




INFORMATION REPORT

TO:	Mayor and Members General Issues Committee
COMMITTEE DATE:	August 4, 2022
SUBJECT/REPORT NO:	Potential Cost Associated with the Preliminary C5167 Arbitration Award on Unpaid Leave of Absence (HUR21008(d)) (City Wide)
WARD(S) AFFECTED:	City Wide
PREPARED BY:	Lora Fontana (905) 546-2424 Ext. 4091
SUBMITTED BY:	Lora Fontana Executive Director Human Resources
SIGNATURE:	

COUNCIL DIRECTION

As part of their deliberations on the COVID-19 Mandatory Vaccine Verification Policy ('the Policy'), Council has requested that Human Resources staff provide periodic information updates in relation to the potential costs of implementing the Policy. This Report is intended to provide information in relation to the potential costs associated with the preliminary CUPE Local 5167 Arbitration Award respecting Unpaid Leave of Absence.

INFORMATION

On January 13, 2022, CUPE Local 5167 filed a policy grievance on the City's Mandatory COVID-19 Vaccine Verification Policy. The City and the Union held the first day of hearing on May 24th, 2022, at which time, CUPE sought a preliminary decision in relation to whether the vaccination language in the collective agreement applies in the circumstances.

At the hearing, CUPE requested that Arbitrator Jesse Nyman bifurcate (or "split") the hearing to determine, as a preliminary matter, whether or not a specific provision in the CUPE 5167 Collective Agreement applies in the circumstances contemplated by the Policy. This language in the collective agreement references immunization and outlines

OUR Vision: To be the best place to raise a child and age successfully.

OUR Mission: To provide high quality cost conscious public services that contribute to a healthy, safe and prosperous community, in a sustainable manner.

OUR Culture: Collective Ownership, Steadfast Integrity, Courageous Change, Sensational Service, Engaged Empowered Employees.

SUBJECT: Potential Cost Associated with the Preliminary C5167 Arbitration Award on Unpaid Leave of Absence (HUR21008(d)) (City Wide) - Page 2 of 5

potential consequences for employees who fail to participate in such immunization programs. The consequence referenced is an unpaid leave of absence.

Specifically, article 10.3(g) of the collective agreement states that:

“Where an Employee is required by the Employer to be immunized, the Employer agrees to provide or reimburse Employees for the cost of immunizations not covered by OHIP. Where a prophylactic alternative to immunization is available it may be taken as a substitute to immunization where appropriate based on medical or religious grounds. It is understood that the Employer cannot force an Employee to be immunized or to take the prophylactic alternative without their consent. It is further understood that where such immunization (or the prophylactic alternative to immunization) is required in order for the Employee to attend work and the Employee refuses the immunization or its substitute, they may be placed on unpaid leave with no loss of seniority. In this event the Employer agrees to take reasonable steps to accommodate workers through alternate work arrangements.”

On May 30th, 2022, Arbitrator Nyman issued a preliminary award indicating that he will consider the application of this language in relation to the Policy as a preliminary matter and determine whether the Policy (and subsequent termination of employment) is contrary to the relevant collective agreement provisions.

Given this preliminary award, staff can now provide an anticipated summary of the potential costs related to the implementation of the Policy, as it relates to the CUPE Local 5167 collective agreement language. It should be further noted that this language is also applicable to the CUPE Local 1041, CUPE Lodges and ONA Public Health collective agreements

Current Status

As of July 20, 2022, non-compliant employees can be sorted into the following general representation categories or groups:

Union Affiliation	Rapid Testing Employee Headcount	Non-Compliant (on unpaid leave)
-------------------	----------------------------------	---------------------------------

SUBJECT: Potential Cost Associated with the Preliminary C5167 Arbitration Award on Unpaid Leave of Absence (HUR21008(d)) (City Wide) - Page 3 of 5

ATU	47	4
CUPE 1041**	4	0
CUPE 5167**	109	7
CUPE Lodges**	0	7
CLAC (Volunteer Firefighters)	6	0
HPFFA (Firefighters)	23	1
HOWEA (Water)	3	0
OPSEU (Paramedics)	5	1
ONA Public Health**	3	0
ONA Lodges	0	1
Subtotal Unionized Employees	200	21
Subtotal Non-Union	34	9
TOTAL ALL EMPLOYEES	234	30
** Denotes collective agreements with immunization provisions		

The above numbers are fixed in time and are subject to ongoing changes as staff continue to provide proof of vaccination as time passes. The total number of impacted employees will directly impact potential costs in this matter.

