

Health care workers, mandatory influenza vaccination policies and the law

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Over the last few years, there has been increasing discussion about the importance of influenza vaccination for health care workers. There is consensus that all health care workers should receive the influenza vaccine annually,¹⁻⁴ but the actual vaccination rates in this group remain below 50%.^{5,6} In response to this low rate and the evidence that vaccination of health care workers is associated with improved patient outcomes, an increasing number of expert and professional groups recommend that annual influenza vaccination be a condition of service in the health care industry.^{7,8}

Although much has been written about the evidence that the vaccination of health care workers against influenza improves patient outcomes^{3,4,7} and about the ethics of mandating vaccination,^{9,10} there is much less published information on aspects of implementation of such policies.

We provide a brief review of the literature regarding the impact of such policies on the vaccination rates among health care workers and their attitudes toward mandated influenza vaccination, and we review key Canadian legal cases.

Condition-of-service vaccination policies and rates of vaccination

Policies requiring vaccination against influenza as a condition of service were first introduced in Ontario long-term care facilities in 1998: unvaccinated employees were required to take antiviral prophylaxis or remain off work during influenza outbreaks in their facilities (“may not work during facility outbreak” policies). Such policies were extended to acute care hospitals in Ontario in

2000 and have since been adopted by health care facilities in other jurisdictions across Canada.

More recently, an increasing number of acute care hospitals in the United States have implemented policies requiring influenza vaccination as a condition of service. Generally, these policies either require vaccination as a condition of employment (vaccination-required policies) or offer workers the choice of either being vaccinated or wearing a mask during periods of influenza activity (vaccinate-or-mask policies). Such policies typically include students, volunteers and contractors as well as employees.

In Canada, as of May 2014, at least one nursing home has a vaccination-required policy. All health authorities in British Columbia and one in New Brunswick and 13 hospitals in Ontario have recently implemented vaccinate-or-mask policies.

Table 1 summarizes the available data about the different types of condition-of-service policies and the associated vaccination rates among health care workers.

Health care workers’ attitudes toward condition-of-service vaccination policies

Health care agencies may be reluctant to implement condition-of-service policies because of a concern about causing discontent among employees. However, among North American surveys each including more than 200 respondents published since 2010, 57%–85% of health care workers supported or strongly supported influenza vaccination as a condition of service.³⁰⁻³⁶ Support for condition-of-service policies is associated with increased knowledge of influenza vaccine science,^{30,36,37} a lengthier career in health care^{31,32} and more exposure to seriously ill patients with influenza^{31,38} — emphasizing that education is a critically important component for gaining employee acceptance when condition-of-service policies are introduced. Health care workers who work in a setting with an immunization mandate are also more likely to support such a mandate.^{36,39} Perhaps surprisingly, in some surveys, a significant minority of

KEY POINTS

- Most North American health care workers who have responded to recent surveys are in favour of condition-of-service influenza vaccination policies.
- In most Canadian legal cases, arbitrators have weighed the individual rights of employees against the consequences of nonimmunization on patients and have decided in favour of patient safety.
- To comply with the Canadian Charter of Rights and Freedoms, employers will need to carefully consider the details of any condition-of-service policy.

unvaccinated workers have reported being in favour of condition-of-service policies.^{36,40,41}

Condition-of-service vaccination policies and the law

Although there may be growing support for condition-of-service policies among health care workers, this does not make such policies legal. In Canada, policies requiring influenza vaccination as a condition of service must comply with employment law, human rights codes and the Canadian Charter of Rights and Freedoms (Table 2).

Employment law

To comply with employment law, a policy that applies to unionized employees must be consistent with the collective agreements between employers and labour unions. Policies must be a reasonable exercise of management rights, which, among other things, requires the policy to be connected to the employer's legitimate business interests. In this case, the relevant business interest lies in protecting patient health and safety.

Most cases considering the lawfulness of condition-of-service policies for influenza vaccination are grievances by unionized employees arguing that these policies violate the collective agreement because they violate the employee's bodily integrity, autonomy and privacy. In contrast, health care employers have argued that these policies are substantially connected to their interest in protecting patients from a real and significant safety risk^{44,51} and that they provide a "choice with consequences": an employee can choose not to be vac-

nated at the risk of being off work (either temporarily or permanently) or being required to wear a mask. The arbitrators who have considered these grievances have generally taken a balancing of interests approach,⁴⁴ weighing the individual rights of employees against the consequences for patients.

