A Comparative Analysis of Novel Issues in U.S. and Canadian Labor Arbitration Related to COVID-19

by

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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 those labor arbitration awards, then comparatively analyzes the awards from Canada and the United States.

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I. Introduction

The COVID-19 pandemic arrived in 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 hoped the pandemic would be short-lived and everything would soon return to normal.[3] When it became clear 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 health care facilities were overwhelmed; many workers worked around the clock and had their vacation and other leaves cancelled. Workers in other industries lost their jobs, either temporarily or permanently, as the economy shut down, then slowly reopened, and consumer demand shifted. For the many workers who could not work for 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

[1] Centers for Disease Control & Prevention, Press Release, *First Travel-related Case of 2019 Novel Coronovirus Detected in the United States* (Jan. 21, 2020), https://www.cdc.gov/media/releases/2020/p0121-novel-coronavirus-travel-case.html.
[2] Elizabeth Wolstein, *Do State Shut-Down Orders Effect a Taking for Which the State Must Pay Just Compensation?*, New York 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).
[4] *Id*.
[5] 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*.

protect worker' health, furloughed or laid off workers, cancelled 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 their action was 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.

When unions disagreed, often they grieved. The final step in resolving grievances in nearly every collective labor agreement is binding arbitration.[7] This has led to arbitration awards over the last 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. labor arbitration awards that deal in some significant way with issues that arose because of the COVID-19 pandemic in 2020-21. The article does not include the many interest arbitration awards in which healthcare workers, firefighters, police officers, and other front-line essential workers have requested safer working conditions and additional pay to compensate them for the additional hazards they have faced. Nor does it 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 I received this way were unpublished opinions. I have included a brief discussion of such awards where the issue is novel or the analysis compelling. However, consistent with the NAA Code of

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

Professional Responsibility, I cannot cite to these cases by name or describe the facts in too much detail because each 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 all three legal publishers.

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 to draw any significant conclusions.

By contrast, the labor relations acts of all Canadian provinces except Saskatchewan, and the Canada Labour Code, require publication of all awards through their respective ministries of labour. CanLII,[9] the database of Canadian law provided by the Canadian Legal Information Institute, collects the awards from the ministries and uploads them to a public database that is accessible, searchable, and free. Searching CanLII in January and February 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 hearing was held online instead of in person. I then wrote the article *Novel Issues in Canadian Labour Arbitration Related to COVID-19*[10] for publication in 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.

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[8] National Academy of Arbitrators, Code of Professional Responsibility, §2.C.b. ("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] https://www.canlii.org/en/. Special thanks to Arbitrators Christopher Albertyn and John Stout for alerting me about CanLII's existence.

[10] ___ ARBITRATION L. REV. ___ (forthcoming fall 2021).

This is that article. With the help of two stellar law librarians,[11] I searched U.S. databases again in March and June 2021, and by then 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-Related Arbitration Awards

A. 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. [12] I will defer until Part IV consideration of why the Canadian and U.S. experiences might differ so markedly, and here will only summarize the Canadian approach.[13]

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. Before COVID, arbitrators presumed hearings would be in-person – and that all witnesses would testify in-person – absent a compelling contrary reason. Arbitrators reasoned that observations of a witness's demeanor are important to assessing credibility, and that demeanor can best be observed in-person rather than by telephone or video. Similarly, arbitrators reasoned that advocates needed to be able to observe a witness's demeanor to conduct an effective cross examination.[14] Even after the pandemic began, arbitrators frequently referred to in-person hearings as "the gold standard".[15]

In early 2020, many people still hoped the pandemic would be short-lived, so the issue concerning online hearings was whether to delay the hearing in anticipation 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

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[11] Many thanks to Nancy Armstrong and Dustin Johnston-Green for their help crafting and running these searches.
[12] Bales, *supra* note __, at Part III.A.
[13] A more detailed description of the Canadian awards is found in Richard Bales, *Novel Issues in Canadian Labour Arbitration Related to COVID-19*, ___ ARBITRATION L. REV. ___ (forthcoming fall 2021).
[14] Memorial Univ. Newfoundland, 2014 Carswell Nfld. 456 (2014) (Arbitrator Oakley) (cited in BC Public School Employers' Assoc./ SD No. 39 (Vancouver) and BC Teachers' Federation/ Vancouver Elementary School Teachers' Assoc., 2020 CanLII 76272 (BC LA) (Sept. 1, 2020) (Elaine Doyle)); Sunnybrook Health Sciences Ctr. and ONA (SB16-06), 2017 CarswellOnt 21721, 294 L.A.C. (4th) 183 (Ont. Arb.) (Arbitrator Surdykowski).
[15] *See, e.g.*, Toronto Transit Commission v. Amalgamated Transit Union, Local 113, O.L.A.A. No. 103 (Ont. Arb.) (2020) (Arbitrator Goodfellow) at ¶ 14.

or videoconference and to the handful of post-covid-onset cases that then had been decided.[16] An early and influential case by Arbitrator Gordon F. Luborsky announced a balancing test for determining whether to grant an adjournment or convert an in-person hearing into a videoconference where the pandemic made it impossible because of legal restrictions on in-person gatherings to convene hold an online hearing. 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.[17]

A subsequent decision by Arbitrator Luborsky expanded the presumption to cover pandemic situations when in-person gatherings were permissible though not advisable, noting the COVID risk persisted even if legal restrictions on gatherings had been lifted and that some people may be reluctant to disclose their underlying medical conditions or other risk factors.[18] He also found, in both this award and a third award, that arguments about needing in-person hearing 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.[19]

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*,[20] Arbitrator Colin Johnston ordered an online hearing over a union's objection that such a hearing was inappropriate for a termination case.[21] He specifically found that the online format had "become the norm for holding labour arbitration hearings since the onset of the Pandemic"[22] 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."[23] Other arbitrators ordering online hearings have rejected arguments based on security of the online platform,[24] a party's general

