VACCINE POLICIES IN WORKPLACES: TO MANDATE, OR NOT TO MANDATE

COVID-19 has imposed new and sometimes challenging obligations on employers. Employers have become very familiar with COVID-19 safety plans, work from home, masking, hand sanitizing and social distancing. All employers have the obligation to maintain the health and safety of their employees.

Can employers implement a mandatory vaccine policy in the wake of COVID-19?

The law is simply not clear. The discussion is somewhat premature, as it will take months before the general public has access to the vaccine.

Mandatory vaccination is not without precedent in Canada. Mandatory vaccination requirements are imposed by law in Ontario and New Brunswick in the public school setting,[1] where parents or guardians have to provide proof of vaccination, unless strict medical or religious/reasons of conscience reasons are provided. These two exceptions: medical contraindications or religion/reasons of conscience.[2]

In the workplace, the issue has been frequently litigated in the healthcare setting, where unions have challenged mandatory vaccination policies or policies such as "vaccine or mask" against seasonal influenza as infringing on the collective agreement.

The case law is inconsistent. Much will depend on the leadership of provincial and territorial medical officers of health. To date, Ontario, Alberta and B.C. have all indicated that they will not mandate vaccination, even in healthcare settings. Nonetheless, employers may have more flexibility than they think.

Mandatory Vaccination Policies Upheld in Some Cases

In a 2013 decision, a B.C. arbitrator upheld a policy that required employees to wear a mask or provide proof of vaccination against the seasonal flu. The "**V**accine **O**r **M**ask" (**VOM**) Policy had been implemented in response to the low rates of immunization achieved through voluntary vaccination campaigns.

[1] *Immunization of School Pupils Act,* RSO 1990, c. I-1; *Public Health Act*, SNB 1998, c P-22.4, s 42.1

[2] Pursuant to the *Immunization of School Pupils Act*, RSO 1990, c. I-1 s 3, the parent of a pupil is not required to cause the pupil to complete the prescribed program of immunization in relation to each of the designated diseases (1) in relation to a designated disease specified by a physician or registered nurse in a statement of medical exemption filed with the proper medical officer of health; or (2) if the parent has completed an immunization education session with a medical officer of health or with a medical officer of health's delegate that complies with the prescribed requirements, if any, and who has filed a statement of conscience or religious belief with the proper medical officer of health. Pursuant to the *Public Health Act*, SNB 1998 c P-22.4, s 42.1(3), proof of immunization is not required if the parent or legal guardian of a child provides the following: (a) a medical exemption, on a form provided by the Minister, that is signed by a medical practitioner or nurse practitioner; or (b) a written statement, on a form provided by the Minister and signed by the parent or legal guardian, of his or her objections to the immunizations.

The VOM Policy also stated that an individual found to be non-compliant may be "subject to remedial and/or disciplinary action **up to and including termination of employment, cancellation of contract and/or revocation of privileges**."

Interestingly, the VOM Policy also imposed the same requirement on visitors, although it is unclear how vaccination records were verified with respect to casual visitors.

The union, Health Sciences Association, brought a grievance, alleging that the policy was not reasonably necessary. The union also alleged that the policy contravened British Columbia's *Human Rights Code*,[3] the *Canadian Charter of Rights and Freedoms* (the "**Charter**")[4] and the *Freedom of Information and Protection of Privacy Act*.[5]

The arbitrator found that the VOM Policy was reasonable for the following reasons;

1. **Expert evidence** weighed in favour of the fact that immunization of health care workers **reduced transmission of the flu to patients**;
2. Based on expert evidence, masking had a **patient-safety purpose** and effect and sufficiently accommodated health care workers who conscientiously objected to vaccination;
3. The VOM Policy was not discriminatory, **as it did not require immunization**. Employees had an option to wear a mask instead;
4. The British Columbia Centre for Disease Control ("**BCDC**") had endorsed the employer's policy in 2012; and
5. VOM Policies were common.[6]

The arbitrator also found that the VOM Policy would also meet any Charter challenges, if the Charter actually applied.