Based on the evidence of effectiveness of the vaccination of health care workers, all arbitrators but one have concluded that policies prohibiting health care workers from working during facility outbreaks are consistent with collective agreements, given the weight of evidence that such policies are connected with the health care organization's interest in patient safety.^{42-45,48} These arbitrators have reasoned that such policies are not disciplinary in nature and that they are consistent with the fundamental obligations of the employee to safeguard the health and safety of patients. In the single contradictory decision, in 2002, the arbitrator concluded that an unpaid-leave policy was unreasonable because it constituted mandatory medical treatment and removed the employee's choice.⁴⁶ However, in two other cases concerning vaccination-required policies, arbitrators have upheld the employers' decisions to dismiss an unvaccinated employee. In the case of the Kotsopoulos grievance,⁴⁸ the arbitrator concluded that the decision to dismiss a paramedic who declined vaccination, which was then required by the Ontario Ambulance Act, was consistent with the collective agreement. In the case of Barkley, an arbitrator upheld the decision to dismiss a nonunionized health care worker when she refused to be vaccinated.⁴⁹

In the recent decision involving British Columbia's Health Sciences Association, the arbitrator

Table 1: Condition-of-service policies in health care agencies and vaccination rates among health care workers

Policy	Impact on vaccination rates
May not work during facility outbreaks*	<ul style="list-style-type: none"> Initial implementation in Ontario in 1998/99 increased vaccination rates in long-term care facilities from 38% to more than 90%.⁵ However, vaccination rates subsequently decreased to less than 60%.⁵ Similar policies implemented in Ontario acute care hospitals and in long-term care facilities in other provinces were not associated with such substantial increases in vaccination rates.
Vaccinate or mask†	<ul style="list-style-type: none"> Significant increase in vaccination rates, achieving rates between 53% and 95%.¹¹⁻¹⁸ Higher rates were achieved in centres with higher preimplementation rates, and perhaps with more stringent enforcement and greater consequences for nonadherence. Experiences from 13 Canadian acute care hospitals and 2 health authorities or groups of health authorities suggest that implementation is associated with increases in vaccination rates of 17%-35% in the first year.[§]
Vaccination required‡	<ul style="list-style-type: none"> In the United States, such policies have increased vaccination rates to > 95%.¹⁷⁻²⁹ One Ontario long-term care facility has had a successful policy for more than 5 years.
<p>*"May not work during facility outbreak" policies require workers who are not vaccinated against influenza to not work in a health care facility during a declared facility outbreak of influenza.</p> <p>†Vaccinate-or-mask policies require unvaccinated health care workers to wear a mask while in areas where patient care is provided or patients may be present during the winter or influenza season.</p> <p>‡Vaccination-required policies require that workers be vaccinated against influenza annually if they wish to work for the facility or agency.</p> <p>§Personal communications: Dr. Gordon Dow (Moncton Hospital), 2013; Dr. Bonnie Henry (BC Centre for Disease Control), 2014; Dr. Kevin Katz (North York General Hospital), 2014.</p>	

ruled that a vaccinate-or-mask policy was consistent with the collective agreement. In finding the policy to be reasonable, the arbitrator noted that the evidence showed that the policy was the least intrusive policy needed to increase patient safety and that situations in which wearing an opaque mask would impede the ability to perform the jobs (e.g., some speech language therapy) would be individually accommodated.⁴⁷

Provincial human rights codes

Condition-of-service policies must also comply with provincial human rights codes, which prohibit discrimination in employment based on disability or creed (among other grounds). Canadian courts have endorsed a multidimensional definition of “disability,” which may be real or perceived and which emphasizes human dignity, respect and the right to equality.⁵² Although there has been no case to date, a court might conclude that a condition-of-service vaccination policy must exempt individuals who have a medical contraindication to influenza vaccination.

With respect to “creed,” this is defined in Ontario as “a set of sincerely held religious beliefs or practices which need not be based on the edicts of an established church or particular denomination.”⁵³ The Human Rights Tribunal of Ontario, which enforces The Ontario Human Rights Code, recently considered a case in which a paramedic argued that his employer discriminated against him by refusing to schedule him until he was vaccinated.⁵⁰ The tribunal concluded that the employee’s refusal to receive the influenza vaccination was

based not on creed but rather on a general objection to immunization. Although the applicant in that case did not satisfy the legal standard, it is likely that condition-of-service vaccination policies must permit exemptions that accommodate religious beliefs and practices.

The Canadian Charter of Rights and Freedoms

Condition-of-service policies may also be subject to the Canadian Charter of Human Rights and Freedoms. If government conduct (e.g., provincial legislation or a medical officer of health) violates an individual’s charter-protected rights, a court can declare it to be unconstitutional. The charter would thus apply to a provincial law mandating influenza vaccination of health care workers. The charter might apply to a policy introduced by a health care facility, but only if that policy is considered to be the implementation of a broader governmental policy.^{10,54,55} Although some arbitrators have applied the charter to hospital facility policies,^{42,46} others have refused,⁴⁵ and one considered charter issues but did not rule on whether the charter applied.⁴⁷

In cases to date, it has been argued that two sections of the charter may be violated by condition-of-service vaccination policies: the right to liberty and security of the person (section 7), and the right to freedom of expression (section 2b). The right to security of the person has been interpreted by courts as protecting an individual’s physical integrity and a person’s right to make choices concerning his or her own body.^{56,57} The right to liberty, which has been considered less frequently in the