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[16] *See, e.g.*, Southampton Nursing Home and Service Employees Int'l Union, Local 1 Canada, 2020 CanLII 26933 (ON LA) (Apr. 14, 2020 (Gordon F. Luborsky).
[17] *Id*. at ¶ 41.
[18] City of Hamilton and Hamilton Ontario Water Employees Association (HOWEA), 2020 CanLII 59546 (ON LA) (Gordon F. Luborsky) at ¶ 36, citing Geoffrey B. Morawetz, Chief Justice, *Notice to the Profession re: Justice Participants Unable to attend In-Court Hearings in the Ontario Superior Court of Justice* (July 21, 2020), available at https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/in-court-hearings/.
[19] City of Hamilton at ¶ 35; Corporation of the City of Belleville and Belleville Professional Firefighters' Association, 2020 CanLII 65743 (ON LA) (Gordon F. Luborsky) at ¶ 13.
[20] 2020 CanLII 107569 (Oct. 27, 2020) (Colin Johnston).
[21] *Id*. at ¶ 3.
[22] *Id*. at ¶ 16.
[23] *Id*. at ¶ 21.
[24] City of Toronto and Canadian Union of Public Employees Local 79, 2020 CanLII 68805 (ON LA) (Marilyn A. Nairn) at ¶11.

discomfort with online technology,[25] and purported difficulty of using online technology in document-intensive cases.[26]

Only one Canadian arbitrator to my knowledge has ordered an in-person hearing over objection.[27] However, because this award was issued only a few days after Arbitrator Luborski's second award described above, it relied on Arbitrator Luborski's finding that the presumption applied only when the pandemic made an in-person hearing impossible, and did not reflect Arbitrator Luborski's subsequent decision that the presumption favoring online hearings applies even when in-person awards are legally permissible.[28] 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.[29]

B. Mandatory Return to Work

I expected to find a plethora of awards dealing with issues related to mandatory returning 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.

The award is *Josephine County and Service Employees International Union Local 503, Oregon Public Employees Union*.[30] The grievant was a truck and heavy equipment mechanic for Josephine County, Oregon.[31] He had two children, in eighth and eleventh grades. [32] Oregon schools went online in April 2020 because of COVID-19.[33] Grievant's wife had just started a new job and could not take time off; they had no family nearby to help, so the family decided

[25] Cancoil Thermal Corp, and United Food and Commercial Workers Canada, Locals 175 & 633, 2020 CanLII 34521 (May 12, 2020) (Kim Bernhardt) at ¶18.
[26] Regional Municipality of Peel (Peel Regional Paramedic Services) and Ontario Public Service Employees Union Local 277, 2020 CanLII 48565 (July 20, 2020) (Kelly Waddingham), at ¶19.
[27] BC Public School Employers' Association SD No. 39 (Vancouver) and BC Teachers' Federation/ Vancouver Elementary School Teachers' Association, 2020 CanLII 76272 (BC LA) (Sept. 1, 2020) (Elaine Doyle).
[28] BCPSEA/SD No. 68 and BCTF/Nanaimo District Teachers' Assoc., 2020 CanLII 89909 (Sept. 29, 2020) (Amanda Rogers).
[29] Mount Sanai Hosp. and National Organized Workers Union, 2020 CanLII 28953 (ON LA) (Apr. 22, 2020) (Gail Misra); Extendicare and Service Employees International Union, 2020 CanLII 36854 (ON LA) (June 1, 2020) (Elaine Newman) at ¶¶ 15-14.
[30] To be posted on the Oregon ERB website (June 4, 2021) (Stephen Douglas Bonney).
[31] *Id*. at 2.
[32] *Id*. at 4.
[33] *Id*.

Grievant would take FMLA leave[34] as permitted by the Emergency Family and Medical Leave Expansion Act.[35] When the children began summer break, the County notified Grievant he had four weeks FMLA leave remaining for 2020.[36]

In August 2020, after learning his children's school would be online at the beginning of the 2020-21 school year, Grievant submitted two leave requests: one for the remainder of his FMLS leave, and the other for paid time off (PTO) using the 434[37] hours accrued in this PTO bank.[38] The County granted the first request, but denied the second because of "Low Staffing Levels".[39] On September 28, the County told Grievant 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.[40] He did not return.[41] 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.[42] The union grieved.

The collective bargaining agreement provided that an employee failing to return from a 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."[43] Grievant's absence was not because of sickness or disability, and neither party disputed that pandemic-related school closures were "beyond [Grievant's] control", so the issue turned on whether Grievant was "unable to return to work by reason of … other legitimate reason".[44]

Arbitrator Stephen Douglas Bonney found Grievant had made this showing. 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

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[34] *Id*. at 4-5.
[35] 29 U.S.C. §§ 3101-3106, amending Title I of the Family and Medical Leave Act (FMLA), 29 U.S.C. 2601, et seq. (permitting certain employees of covered employers to take up to twelve (12) weeks of expanded family and medical leave, ten 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 child care provider is closed or unavailable due to Covid-19 related reasons).
[36] *Id*. at 4.
[37] *Id*. at 7.
[38] *Id*. at 5.
[39] *Id*. at 5.
[40] *Id*. at 6.
[41] *Id*.
[42] *Id*. at 7.
[43] *Id*.
[44] *Id*. at 10.

> 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 they were flexible, there was no evidence indicating that management ever took the initiative in meeting with the grievant or exploring concrete options that would allow him to return to work. [45]

As remedy, Arbitrator Bonney directed the County to restore Grievant's PTO bank to the full 434 hours.[46]

C. Workplace Safety Issues

Another issue on which I expected to find lots of awards – but have not – 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 failing to permit employees to self-isolate as needed.[47] Another Canadian award, this time by Arbitrator Colin Johnson, involved claims by nurses that an Ontario-area hospital had not adequately provide 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.[48]

I have not yet found any U.S. awards on point.

D. Covid Workplace Policies

1. Duty-to-Bargain and Substantive Challenges

By mid-2020, most employers had adopted some form of workplace policies designed to protect employees and others from COVID-19. 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

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[45] *Id*. at 11.
[46] *Id*. at 14.
[47] Participating Nursing Homes and Ontario Nurses Association, 2020 CanLII 32055 (ON LA May 4, 2020) (John Stout); Participating Nursing Homes Sienna Madonna Care Community and Ontario Nurses' Association 2020 CanLII 39641 (ON LA June 10, 2020) (John Stout); Blackadar Continuing Care Ctr. and Ontario Nurses' Association, 2021 CanLII 3440 (ON LA Jan. 13, 2021) (John Stout).
[48] Health Sciences North and Ontario Nurses/ Association, 2021 CANLII 35430 (ON LA April 16, 2021) (Colin Johnston).

