

*Mandatory Influenza Vaccination of Health
Care Workers: What Past Legal Cases
Reveal About Future Policy-Making*



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Disclosure Statement



I have no affiliation (financial or otherwise) with a pharmaceutical, medical device or communications organization.



Overview



- 1. Mandatory Influenza Vaccination Policies**
- 2. The Legal Principles**
- 3. Future Policy Making**

The Policies



- **Three types of mandatory vaccine policies:**
 - Vaccinate-or-dismiss
 - Suspension without pay during influenza outbreak
 - Vaccinate-or-mask policies

The Policies



- **Why?**
 - Reduce transmission to elderly and sick
 - ✦ Debate about evidence
 - Failure of voluntary immunization policies

The Policies



- Who?
 - Provincial government
 - ✦ e.g. former *Ambulance Act*, R.S.O. 1990, c. A.19
 - Medical officer of health
 - ✦ e.g. *Health Protection and Promotion Act*. R.S.O. 1990 c. H.7, s. 22
 - Health care facilities
 - ✦ e.g. *Carewest v. Alberta Union of Provincial Employees*, [2001] A.G.A.A. No. 76
 - Joint effort
 - ✦ e.g. *Health Employers Assn. of British Columbia v. Health Sciences Assn. (Influenza Control Program Policy Grievance)*, (2013) 237 L.A.C. (4th) 1

The Legal Principles



- What are the relevant legal principles?
 - ✦ Employment law
 - Health care facilities
 - ✦ Provincial human rights codes
 - Government & health care facilities
 - ✦ *The Canadian Charter of Rights and Freedoms*
 - Government conduct and action
 - Health care facilities?

The Legal Principles: Employment Law



- For unionized employees:
 - Governed by collective agreement
 - Human rights legislation
 - Management rights provision requires employer to exercise rights reasonably
 - *Re KVP Co. and Lumber & Sawmill Workers' Union, Loc. 2537* (1965), 16 L.A.C. 73.
- All policies have generally been upheld except in one case

The Legal Principles: Human Rights Codes



Every person has a right to equal treatment with respect to employment without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, **creed**, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or **disability**

- Ontario Human Rights Code, R.S.O. 1990, c. H.19, section 5
 - ✦ See for e.g. *Ataellahi v Lambton County (EMS)*, 2011 HRTO 1758,
 - ✦ BC Health Employers?



The Legal Principles: *The Canadian Charter of Rights and Freedoms*

Everyone has the right to life, **liberty and security of the person** and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Section 7 (emphasis added)

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 1

The Legal Principles: The Charter



- Arguments:

- Security of the person:

- ✦ “the injecting of a foreign substance into a person's body which may cause muscle ache, fatigue or other side effects is invasive. The introduction of the viral material included in the influenza immunization into the person's muscle tissue and then into the bloodstream violates a person's bodily integrity.”: *Health Employers Assn. of British Columbia v British Columbia Nurses' Union* (2006), 155 L.A.C. (4th) 252. para. 30

- Liberty interest:

- ✦ “right to make a choice about what goes into a person's body and whether that can be subject to an unfair choice” between vaccination and working: *Health Employers*, para. 32

The Charter: Vaccinate or Suspend



- “no choice”
 - “enforced medical treatment”
 - *St. Peter’s Health System v. Canadian Union of Public Employees, Loc. 778 (2002)* 106 L.A.C. (4th) 170, para. 67.
- “choice”
 - “...not evident the economic consequences of failing to become immunized are so severe they effectively deny an individual choice over her body. It cannot be said the loss of a number of days or weeks of work, although no doubt significant on an individual basis, meets that threshold.”
 - *Health Employers*, para. 85
 - See also *Re Carewest and A.U.P.E. (2001)*, 104 L.A.C. (4th) 240

The Charter: Vaccinate or Dismiss



- Does influenza immunization as a condition of employment violate the rights to liberty and/or security of the person?

The Charter: Vaccinate-or-Mask



- Does not violate section 7
- Policy offers “choice”
- Not invasive, not stigmatizing
 - ✦ *Health Employers Assn. of British Columbia v. Health Sciences Assn. (Influenza Control Program Policy Grievance)*, (2013) 237 L.A.C. (4th) 1

Future Policy Making



- Does the policy balance individual rights with the public health goal of protecting patient health?
- Alternatives?
 - Are voluntary policies effective?
 - Are less intrusive alternatives effective?
 - ✦ Opt out
 - ✦ Vaccinate-or-mask
- Policy must respect certain interests:
 - exceptions for medical and religious reasons in order to respect provincial human rights codes.