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'Vaccinate or mask' policy found to be unreasonable

Risk to patients not proven enough to trump employee privacy: Arbitrator

By Patrick Ganley and Lisa Bolton

It's a common conundrum for employers who have significant safety concerns in the workplace: How many precautions can they take without infringing upon employee rights? How much safety risk does there have to be in order to infringe upon those rights?

It's an issue safety-sensitive employers face and now it's come to light in medical environments where the safety of patients as well as employees is a concern — particularly where communicable illnesses like the flu are around.

Flu season is upon us and many employers are paying close attention to the recent arbitration decision in *Sault Area Hospital v. Ontario Nurses Association*. The case involved a "vaccinate or mask" policy which required healthcare workers to wear surgical masks when working during flu season if they had not received the flu vaccine. The policy was implemented at the Sault Area Hospital in Sault Ste. Marie, Ont., and approximately 30 other hospitals in the province.

The Ontario Nurses Association (ONA) grieved the policy as an unreasonable exercise of management rights and a breach of employee privacy rights. The hospital defended the policy as a valid patient safety measure that reasonably balanced the interests of protecting against a potentially deadly and infectious disease, with employee personal autonomy and privacy.

The arbitrator found the policy was unreasonable in the circumstances because the weight of scientific evidence was not sufficient to warrant requiring unvaccinated workers to wear masks for six months. Without a justifiable patient safety purpose, the arbitrator found the policy operated to coerce immunization and undermine the collective agreement right of healthcare workers to refuse vaccination.

It's important to note this decision was not about the right to require a health care worker to be vaccinated. Rather, it was about whether a policy requiring an unvaccinated health care worker to wear a mask was inconsistent with the collective agreement. The arbitrator found the mask requirement was inconsistent with the collective agreement on the basis there was not a justifiable patient safety purpose. Had there been a justifiable patient safety purpose, the decision may have been different.

The collective agreement between the Hospital and ONA required healthcare workers to receive the flu vaccine unless a worker chose not to, in which case should there be an outbreak in the hospital, the worker could be placed on unpaid leave during the outbreak; or, if there was a medical reason why the worker could not receive the vaccine, the worker would be reassigned during the outbreak.

On Jan. 1, 2014, the hospital implemented the policy which, among other things, stated as follows:

"All persons carrying on activities at [the hospital], which includes employees, students, undergraduate and post-graduate medical trainees, physicians, volunteers and contract workers, must receive annual influenza immunization or wear a surgical/procedure mask during the influenza season (typically from November to April) when in a patient care/clinical area, or when engaged in work-related patient interactions in any area of the hospital."

Shortly thereafter, the hospital also required all vaccinated healthcare workers to place a sticker on their ID badge "indicating their status." Any healthcare worker without a sticker would be required to wear a mask even if they had received immunization. This would enable a patient to "immediately identify those who have taken this extra precaution against the flu."

The position of the hospital

The Ontario Hospital Association (OHA) and the hospital defended the policy as a valid patient safety measure, the primary purpose of which was to prevent flu transmission from unvaccinated healthcare workers to patients. The OHA argued the policy was reasonable in light of “earlier disturbing critical incidents;” the low rates of immunization among healthcare workers — roughly 42 per cent — and undisputed expert evidence supporting vaccination as the best method to prevent the transmission of influenza.

ONA's position

ONA's response was three-fold:

First, the policy was implemented without sufficient consultation and was inconsistent with concerns raised by the hospital's own chief of medical staff, and consultants who concluded the policy was “very punitive,” lacked scientific support, and had been instituted primarily to increase immunization rates as “few people would want to wear a mask for 6-7 months.”

Second, the scientific evidence suggested the use of masks was “negligible in the combat of influenza transmission by or to healthcare workers and patients.” As evidence of this (among other evidence), ONA pointed to the hospital's failure to reconsider the merits of the policy when it became clear the 2014-2015 vaccination would not be as effective as hoped in combating the most common strain of influenza that season. If masks were as effective as the hospital maintained they were, this “mismatch year” should have resulted in the mask-wearing requirement being imposed on all healthcare workers that season. According to ONA, “an illogical policy is not a reasonable policy”.

Third, the policy violated employee privacy rights as it was accompanied by a hospital-wide posting explaining that masks were to be worn by unvaccinated employees — indirectly resulting in compulsory disclosure of personal medical information.

The true purpose of the policy was to drive up vaccination rates through coercive means, undermining the employee's right to refuse vaccination, argued the ONA.

The decision

Even accepting vaccination was the best method currently available to prevent the transmission of influenza, the arbitrator found the policy unreasonable for the following principal reasons:

- **Improper purpose.** The policy sought to prevent hospital-acquired influenza by increasing vaccination rates. However, requiring the use of masks as a consequence for refusal to vaccinate was not a useful method to protect patient safety.
- **Lack of evidence.** There was “scant scientific evidence” the use of masks was effective in reducing the transmission of the virus.
- **Balance of interests.** The requirement a healthcare worker either be vaccinated or wear a mask made a significant demand of employees who exercised their right not to be vaccinated.

Lessons for employers

The decision in *Sault Area Hospital v. Ontario Nurses Association* offers the following important lessons for employers seeking to develop and implement a workplace policy:

- **Identify the purpose of the policy.** The reasonableness of a policy will be assessed in light of its purpose. An employer must therefore be able to rationally defend the purpose of a policy.

- **Ensure the terms of the policy support the purpose.** Policy terms should directly support the policy goal. The closer the connection between the terms and goal, the easier it will be to establish the policy is reasonable.
- **Ensure consistency with existing obligations.** A policy's consistency with other workplace rules (including where applicable a collective agreement), will enhance compliance with the policy and help defend it if challenged.
- **Ensure the policy is clearly communicated and consistently enforced.** The reasonableness of a policy is often influenced by the manner in which it is communicated to employees and enforced. Consistency is key.
- **Engage employees in the development of a policy.** Wherever possible, engage employees (and union bargaining agents) in the policy-making process, and incorporate reasonable feedback. This will help reduce opposition to the policy and increase its effectiveness.
- **Consider the impact on employees.** Can the policy objectives be achieved by other less intrusive means? If so, consider implementing those means instead.
- **Ensure compliance with legislation.** Many workplace policies will engage employment-related statutes such as the Human Rights Code, Employment Standards Act or Occupational Health and Safety Act. When developing a workplace policy be sure to take into account obligations under all relevant statutes.

For more information see:

- *Sault Area Hospital and Ontario Nurses Association* (Sept. 8, 2015), J. Hayes - arb. (Ont. Arb.).

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