Arbitrator Augustus M. Richardson's Award in *Canadian Union of Public Employees, Local 3513 and Breton Ability Centre*,[49] finding that a group home's implementation of a no-moonlighting policy in an attempt to curb transmission among health care 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 the rule was temporary.[50] 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".[51]

An example of a direct substantive challenge of a COVID-19 policy is *Caressant Care Nursing & Retirement Homes and Christian Labour Assoc. of Canada*,[52] which also is described in my earlier article. A nursing home required all staff to receive a nasal-swab test for COVID every two weeks.[53] The union, analogizing this to a random drug test, argued the policy was an unreasonable exercise of management rights and an intrusion on employee privacy and dignity.[54] Arbitrator Dana Randall disagreed, finding the severe impact of a COVID infection – especially to the vulnerable population of a nursing home – far outweighed the indignity of a nasal swab.[55]

To date I have not found any U.S. awards challenging covid workplace policies on either duty-to-bargain or 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.[56] For example, in *Mercy Health General Campus*,[57] 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. 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, 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 grievance pipeline.

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[49] 2020 CanLII 93886 (NS LA Dec. 1, 2020) (Augustus M. Richardson).
[50] *Id*. at ¶¶ 93-95.
[51] *Id*. at ¶ 101, 104.
[52] 2020 CanLII 100531 (ON LA Dec. 9, 2020) (Dana Randall).
[53] *Id*. at 1.
[54] *Id*. at 6-7.
[55] *Id*. at 8-9.
[56] GC Memo 20-04 Case Summaries Pertaining to the Duty to Bargain in Emergency Situations (3/27/2020); Children School Services, Case No. 5-CA-258669 (6/30/2020); Mercy Health General Campus, 07-CA-258425 (7/15/2020).
[57] 07-CA-258425 (7/15/2020).

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) thew a pizza party in violation of a hospital's COVID policy restricting communal social gathering in the hospital and the sharing of food. Arbitrator Norm Jesim agreed discipline was appropriate, but held discharge was disproportionate compared to the other employees who had participated in the party.[58]

- 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.[59]

- 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 "This 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 March 30 incident did not warrant discipline, because although the COVID screening questions are commonplace now, they 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.[60]

- 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 "You 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 the gardener was lucky the school did not fire him.[61]

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[58] Trillium Health Partners and CUPE Local 5180, 2021 CanLII 127 (ON LA Jan. 7, 2021) (Norman Jesin).
[59] Labourers' Int'l Union of North America, Ontario Provincial District Council and Labourors' Int'l Union of North America, Local 183 and Aecon Industrial, a Division of Aegon Constr. Group Inc., 2020 CanLII 91950 (ON LA Nov. __, 2020) (Joseph D. Carrier) (date blank on award).
[60] Canadian Union of Public Employees, Local 3226 and Town of Quispamsis, 2021 CanLII 43139 (NB LA May 14, 2021) (Michel Doucet).
[61] Board of Education of School District No. 39 (Vancouver) and Canadian Union of Public Employees, Local 407, 2021 CanLII 43175 (BC LA May 10, 2021) (Paul Love).

Reported U.S. cases – though there aren't as many of them – are consistent with the Canadian ones in showing little sympathy for workers who knowingly violate reasonable COCID safety policies. For example, in the Connecticut case of AAA Labor Arbitration Award No. AA-1 ARB ¶ 8801,[62] 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 requiring the wearing of surgical masks at all times while on duty.

On the morning of April 9, 2020, the grievant was off duty, having just finished his shift at a firehouse. He received a text from a fellow firefighter and childhood friend, on duty at the time at Fire Headquarters, that made him upset. The grievant entered Fire Headquarters through a door that was not the covid-designated entrance. He was not wearing a mask, and did not present himself for COVID questioning or a temperature check. He approached his ostensible friend and the two engaged in a brief shouting match.

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

In an unpublished case,[63] 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[64] upheld the discharge.

An award in which an arbitrator rejected the imposition of discipline is 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.[65] When COVID hit, however, the company made several statements to employees tending to indicate that absences for COVID-related symptoms would not be counted under the policy.[66] For example, during shop meetings about COVID, management officials told employees not to worry about absences during the pandemic.[67] The General/Plant manager

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[62] (Wolters Kluwer) (Feb. 22, 2021). 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.

[63] On file with author. As described above in footnote __ (8), I cannot cite to unpublished cases by name or describe the facts in too much detail because each would violate the confidentiality of the arbitration proceeding.

[64] The arbitrator of this award requested that his name be withheld.

[65] *Id*. at *3-5.

[66] *Id*. at *13-16.

[67] *Id*. at *15.

told employees at a shop meeting that absences during the pandemic would be handled on a "case by case" basis.[68] The 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."[69]

On March 20, 2020, the grievant, a Crane Operator,[70] called in sick because he had chills and a headache.[71] The company assessed him one point toward the attendance policy, which put him at six points and therefore at the threshold for discharge.[72] On April 8, he came to work 20 minutes late, for which the company assessed one-half point, putting his total at 6.5.[73] The company then fired him.[74]

The union grieved, arguing the company should not have counted the March 20 absence for COVID symptoms.[75] Arbitrator Michael J. Bommarito agreed. He found the absence policy 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.[76] He therefore found Grievant lacked notice about what he could be disciplined for or what the discipline would be.[77] Arbitrator Bommarito therefore ordered grievant reinstated with back pay and 5.5 points under the company's attendance policy.[78]

E. 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 changes in demand for the employer's goods or services, whether an employees are entitled to callback pay for online meetings, and other similar issues.

1. Sick Pay

[68] *Id*.
[69] *Id*. at *11-12.
[70] *Id*. at *28.
[71] *Id*. at *12.
[72] *Id*. at *16.
[73] *Id*. at *16-17.
[74] *Id*.
[75] *Id*. at *17.
[76] *Id*. at *21.
[77] *Id*. at *22.
[78] *Id*. at *28.