In Ontario, an arbitrator upheld a mandatory vaccination requirement imposed by the North Bay General Hospital on nurses during a widespread influenza outbreak in North Bay community.[7] Several nurses refused and were placed on **an unpaid leave of absence** because they had refused to be vaccinated against the flu. The union grieved. The collective agreement had specific provisions dealing with vaccinations during an active outbreak. The Ministry of Health had made a recommendation to the North Bay General Hospital to implement its influenza measures. The arbitrator therefore dismissed the union's grievances.

Mandatory Vaccination Policy not upheld in other cases

Arbitrators have also found mandatory vaccination policies to be unreasonable. In the 2015 decision *Sault Area Hospital and Ontario Nurses' Association*, the arbitrator found that the Sault Area Hospital's VOM Policy attempted to coerce flu immunization and **thereby undermined an employee's established right under the collective agreement to refuse vaccination**.[8]

The arbitrator stated that the requirement that a health care worker either be vaccinated or wear a mask made a significant demand on employees who exercised their right not to be vaccinated. The arbitrator also held that the VOM Policy was unreasonable **as the scientific evidence available**

[3] RSBC 1996, c 180.

[4] Part 1 of the *Constitution Act, 1982*, being schedule B to the Canada Act 1982 (UK), 1982, c 11.

[5] RSBC 1996, c 165.

[6] The arbitrator cited *Irving Pulp & Paper Ltd. v CEP*, Local 30, 2013 SCC 34.

[7] *North Bay General Hospital v ONA*, 2008 CarswellOnt 9040 (Ont Arb).

[8] *Sault Area Hospital and Ontario Nurses' Association*, 2015 CanLII 55643 (ON LA) [*Sault Area Hospital*].

was insufficient to require employees to wear masks for up to six months every year.

As in *St. Peter's Health System v CUPE, Local 778*, the arbitrator noted that the VOM Policy **had not been mandated by a medical officer of health conferred authority by statute**.[9] In addition, the College of Nurses had not required nurses to vaccinate against the flu as a professional standard, nor had other provincial regulatory bodies of health care workers.

The arbitrator took issue with the scant scientific evidence and inconsistent expert opinions on the efficacy of masks in reducing virus transmission.

The arbitrator stated the following:
To review the labour relations implications of the VOM Policy does not disregard or discount the medical expertise. It simply recognizes that the medical expertise has a different focus that is incomplete for the purposes of the legal question at issue. While important in assessing what is reasonable, the medical expertise is not controlling in and of itself because it does not engage the labour/human rights/privacy expertise that balances employee rights with scientific information.

It is very likely that the science will evolve and opinions about the prevention and control of influenza disease may coalesce into more of a consensus than has been achieved to date.

In the more recent 2018 decision, *St. Michael's Hospital v Ontario Nurses' Association*, an arbitrator once again found a VOM Policy to be unreasonable for a lack of scientific evidence in favour of masks.[10]

The arbitrator characterized the issue in the following manner:
[The question is] whether the evidence supports the conclusion that the use of surgical or procedural masks, worn by unvaccinated [healthcare workers] for some or all of the flu season, actually results in reduction of harm to patients? Does it prevent the transmission of illness? Does it save lives?

If the VOM policy prevented patient illness and saved patient lives, its reasonableness would be difficult to challenge.

As was the case in *Sault Area Hospital*, the arbitrator held that the evidence supporting a masking mandate was "insufficient, inadequate, and completely unpersuasive." The arbitrator found that masks were not an effective means of source control to stop the transmission of the flu. The arbitrator also held that there was a **low risk of asymptomatic transmission**.

Conclusion
The case law has been developed in the context of seasonal influenza, where efficacy can vary between 20 to 60%.[11] Preliminary evidence suggests that the COVID-19 vaccines are over 90% effective.[12] COVID-19 is estimated to be roughly ten

[9] *St Peter's Health System v CUPE, Local 778*, 2002 CarswellOnt 4709 (Ont Arb) [*St. Peter's Health*].