Table 2: Canadian legal cases related to condition-of-service policies for influenza vaccination of health care workers

Condition-of-service policy	Area of law		
	Employment law	Human rights codes	Canadian Charter of Rights and Freedoms
May not work during facility outbreak*	In all but one case, policies are lawful	No relevant cases	Where applicable§, cases have been divided on whether such policies violate the right to liberty and security of person (section 7)
Vaccinate or mask†	Policies are lawful	Lawful if the policy provides exemptions for creed and disability	Where applicable§: <ul style="list-style-type: none"> • No violation of the right to liberty and security (section 7) • Possible violation of the right to freedom of expression (section 2b), which would be justified by section 1¶
Vaccination required‡	Policies are lawful	Lawful if the policy provides exemptions for creed (no cases related to disability)	No relevant cases

*“May not work during facility outbreak” policies require workers who are not vaccinated against influenza to not work in a health care facility during a declared facility outbreak of influenza (decisions^{42,46}).

†Vaccinate-or-mask policies require unvaccinated health care workers to wear a mask while in areas where patient care is provided or patients may be present during the winter or influenza season (single decision⁴⁷).

‡Vaccination-required policies require that workers be vaccinated against influenza annually if they wish to work for the facility or agency (3 decisions⁴⁸⁻⁵⁰).

§The charter applies to government policies. Whether the charter applies to health care facility and/or agency policies is a complex legal question and is addressed in the main text.

¶Section 1 of the charter specifies that charter rights may be limited if it can be shown that the breach is reasonable and demonstrably justified.

health care context, has been interpreted as including the power to make personal and autonomous decisions with respect to one's health care.⁵⁸ The right to freedom of expression has been interpreted to include the right "to say nothing or not to say certain things."⁵⁹ These individual rights are not unlimited. The rights to liberty and security of the person can be breached if to do so is consistent with the "principles of fundamental justice." Both of these rights and the right to freedom of expression may also be breached where it can be shown that the breach is reasonable and justified in accordance with section 1 of the charter.

With respect to the rights to liberty and security, vaccinate-or-mask policies have been found not to violate liberty or security rights, because the vaccine is not mandatory and masks are insufficiently invasive to violate these rights.⁴⁷ Decisions to date are divided on whether policies prohibiting health care workers from working during facility outbreaks violate the liberty and security interests of health care workers. The principal difference between these decisions is how the arbitrator perceived the severity of the policy's consequences and whether the health care worker can be seen as having a true choice to be vaccinated. Thus, in the case of St. Peter's Health System, the arbitrator concluded that the policy violated the employees' security and liberty rights;⁴⁶ this arbitrator did not go on to determine whether the violation was consistent with the principles of fundamental justice or was reasonable and justified. By contrast, in the 2006 decision involving the Health Employers Association of BC, the arbitrator concluded that the health care worker's right to liberty and security were not engaged because the imposed economic consequences were not sufficiently severe as to effectively deny an individual choice over her body.⁴²

Vaccination-required policies are, of course, associated with much more severe economic consequences than policies prohibiting health care workers from working during facility outbreaks. Although no arbitrator or court has considered whether such policies violate the charter, they may be seen as leaving the employee with no choice but to be vaccinated.⁴³ However, the Supreme Court of Canada has consistently refused to recognize that the charter protects economic rights, such as the right to work, which may present an important obstacle to this argument.⁶⁰

With respect to freedom of expression, BC's Health Sciences Association argued that compelling an unvaccinated worker to wear a mask is a form of "forced expression" because it may reveal to others that he or she chooses not to be vaccinated. The arbitrator in this case recognized that this might be the case but ruled that the

employer had shown that the policy was a reasonable and justifiable limit on employee rights.⁴⁷

It is important to note that, if a condition-of-service policy is judged to have breached charter rights, the details of the policy will be critical in determining whether the breach is justified. To be justifiable, the specific policy must be tailored to its stated objective and must impair the rights of individuals as little as possible. Thus, employers should carefully consider which groups of employees pose a risk to patients if they remain unvaccinated, when influenza activity is sufficient to warrant work exclusion, whether alternatives have truly been exhausted, what is the appropriate consequence of refusing to be vaccinated, and whether this consequence is fairly applied.^{45,47}

Conclusion

Vaccinate-or-mask policies for influenza vaccination in health care organizations result in substantial increases in the vaccination rates among health care workers, are supported by most health care workers and, based on decisions to date, are likely to be found to be in compliance with Canadian law. Although vaccination-required policies have been upheld by arbitrators, employers who opt for more intrusive policies should carefully consider whether the details of such a policy maximize patient safety while impairing the charter rights of health care workers as little as possible. Physicians and employers should work together to find the best means to improve vaccination rates and protect both patients and providers from influenza.

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