-Person Arbitration Hearings*, 49 ABA LAB. & EMP. L. NEWSL. (June 3, 2021), https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/winter-spring-2021-issue/zoom-vs-inperson/.

³⁵⁰ See *supra* Part III.D.2.

³⁵¹ See *supra* text accompanying notes 61–63.

³⁵² See *supra* Part III.G.

³⁵³ See *supra* Part III.E.2.

³⁵⁴ See *supra* Part III.F.1.

³⁵⁵ See *supra* Part III.F.2.

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V. CONCLUSION

The COVID-19 pandemic abruptly changed the way many Americans and Canadians work, raising novel issues under many collective bargaining agreements. Analysis of the arbitration awards grappling with these issues offers a unique opportunity to compare and contrast the Canadian and U.S. labor arbitration systems. Canadian awards are much more likely than U.S. awards to cite to previous arbitral awards as persuasive authority, resulting in a more consistent evolution of arbitral “law” in much the same way that common law has steadily evolved over time. Canadian arbitrators appear much more likely than their U.S. counterparts to issue awards on preliminary or procedural issues, particularly when such an award may be instructive to other arbitrators and parties grappling with the same issues. Issues that arose frequently on both sides of the border included discipline for violating COVID-related safety rules and whether employees were entitled to sick or vacation pay while quarantining. An issue that arose frequently in the U.S but not Canada was whether employees were entitled to premium “emergency” pay during pandemic conditions. Other issues which arose infrequently included challenges to return-to-work policies and employee discipline for off-duty conduct that risked COVID exposure.