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 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 prefer the option of receiving sick or vacation pay while in quarantine. Employers have generally been receptive to this, 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 a vacation.

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

An easy place to start is 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.*,[79] by Arbitrator John Stout. A union representing nurses filed grievances against several Ontario-area nursing homes alleging failure to pay compensation when nurses had to quarantine because of the COVID pandemic.[80] The union's position was that nurses under quarantine were "sick" and therefore entitled to sick-pay compensation.[81] The nursing homes argued that only nurses who had exhibited symptoms or tested positive are "sick" and therefore entitled to sick pay.[82]

Arbitrator Stout agreed with the nursing homes. 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]".[83] 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.[84] Asymptomatic employees who have not tested positive or who have not been tested likewise are not contractually entitled to sick pay.[85]

A similar case is *Municipality of Chatham-Kent and Canadian Union of Public Employees, Local 12.2*.[86] Grievant, a municipal librarian, took an ill-timed vacation to Mexico, and returned to Canada in March 2020 just as the pandemic was arriving.[87] Upon her return, her employer directed her to self-isolate at home for fourteen calendar days and to use sick time for the ten

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[79] 2020 CanLII 36663 (ON LA May 26, 2020) (John Stout).
[80] *Id*. at ¶ 2.
[81] *Id*. at ¶ 4.
[82] *Id*.
[83] *Id*. at ¶ 43.
[84] *Id*. at ¶¶ 55-56.
[85] *Id*. at 59.
[86] 2021 CanLII 37778 (ON LA April 30, 2021).
[87] *Id*. ¶ 7.

working days she missed work.[88] 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 grievant's work hours without notice, and that the employer improperly required grievant to draw from her sick bank when she was not sick.[89]

Arbitrator Colin Johnston, citing Arbitrator Stout's award described above, ruled the grievant was not entitled to wages for the time spent in quarantine.[90] He found 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.[91] He also found the quarantine was not a change in work hours because that 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.[92]

However, Arbitrator Johnson found the employer violated the labour agreement by requiring the employee to draw from her sick bank when she was under quarantine. The agreement provided that payment under this provision is for "absences due to illness or non-work related injury including dental and medical appointments …".[93] Grievant's quarantine was not an illness or injury and did not require any medical appointments.[94] Instead, the employer should have treated it as an unpaid leave of absence.[95]

Together, these two Canadian awards stand for the general proposition that, under a typical labor contract defining "sick" in the typical way, an employee 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 using their sick/vacation days so their paycheck continues.

A U.S. award consistent with this approach, but arising under very different circumstances, is *3M Company and United Steelworkers, Local 11-75*.[96] In March 2020, 3M

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[88] *Id*. ¶ 12-13.
[89] *Id*. ¶¶ 16-23.
[90] *Id*. ¶¶ 52-53.
[91] *Id*. ¶ 58.
[92] *Id*. ¶ 67.
[93] *Id*. ¶ 79.
[94] *Id*. ¶¶ 77-81.
[95] *Id*.
[96] Wolters Kluwer Labor Arbitration Awards, 21-1 ARB ¶ 7747 (Dec. 4, 2020) (A. Ray McCoy).

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 …".[97] 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.[98] 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.[99] 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.[100] Grievant never reported an inability to work; was not ill, injured, or pregnant; and had not supplied medical documentation.[101] Instead, he had simply reported cold-like symptoms, and 3M had ordered him to quarantine.[102] 3M therefore 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 that such as grading papers. The school countered 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:

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[97] *Id*. at 3.
[98] *Id*. at 10.
[99] *Id*. at 13.
[100] *Id*. at 5-6.
[101] *Id*. at 11.
[102] *Id*.

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.

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 health care provider.[103] It was in effect from April 1 through December 31, 2020, [104] and its implementing regulations exempted employees who are "health care providers".[105]

Two U.S. awards – one published and one not – consider the applicability of the FFCRA to pandemic leave. In one, an unpublished award from New York,[106] an employer paid several employees during their quarantines and docked them for a commensurate number of sick and vacation days.[107] The union grieved, asking the arbitrator to return those days.[108] 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.[109] 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.[110] Arbitrator Adelman required the employer to return three days to two employees for days when the employees were seeking medical diagnoses for possible COVID infection.[111]

The published FFCRA award is *Squirrel Hill Wellness and AFSCME District Council 84, Local 1807*.[112] 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.[113] The employer apparently put her on an unpaid leave of absence.[114] The union

[103] Pub.L. 116–127 (2020).
[104] *Id*.
[105] 29 C.F.R. § 826.30 (excluding health care providers).
[106] On file with author (Apr. 15, 2021) (Richard Adelman).
[107] *Id*. at 3.
[108] *Id*. at 6-7.
[109] *Id*. at 11.
[110] *Id*. at 11-12.
[111] *Id*. at 13-14.
[112] 2021 BL 147534, 2021 BNA LA 27 (April 12, 2021) (John M. Felice).
[113] *Id*. at *1.

grieved, arguing she was entitled to pay under the FFCRA.[115] Arbitrator John M. Felice disagreed, finding that as a certified nurse assistant[116] she was a "health care provider" excluded by the statute.[117]

c. Other Sick- and Vacation-Pay Issues

One other unpublished award deals with sick- and vacation-pay issues. In a New York case,[118] 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.[119] When COVID hit, the employer invoked this clause, ceased operations, and furloughed most of its workers.[120] 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.[121] The union grieved.