[10] *St. Michael's Hospital v Ontario Nurses' Association*, 2018 CanLII 82519 (Ont LA) [*St. Michael's Hospital*].

[11] Center for Disease Control, *CDC Seasonal Flu Vaccine Effectiveness Studies*, https://www.cdc.gov/flu/vaccines-work/effectiveness-studies.htm (accessed December 14, 2020).

[12] Bryce Y. Lee, *How Effective Will Covid-19 Coronavirus Vaccines Be? 8 Reasons It's Too Early to Tell,* https://www.forbes.com/sites/brucelee/2020/11/27/how-effective-will-covid-19-coronavirus-vaccines-be-5-reasons-its-too-early-to-tell/?sh=3aa3d65f1617 (accessed November 27, 2020).

(10) times more lethal than the seasonal influenza.[13] There is significant evidence that mask policies significantly lower disease spread.[14]

It is our opinion that *Sault Area Hospital* and *St. Michael's Hospital* would be decided differently today in the context of the COVID-19 pandemic, given current public health mask mandates and the established asymptomatic transmission of COVID-19. The healthcare setting is clearly a high risk setting, both for healthcare practitioners and patients.

What about other settings, such as amateur and professional sports, the hospitality industry, mass transportation, or live entertainment?

The CEO of Australian airline Qantas has already indicated that passengers will have to provide proof of COVID-19 vaccination, subject to medical exemptions.[15] The Netherlands is debating what it terms "indirect vaccination obligation", i.e. certain activities and locations would be off-limits to individuals without proof of vaccination.[16]
In our opinion, much will depend on the evidence about how much vaccination protects the risk of transmission of disease to others.

Currently, the testing has focused on the efficacy of the vaccination on protecting the recipient of the vaccine from disease. If evidence grows that vaccination **also** protects against transmission of disease to others, there will be a very strong legal argument that employers should be able to insist on mandatory vaccination of employees and visitors to the workplace, absent a legally-protected exemption. Unionized employers need to work closely with union representatives to implement any kind of vaccination policy.

Most importantly, our public health authorities need to issue clear directives regarding vaccination. The 1918 influenza killed approximately 50 million worldwide, with approximately 55,000 in Canada and 675,000 in the United States. We do not want to replicate that tragedy a century later.

P.A. Neena Gupta, Cristina Borbely, Tushar Anandasagar

If I infect a patient without knowing I have COVID-19 while rendering care and am sued, will my Professional Liability Insurance protect me?

If you are delivering professional services and are worried about liability related to possible transmission of COVID-19 to your patients, please rest assured that your individual professional liability insurance (PLI) policy is there to protect you.

An allegation related to transmission of COVID-19 while delivering professional services should be considered similar to any other allegation of injury to a patient under your PLI policy.

As with professional practice generally, you are expected to practice safely and work within your scope of practice. During the current COVID-19 pandemic this means following the

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[13] Johns Hopkins Medicine, *Coronavirus Disease 2019 vs. the Flu,*

https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus/coronavirus-disease-2019-vs-the-flu

[14] Nina Bai, *Still Confused About Masks? Here's the Science Behind How Face Masks Prevent Coronavirus,* June 26, 2020
https://www.ucsf.edu/news/2020/06/417906/still-confused-about-masks-heres-science-behind-how-face-masks-prevent (accessed December 14, 2020).

[15] BBC News, *Covid: Vaccination will be required to fly*, November 23, 2020 (accessed December 18, 2020)

[16] Victoria Sévano, *Could there be an indirect mandatory vaccination rule in the Netherlands?,* I am expat, November 19, 2020 (accessed December 18, 2020).

recommendations of your provincial/territorial government and the best practice guidelines and standards set by your regulatory body and workplace, particularly with respect to infection prevention, use of PPE, directives regarding vaccination, and safe delivery of care.

If you disregard these guidelines, it could be argued that transmission of the virus was an expected or intended consequence of your decision and your insurance coverage may not respond. It is also standard to have exclusions for claims arising from actual or alleged abuse.

Please remember to practice safely to keep yourself and your patients' safe in these difficult times.