Labour Relations Update

As noted, there are other City collective agreements that contain similar “immunization provisions” within their collective agreements. The result may be a deferral of approximately half of the severance cases to some future date of those in the non-disclosing employee population. These include CUPE Local 1041, CUPE Lodges, and ONA Public Health. The breakdown of potentially deferred outcomes arising from this language is as follows:

Employees without “immunization” or “Unpaid Leave” Collective Agreement Language		Employees with “immunization” or “Unpaid Leave” Collective Agreement Language	
ATU	51	CUPE 5167	116
CLAC	6	CUPE 1041	4
HOWEA	3	CUPE Lodges	7
HPFFA	24	ONA Public Health	3
ONA Lodges	1		
OPSEU	6		

SUBJECT: Potential Cost Associated with the Preliminary C5167 Arbitration Award on Unpaid Leave of Absence (HUR21008(d)) (City Wide) - Page 4 of 5

Non-Union	43		
TOTAL	134	TOTAL	130

Accordingly, if CUPE 5167's position is accepted by Arbitrator Nyman (that their language regarding unpaid leaves applies in the circumstances), this will likely have the result of deferring more than half of the costs associated with Policy-related terminations to some future date. Approximately 134 terminations would be carried out of active employees at the City on October 1, 2022 if this language is found to apply in the circumstances.

Costing Estimate

Unionized Employees with Immunization Language in Agreement

In the event that Arbitrator Nyman directs that termination (now scheduled for Oct. 1st, 2022) is inconsistent with the relevant provisions of the collective agreement, the result will likely be that those employees would be placed on an indefinite unpaid leaves of absence (likely between 9 and 12 months (N=130)), pending a future employment decision concerning frustration of the employment contract. It can be reasonably assumed that Arbitrator Nyman's decision on the CUPE 5167 preliminary matter will be aligned to the other collective agreements having the same language respecting immunization.

This group of employees would, in the event that just cause and wilful misconduct are not found to have occurred, at a minimum, be entitled to termination and severance payments arising from the operation of the *ESA*. This group would have an increased likelihood of receiving *ESA* amounts, owing to the likelihood that these employees will, ultimately, not be terminated for failing to follow the Policy, but as a result of being placed upon an unpaid leave for an extended period of time, resulting in the eventual frustration of the employment relationship.

Based upon length of service and current wage rates of these affected employees (N=130), it is estimated that these costs would be in the range of approximately \$2,793,810.72 to \$7,386,737.99. These figures take in to consideration both *ESA* requirements as well as common law requirements. Given the provisions provided for in the collective agreement, it is anticipated that our severance obligations with these groups is more likely in line with the *ESA* requirements. A breakdown of these costs is provided below:

Costing Estimates - Active & Non-Compliant Employees with immunization language

SUBJECT: Potential Cost Associated with the Preliminary C5167 Arbitration Award on Unpaid Leave of Absence (HUR21008(d)) (City Wide) - Page 5 of 5

Union/Group	ESA Minimum	Common Law
CUPE 1041	\$ 169,970.03	\$ 435,052.97
CUPE 5167	\$ 2,447,105.24	\$ 6,499,614.45
CUPE Lodges	\$ 115,009.63	\$ 292,333.93
ONA Public Health	\$ 61,725.82	\$ 159,736.64
Total	\$ 2,793,810.72	\$ 7,386,737.99

Given that the termination (for frustration) would likely be delayed, these costs could be increased by agreed-to wage increases in the upcoming negotiations.

In the event that Arbitrator Nyman finds no conflict between the Policy and the language of the collective agreement, then termination remains as a viable option for the City to exercise in relation to these employees when the October 1st date arrives. In this case, the matter of termination of employment would remain outstanding and would then be determined through the arbitration process.

Legal and Arbitration Related Costs

As of May 31st, 2022, the City has incurred the following legal and arbitration costs associated with the vaccine verification policy:

Mandatory COVID-19 Vaccination Policy Legal Costs (2020-2022)

Summary;

Grievances	\$ 57,346.39
Non-Union Injunction Matter	\$ 23,850.05
General Legal Advice	\$ 12,075.63
Total	\$ 93,272.07

The next arbitration date with Arbitrator Nyman addressing this preliminary matter of whether or not the unpaid leave of absence provisions apply in these circumstances, as contemplated in the policy, is currently scheduled for September 16 and 23, 2022. It is anticipated that Arbitrator Nyman will issue a decision on the preliminary matter prior to September 30, 2022, if possible. Human Resources staff will continue to provide periodic updates on the outcomes of any arbitrations and other litigation outcomes and costs associated with the policy, as available.