On the vacation issue, the employer argued a vacation is "respite from work".[122] 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.[123] On the sick-pay issue, the employer argued that sick pay is for employees who are sick and are missing work.[124] 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.[125] Equitably, the employees had earned this banked vacation time and should be entitled to use it.[126] Moreover, the employer had frequently encouraged employees to use their vacation time during layoff periods,

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[114] *Id*.
[115] *Id*.
[116] FFCRA's implementing regulations defined "health care providers" as including "[n]urses, nurse assistants…". 29 C.F.R. § 826.30©(1)(i)(B).
[117] 2021 BL 147534, 2021 BNA LA 27 at *3.
[118] On file with author (Dec. 29, 2020) (Richard Adelman).
[119] *Id*. at 4.
[120] *Id*. at 4-5.
[121] *Id*. at 5, 12.
[122] *Id*. at 8.
[123] *Id*.
[124] *Id*. at 14.
[125] *Id*. at 10.
[126] *Id*.

undercutting its argument that vacation time could be taken only when the employer was operating.[127]

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.[128] 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."[129]

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[130] 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-through-12th-grade schools closed for several weeks effective end-of-business March 16.[131] Notwithstanding closure of the physical school buildings to students, teaching continued online,[132] and many teachers taught from the school buildings.[133] 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 to be available to work and would be called in as needed.[134] This continued through June 30, 2020, [135] though most employees returned to their regular work schedule after a general order of return to work was made on May 4, 2020.[136]

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[127] *Id*.
[128] *Id*. at 15.
[129] *Id*. at 15-16.
[130] 2020 BL 515283, 2020 BNA LA 1918 (Dec. 11, 2020) (Michael Paolucci).
[131] *Id*. *5.
[132] *Id*. at *6.
[133] *Id*. at *5.
[134] *Id*. at *6.
[135] *Id*. at *7.
[136] *Id*. at *16.

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].[137]

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.[138]

Arbitrator Michael Paolucci found that the COVID pandemic qualified under the phrase "other calamity", and that therefore Calamity Pay applied.[139] 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.[140] He reasoned that the most logical end-point for Calamity Pay was May 4, 2020, when most employees returned to work as usual.[141] 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 who are not actually working. In this way, double pay, an otherwise extraordinarily large benefit, can be justified.[142]

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*.[143] The Mayor of the City of Portland issued a local state of emergency on March 12, 2020 in response to the pandemic.[144] On March 15, City buildings were closed, with only "critical" employees allowed access.[145] Other employees were ordered to stay at home and telework if possible.[146]

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[137] *Id*. at *2-3.
[138] *Id*. at *8.
[139] *Id*. at *14.
[140] *Id*. at *14-15.
[141] *Id*. at *16-17.
[142] *Id*. at *15.
[143] To be published at the website of the Oregon Employment Relations Board (Feb. 18, 2021) (Stephen D. Bonney).
[144] *Id*. at 6.
[145] *Id*.
[146] *Id*.

A coalition of six City unions filed a class grievance complaining the City failed to provide "holiday pay" pursuant to the collective bargaining agreement.[147] The applicable provision of the contract provided:

> 9.12 Essential Employees. 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.[148]

The unions argued that City workers who physically reported to work at a City office or in the field (but not teleworkers) should receive holiday pay while the City was closed and most employees were sitting at home and paid for not working.[149]

Arbitrator Stephen D. Bonney noted that Article 9.12 was negotiated to address the inequity, that frequently arose during snowstorms, of requiring essential employees to commute to work in dangerous conditions while other employees were paid to stay home.[150] He interpreted Article 9.12 as being triggered when three things occurred: (1) a citywide closure, (2) 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.[151] He found all three conditions satisfied on March 15, 2020, when City offices were closed, essential employees were ordered to report to work, and other employees were paid to despite not working.[152]

The unions argued the holiday pay should continue through mid-May.[153] However, Arbitrator Bonney found that by April 1, most City workers had obtained laptops and VPNs and were able to telework from home.[154] He therefore found April 1 the appropriate date for ending the holiday pay.[155]

An award raising the same issue of premium pay during emergencies – but containing very different contract language – is an unpublished award from New York by Arbitrator Howard G. Foster.[156] A collective bargaining agreement between a city and its highway and

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[147] *Id*. at 8.
[148] *Id*. at 5.
[149] *Id*. at 9.
[150] *Id*. at 14.
[151] *Id*. at 16.
[152] *Id*. at 16-17.
[153] *Id*. at 18.
[154] *Id*. at 19.
[155] *Id*.
[156] Award on file with author (Dec. 28, 2020) (Howard G. Foster).

sanitation workers contained a section on "Overtime Callouts and Emergencies".[157] This section provided that if the city declared an emergency, "thereby implementing the provisions of" [a subparagraph that said that overtime work was voluntary "except in case of emergency"], the city would "pay time and one-half (1-1/2) for all hours worked during the emergency…".[158] The union argued this language required that if an emergency is declared, its members are entitled to overtime for all hours worked during the emergency, regardless of whether any overtime was actually worked.[159]

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.[160] 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.[161] Finally, reading the language of the collective bargaining agreement as a whole, he described the bargain between the city and the union as this:

> 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.[162]

He therefore denied the grievance.[163]

Finally, the award in 2020 AAA LEXIS 302[164] turned on whether the employer was "closed". A town in Massachusetts closed most of its buildings to the public on March 20, 2020, because of the pandemic.[165] However, the town continued to provide most regular services.[166] Though the doors to Town Hall were locked, employees continued to work either in-person in

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[157] *Id*. at 2.
[158] *Id*. at 2-3.
[159] *Id*. at 3-4.
[160] *Id.* at 7.
[161] *Id*.
[162] *Id.* at 8.
[163] *Id*. at 9.
[164] (Nov. 27, 2020) (Marcia L. Greenbaum).
[165] *Id*. at *24.
[166] *Id*. at *48.

the building or remotely from home.[167] The collective bargaining agreement between the town and its airport employees provided:

> Section 23.4 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.[168]

The union argued Section 23.4 entitled its bargaining unit who had reported to work during this time were entitled to overtime for all hours worked.[169] Marcia L. Greenbaum disagreed. The difference between "open" and "closed", Arbitrator Greenbaum found, turns not on whether the doors were locked, but on whether the town is "conducting its usual business and there is access by the public."[170] 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.[171] Arbitrator Greenbaum therefore found that Town Hall was not "closed" within the meaning of Section 23.4, and the airport employees were not entitled to overtime.[172]

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*.,[173] a food service distributor experienced a 65% drop in demand for its products as the pandemic closed restaurants, office buildings, and schools.[174] The employer laid off about 25% of its workforce and reduced its delivery schedule from six to four days per week.[175]

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[167] *Id*.
[168] *Id*. at * 56.
[169] *Id*. at *34-35, 61.
[170] *Id*. at *57-58.
[171] *Id*. at * 58.
[172] *Id*. at * 60.
[173] Bloomberg BNA Labor Arbitration Decision (Dec. 28, 2020) (Freeman R. Bosley Jr.).
[174] *Id*. at 4-5.
[175] *Id*. at 5.

