



Growing your brand
5 ways for employers
to boost their reputation **page 4**

Covering up

Hospitals lose out on vaccinate-or-mask policy
page 2

Vaccinate-or-mask policy struck down by Ontario arbitrator

'The policy is illogical and makes no sense'

BY JOHN DUJAY

Many Ontario nurses will no longer be forced to wear masks while on duty if they were not vaccinated for influenza now that the Ontario Nurses' Association (ONA) has won a grievance arbitration case against a Toronto hospital and the Ontario Hospital Association (OHA).

"The policy is illogical and makes no sense — the exact opposite of it being reasonable," said arbitrator William Kaplan in his Sept. 6 decision.

"Requiring unvaccinated (health-care workers) to wear surgical or procedural masks — notwithstanding the inherent illogicality of it all — is unreasonable, and so, therefore, is the policy compelling it."

"In the face of all of this, the 'ask' that (health-care workers) wear a mask for their entire shift for possibly months on end when entirely free of symptoms is completely unreasonable and is contrary to the collective agreement."

The OHA said it was disappointed with the decision. "Hospital leaders enacted this policy in good faith to protect these populations from what could be a potentially fatal illness," said Aslan Hart, public affairs specialist at the OHA.

"The top priority of all hospitals is to provide patients with a safe environment while they receive care. During flu season, hospitals are highly congested environments that are serving the province's most vulnerable patients, including the frail, elderly, children and those too sick to receive immunization."

And other jurisdictions in Canada have implemented this policy, she said.

"Most notably in British Columbia, a similar provincial policy was upheld by an arbitrator appointed by the provincial Labour Relations Board, who ruled that given the seriousness of influenza, a program that increases immunization rates in the health-care setting was a reasonable policy."

Background

The case was first brought to arbitration after Toronto's St. Michael's Hospital imposed such a policy for health-care workers during the 2014-15 flu season. Sinai Health System, Sunnybrook Health Sciences Centre, North York General Hospital, the Centre for Addiction and Mental Health, Michael Garron Hospital and Baycrest Health Sciences were also part of the case.

The ONA immediately grieved the policy after it was implemented.

"We felt that the mask issue is not only something that wasn't necessary, and actually not proven by science (as seen) from most of the decisions or awards and arbitrators — they certainly weren't convinced that there was scientific evidence to support it," said Vicki McKenna, ONA president in Toronto.

"We just felt that it was unnecessary; these policies were obtrusive and unnecessary and not supported in science, so that's why we took it forward."

In his Sept. 6 ruling, Kaplan cited a 2015 decision regarding a similar policy at a hospital in Sault Ste. Marie, Ont.

"The policy was introduced at (Sault Area Hospital) for the purpose of driving up vaccination rates," said arbitrator James Hays in his 2015 decision.

"I also find that the weight of scientific evidence said to support the VOM (vaccinate-or-mask) policy on patient safety grounds is insufficient to warrant the imposition of a mask-wearing requirement for up to six months every year."

Accordingly, Sault Area Hospital discontinued its



HR News
at Your Fingertips

-  **THE LATEST NEWS**
-  **THE BEST COMMENTARY**
-  **DELIVERED WEEKLY**
-  **FOR READING ON ANY DEVICE**

Sign up for the *Canadian HR Newswire* today for free and enjoy great content from the publishers of *Canadian HR Reporter*.

Visit www.hrreporter.com/canadian-hr-newswire

the answer company
THOMSON REUTERS®

Hospitals will likely be more reluctant to impose vaccinate-or-mask policies on health-care workers without getting more evidentiary support for their position, according to a lawyer.



Credit: one photo (Shutterstock)

VOM policy, as did other hospitals. However, some hospitals, including St. Michael's, did not do so, necessitating the Kaplan decision.

Expert opinion crucial

It was the expert evidence that turned the tide for the ONA, said Lad Kucis, partner at Gardiner Roberts in Toronto.

"There was really insufficient evidence that asymptomatic or pre-symptomatic transmission was even happening," he said. "There really wasn't any evidence that the transmission of the flu by non-symptomatic health-care workers was really a significant issue."

The hospital was relying on one set of experts and the ONA was relying on another, said Ian Campbell, partner at Fasken Martineau DuMoulin in Toronto.

"The experts disagreed, and this ultimately came down to the arbitrator listening to the evidence of both sides and deciding whose experts he preferred, picking apart the various positions put forward," he said.

"It's notable arbitrator Kaplan goes through the expert evidence in great detail — and in some cases highlighting... picking apart the testimony brought forward by some of the expert witnesses, including finding significant issues of concern with the reports tendered — and I think that went a long way to supporting or leading to his conclusions, because the experts he was most critical of were the experts called by the hospital."

The St. Michael's evidence was based on a 2014 report, cited by Kaplan, from the Toronto Area Health Sciences Network, consisting of 13 teaching hospitals.

"The wearing of face masks can serve as a method of source-control of infected (health-care workers) who may or may not have symptoms. Masks may also prevent unvaccinated (health-care workers) from as yet unrecognized infected patients or visitors," it said.

This grievance wasn't about saying yay or nay to the vaccine, said McKenna, as the association encourages members to partake in the vaccine, and many do.

"However, we all know that that isn't the silver bullet — there's many other things that are helpful to prevent the spread of influenza," she said.

There are already policies in place that would address an influenza outbreak, according to McKenna.

"When the medical officer of health determines that there's an influenza outbreak, then a whole procedure falls into place around protections for health-care workers and patients and their families that they care for, that's already there."

And in the collective agreement, the language

addresses what procedures or mechanisms are initiated when an outbreak happens, said McKenna.

"We did that with employers right across the province. Then, a few years ago, employers started to institute policies which spoke about if nurses or, in particular, health-care workers generally, on not partaking the influenza vaccine, that then they will have to wear masks anytime they're in a patient-care area."

However, the VOM policy has nothing to do with influenza outbreaks, which are governed by a different protocol and not at issue in this case, said Kaplan in his arbitration decision.

Looking ahead

Arbitrators must focus on the merits of the case before them and what is written in the collective agreement, said Campbell.

"Arbitrators are not bound necessarily by the decisions of other arbitrators because they're on the same level. And so while decisions rendered by other arbitrators, especially respected arbitrators, are normally given deference and often followed, it's not as if there's a precedent that must be followed," he said.

"In the court system, when a higher level of court renders a decision, lower levels of courts are required to follow it; those same principles don't apply in this context."

It is unclear whether or not the OHA or any hospital involved will appeal the case, said Kucis.

"I think that hospitals will be a little bit more reluctant to try to impose these things without getting a little bit more evidentiary support for their position," he said. "In the near term, I think it's pretty clear that forcing nurses to wear masks when they're unvaccinated, symptom-free is unreasonable."

"That's the key takeaway for now, and I don't anticipate that we're going to be seeing hospitals fighting this in the immediate future."

For its part, the OHA said it will "continue to work with government and our partners across the continuum-of-care to ensure the highest level of safety during the upcoming flu season," said Hart.

But the ONA will continue to fight against any future vaccinate-or-mask policies, said McKenna.

"Some of (the hospitals) have done a U-turn and have agreed that they'll no longer institute such a policy (but) we haven't heard from all of the employers as of yet on what they're doing."

“
There's many other things that are helpful to prevent the spread of influenza.”