The collective bargaining agreement guaranteed a group of employees a workweek of either five consecutive eight-hour days or any four ten-hour days.[176] When the employer changed its delivery schedule, it re-schedule these employees to work four non-consecutive eight-hour days.[177] The union agreed the layoff was permitted by the contract, but grieved the changed work schedule and lost hours.[178] The employer argued the pandemic was a "true emergency" entitling it to take action that would "technically" violate contract language.[179] Arbitrator Freeman Bosley, Jr. disagreed, and ordered the employer to make the employees whole for the loss of the fifth eight-hour day.[180]

A second case involving a reduction in hours involved New York crossing guards.[181] The collective bargaining agreement provided minimum daily salaries and that guards would receive "their normal full day's pay" during school closures.[182] In fall 2020, the school adopted a hybrid model of remote and in-person learning and closed schools on Fridays, when all students would be learning remotely.[183] Crossing guards were not paid for most of those Fridays.[184] From November 24, 2020, through December 14, 2020, the school was closed.[185] Crossing guards were reassigned, but received fewer hours and reduced pay.[186] Arbitrator Ira Cure found that absent a force majeure clause, the crossing guards were entitled to their full pay.[187]

An example of an employer changing shift schedules in response to changing customer demand is provided by this unpublished New York award.[188] The company at issue installed, maintained, and serviced imaging equipment at hospitals and imaging centers in and around New York City.[189] The pandemic hit New York City early and hard.[190] 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.[191] As a result, requests for services, and the Company's business revenues, decreased substantially, and overtime costs increased.[192] The Company

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[176] *Id*. at 6.
[177] *Id*. at 6-7.
[178] *Id*. at 6.
[179] *Id*. at 6.
[180] *Id*. at 8.
[181] Award on file with author (March 15, 2021) (Ira Cure).
[182] *Id*. at 4-5.
[183] *Id*. at 7.
[184] *Id.*
[185] *Id.*
[186] *Id.* at 7-8.
[187] *Id*. at 14-15.
[188] Award on file with author (Nov. 23, 2020) (Richard Adelman).
[189] *Id*. at 2.
[190] *Id*. at 2-3.
[191] *Id*. at 3.
[192] *Id*.

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 by reducing standby coverage.[193]

The collective bargaining agreement provided for three shifts, for various start times for these shifts, and for payment of shift differentials of 10 or 20 percent depending on the starting time of the shift.[194] It also stated that the company would give four weeks' notice before changing the starting hours of an employee's shift.[195] Similarly, the CBA 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.[196]

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.[197] 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."[198]

Arbitrator Richard Adelman found the CBA entitled the company to change the shift assignments and reduce the standby hours, but only after providing the required notice.[199] 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.[200] Regarding standby hours, he ordered the company to compensate the employees who had lost those hours during the 60 days' notice period.[201]

A final chase of an employer unilaterally changing work schedules is AA-1 ARB ¶8731.[202] The 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

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[193] *Id*.
[194] *Id*.
[195] *Id*.
[196] *Id*. at 6, 18-19.
[197] *Id*. at 3-5.
[198] *Id*. at 13.
[199] *Id*. at 16-18.
[200] *Id*. at 18.
[201] *Id*. at 21-23.
[202] Wolters Kluwer AAA Labor Arbitration Awards (Dec. 28, 2020) (Eileen A. Cenci).

service, changing Saturdays to a Sunday schedule, and including Saturdays as part of the job-bid process so Saturdays would be fully staffed.

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 to 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.

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*,[203] the collective agreement set 7.5-hour shifts and required the nursing-home employer to pay time and one-half for work exceeding this.[204] When COVID hit, the home moved many employees to twelve-hour shifts, to reduce movement in and out of the home and thereby to limit the spread of the disease.[205] Employees still worked and were paid for the same total number of hours each week.[206] The home did not pay overtime for the daily hours exceeding seven and one-half.[207]

The home argued it was excused from paying overtime by a Provincial emergency order[208] authorizing nursing homes to "develop, modify and implement redeployment plans, including … changing the scheduling of work or shift assignments."[209] 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.[210]

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

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[203] 2020 CanLII 50475 (ON LA) (July 27, 2020) (Bram Herlich).
[204] *Id*. at 2.
[205] *Id*.
[206] *Id*. at 4.
[207] *Id.* at 2.
[208] Order Under Subsection 7.0.2(4) of the Act – Work Deployment Measures in Long-Term Care Homes (March 23, 2020), issued pursuant to Emergency Management and Civil Protection Act, O. Reg. 77/20, and reproduced in *id*. at 13-14.
[209] *Id*.
[210] 2020 CanLII 50475 at 4.

overriding the provision of the collective agreement setting seven and one-half hour shifts.[211] However, the order said nothing about compensation issues, and therefore did not authorize the employer to override those provisions of the collective agreement.[212]

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*.[213] Hennepin County moved many of its meetings online in spring 2020 in response to the COVID pandemic. In May, the County held two online meetings with employees to review COVID plans, and in late May and early June held two additional meetings to discuss the County's response to civil unrest related to the death of George Floyd. Employees attended these meetings virtually from home. They were paid straight time for attending these meetings, or overtime if the meetings caused the employees to work more than forty hours that week.

A provision of the collective bargaining agreement negotiated before videoconference technology existed provided:

> Call Back Pay. 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.

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. Arbitrator Gerald E. Wallin disagreed, finding the phrase "to the work site" excluded work performed virtually from an employee's home.

5. Paid Leave for Laptop Malfunction

At issue in an unpublished Indiana award[214] was whether an employee was entitled to be paid when she was unable to work because an employer-provided laptop malfunctioned.

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[211] *Id*. at 10.
[212] *Id*.
[213] Wolters Kluwer Labor Arbitration Awards, 20-2 ARB ¶7696 (Oct. 30, 2020) (Gerald E. Wallin).
[214] On file with author (March 2, 2021) (Richard N. Block).

Grievant worked in the field office of a federal agency.[215] In March 2020, the field office was closed because of the pandemic, and grievant was given a laptop and told to work from home.[216] On April 8, 2020, her laptop died.[217] Her supervisor instructed her to bring her laptop to the field office so she could exchange it for a new one.[218] Grievant, however, was unable to do so immediately because she had three young children at home whose school was closed because of the pandemic.[219]

Grievant drove to the field office the next day and exchanged the laptop.[220] She requested paid administrative leave for the 6.5 hours she was unable to work on April 8 because of her malfunctioning laptop.[221] The agency denied the request and the union grieved.[222]

The applicable provision in the collective bargaining agreement incorporated a federal statue 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…"[223] Arbitrator Richard N. Block held that the word "may" gave the agency discretion in deciding whether to grant grievant's request for paid leave.[224] He therefore denied the grievance. [225]

F. 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 has led to conflict over whether such actions are permitted under existing collective bargaining agreements. Often, the furlough or layoff itself is not at issue, but instead the union challenges its implementation. Examples include whether the employer followed 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

[215] *Id*. at 6.
[216] *Id*.
[217] *Id*. at 7.
[218] *Id*. at 8.
[219] *Id*. at 8, 12.
[220] *Id*. at 9.
[221] *Id*. at 8.
[222] *Id*. at 9.
[223] *Id*. at 17.
[224] *Id*.
[225] *Id*. at 24.

employer must follow when doing so. These provisions often were drafted with a long-term decline in demand in mind, 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*.[226] 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.[227] Article 12 of the parties' collective labor agreement specifically governed layoffs 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.[228]

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,[229] asserting instead it was entitled to invoke management rights to effectuate an immediate layoff.[230] 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."[231] 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.[232]

Arbitrator Paul Love reached a similar conclusion in *District of Summerland and Local 213 of the Int'l Brotherhood of Electrical Workers*.[233] The employer, an electric utility, laid off thirty-five workers because of a COVID-induced reduction in demand for electricity.[234] The union challenged the layoff as to a particular employee who had seniority over other employees not laid off.[235] The employer invoked a management-rights clause giving the employer the right to lay off employees.[236] An article in the collective agreement required

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[226] 2020 CanLII 89913 (BC LA) (Sept. 28, 200) (John B. Hall).
[227] *Id*. at 2.
[228] *Id*. at 3, 7-11.
[229] *Id*. at 3.
[230] *Id*.
[231] *Id*. at 49.
[232] *Id* at 36, 43.
[233] 2020 CanLII 108144 (BC LA) (Nov. 11, 2020) (Paul Love).
[234] *Id*. at ¶¶ 1-4.
[235] *Id*. at ¶ 192.
[236] *Id*. at ¶ 195.

layoff in reverse order of seniority by classification.[237] 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.[238]

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*,[239] the University of Akron invoked a force majeure clause in its layoff of nearly 100 faculty members. 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." 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. He held this provision overrode other provisions in the collective bargaining agreement governing 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. 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.

An arbitrator reached a different conclusion in *Alaska Airlines, Inc. and Aircraft Maintenance Fraternal Association, Local 32*.[240] The parties had negotiated a letter agreement containing limited layoff protections in paragraph 1 and a force majeure clause in paragraph 2. The parties subsequently negotiated more extensive layoff protections which became paragraph 4. The force majeure clause provided that "the Company shall be excused from compliance with the above 'no-layoff' provision …" under certain extenuating circumstances. 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.

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[237] *Id*. at ¶ 212.
[238] *Id*.
[239] Wolters Kluwer Labor Arbitration Awards, 20-2 ARB ¶ 7678 (Sept. 18, 2020) (John F. Buettner). Pinpoint cites are not available in the original.
[240] Wolters Kluwer Labor Arbitration Awards, 20-2 ARB ¶ 7677 (Sept. 18, 2020) (Frederic R. Horowitz). Pinpoint cites are not available in the original.

Both of these awards illustrate that an employer's ability to invoke a force majeure clause to effectuate a layoff often will 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. Furloughs

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.

An example is an unpublished U.S. award by Martin Malin. A city's tax revenue plummeted as a result of the pandemic, causing a significant tax shortage. The city negotiated a wage freeze with most of its unions in return for no layoffs, but the union representing public works employees refused. The city then implemented a furlough, reducing the hours of every bargaining unit member by 50%. The union argued that because the collective bargaining agreement contained procedures for layoffs but not furloughs, furloughs were prohibited. The city argued that 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.

G. 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 so was to cut employee benefits.

a. 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 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.[241] The parties negotiated a Memo of Understanding that provided:

> 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.

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.

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. 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.

Two unpublished 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. The language in the 401(k) provision of the contract, he found, 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 plan's provider and to adjust coverage. It did not, however, give the employer discretion to stop paying into the plan. Similarly, Arbitrator Bales, ruled, the language on the 401(k) plan as giving the employer the ability to change the plan provider and investment choices, but not discretion to discontinue the employer match.

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[241] Wolters Kluwer Labor Arbitration Awards, ARB ¶ 8803 (Feb. 13, 2021) (James S. Cooper). Party names and other identifying information are redacted; pinpoint cites are not available in the original.

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 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 them 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 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 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.

b. 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.[242] A collective bargaining agreement between a city and a police union contained a tuition reimbursement program.[243] The city,

[242] AAA Labor Arbitration Awards (June 9, 2020) (Thomas J. Nowell) (redacted in original).
[243] *Id* at *1.

however, failed to fund it, citing lost revenue because of COVID, and the union grieved.[244] 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.[245]

c. Denying or Requiring Leave

The COVID pandemic left many employers – especially health-care providers – shorthanded. Many responded by cutting vacations and other leaves by employees. For example, in the Canadian award of *THK Rhythm Automotive Canada and the Thompson Products Employees' Association*,[246] 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.[247] The union grieved, arguing the employer had a longstanding practice of routinely granting employee requests for the holidays.[248] 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 explaining the operational reasons why the request could not be granted.[249]

Similarly, in an unpublished American award,[250] a state psychiatric hospital sent an announcement to all employees stating it would temporarily suspend the granting of all vacation requests, and that already-approved vacations could be retracted "due to critical staffing needs".[251] 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.[252] Arbitrator Martin H. Malin found the contract entitled the hospital to implement its policy immediately on an emergency basis, but found the employer was nonetheless obligated to give the union notice, and an opportunity to "meet and confer", as soon as practicable.[253] He found no employee had been harmed by the policy, and granted the union's request for a remedy awarding that the union was not properly notified by the employer of the annual leave suspension.[254]

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[244] *Id* at *1-2, 10-11, 18-19.
[245] *Id* at *25.
[246] 2020 CanLII 77149 (ON LA) (Oct. 13, 2020) (William Kaplan).
[247] *Id*. at 2, 3-4.
[248] *Id*. at 2.
[249] *Id*. at 6.
[250] (Martin H. Malin) (January 5, 2021).
[251] *Id*. at 5.
[252] *Id*.
[253] *Id*. at 10.
[254] *Id*. at 11.

The mirror-image of these two awards is *International Association of Machinists and Aerospace Workers and Glory Global Solutions Inc.*[255] 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.[256] The employer cited a provision stating the company would schedule the vacation at the time desired by the employee "if this can be done without interfering with efficient operations" in support of its argument that the company should be allowed to assign vacation times.[257] Arbitrator Glenn D. Newman disagreed, finding this provision merely entitled the company to reject specific requests that would interfere with operations.[258] 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 operational needs.[259] He 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.[260]

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 labor relations acts of all Canadian provinces except Saskatchewan, and 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.

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[255] 2020 BL 449664, 2020 BNA LA 1264 (Oct. 13, 2020) (Glenn D. Newman).
[256] *Id*. at *1.
[257] *Id*. at *3.
[258] *Id*. at *7.
[259] *Id*. at *6-7.
[260] *Id*. at 8.

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 of the parties, (3) the arbitrator has submitted the 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 just that U.S. arbitrators are lethargic or complacent – informal discussions on the NAA 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. It is more a conviction that the parties own the award in fee simple absolute, and 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). If covid cases are a representative sample of all awards, it appears the same handful of arbitrators are contributing a disproportionate number of awards. These arbitrators may or may not be among the best and brightest, and their awards may or may not be a representative sample of all 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, or that take novel approaches to once-settled issues, or that otherwise are so far out of the mainstream that parties may want to read the award before selecting the arbitrator for their own cases.[261] 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, diminishes the value of awards generally as persuasive precedent. In Canada, an hour's worth of research will demonstrate that a consensus has formed among Canadian arbitrators that during COVID, arbitration hearings are presumed online absent a compelling reason to hold

[261] Email from John Sass, on file with author.

them in-person.[262] In the U.S., even if a comparable number of on-point awards existed, it would be impossible to say with any degree of certainty that these awards represent a consensus, because they may or not be representative.

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. Many arbitrators – even National Academy arbitrators at the top of the professional hill – subscribe to none of these 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. All this combines to make access to awards limited and inequitable, and discourages arbitrators from looking to previous awards as guidance.

B. Unique Features of Canadian Awards

Comparing Canadian and U.S. covid-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.[263] 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 hit, the arbitral 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. Similarly, Canadian awards on other covid-related topics are much more likely than their U.S. counterparts to cite to previous awards raising similar issues.[264]

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[262] *See supra* Part III.A.

[263] *See* Part III.A.

[264] *See, e.g.,* the discussion in Part III.e.1.a on whether employees should receive sick pay when they are quarantining.

It is highly unlikely that U.S. arbitrators were not confronted with this issue at least as often as Canadian arbitrators. To the contrary, the NAA listserv and webinars presented by the NAA and others 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 her written award will be published, would see the value (both to herself and to the profession) of writing an award providing guidance to future arbitrators. A U.S. arbitrator, knowing his 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 his bill.

Third, Canadian arbitrators have authority to issue interim decisions and orders, such as reinstatement of a discharged employee pending arbitration.[265] Though most Canadian arbitrators, like their U.S. counterparts, usually issue procedural and preliminary rulings informally (such as by email), they may be marginally more likely than U.S. arbitrators to issue formal rulings on such matters. Thus 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.

The end result, however, is that it appears from the covid awards that U.S. arbitrators are significantly less likely to cite to prior awards on novel issues of law, and the "law" on these issues may develop more slowly in the U.S. than in Canada. This may result in U.S. awards that are less consistent with each other than Canadian awards – but it may not. Many U.S. arbitrators – especially NAA members – talk informally, on the listserv, at conferences, and over the last two years at lots of often participatory webinars. Even if U.S. arbitrators lack the easy access to each others' 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

[265] Kenneth P. Swan, *Labour Arbitration in Canada and Canadians in the NAA*, in The Academy at 75 (forthcoming 2022) (draft on file with author).

A hot topic in both U.S. and Canadian awards was whether employees are entitled to sick pay for time spent in quarantine. An early Canadian award ruled such employees are not "sick" and therefore are not entitled to sick pay.[266] Later awards in both countries, however, turned on the specific language in each contract rather than on generally applicable policies.[267] 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 on both sides of the border 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. [268] 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.[269]

An issue that has been hot in the U.S. but not in Canada is whether employees who remain working when their workplace is "closed" are entitled to premium pay.[270] I do not have an explanation for why this might have been a common 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 a Canadian award in which a nurses' union unsuccessfully challenged covid nasal-swab tests, and another Canadian award challenging a no-moonlighting policy at a healthcare facility. Similarly, I expected to see a plethora of awards 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.[271]

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 and 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. Likewise, I expected to see, but did not, lots of awards challenging employers' return-to-work policies.

V. Conclusion

[266] *See supra* Part III.E.1.a.
[267] *Id*.
[268] *See supra* Part III.D.2.
[269] *Id*.
[270] *Id*. at III.E.2.
[271] *See supra* Part III.C.

COVID abruptly changed the way many Americans and Canadians work, raising unique issues under many collective bargaining agreements. Arbitration awards grappling with these issues offer 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 the evolution of and consistency of arbitral "law" in much the same way that common law has 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 are entitled to sick or vacation pay while quarantining. An issue that arose frequently in the U.S, but not Canada was whether employees are entitled to premium "emergency" pay during a pandemic. Other issues have arisen infrequently or not at all, such as challenges to return-to-work policies and employee discipline for off-duty conduct risking COVID exposure.