

Test Your OHS I.Q.: Can an Employer Require Healthcare Workers to Get Flu Shots or Wear Masks?



SITUATION

A healthcare employer establishes an Influenza Control Policy requiring all workers who access patient care areas to get an annual flu vaccine or wear a mask during flu season whenever present in such areas. The policy's purpose is to reduce the serious and potentially fatal consequences of healthcare workers transmitting influenza to patients, who may be more vulnerable to the flu than the general population. The policy requires workers to notify the employer of their immunization status by a specified date. (During a flu outbreak, two or more cases of influenza in the facility within a week, the mask requirement is lifted and instead workers who haven't been vaccinated and refuse to take antiviral medication are excluded from work without pay. If they can't be vaccinated or take the anti-viral medicine because of medical reasons, they're reassigned or excluded *with* pay.) The union claims the policy violates workers' privacy rights and is unreasonable. (But it doesn't challenge the outbreak aspect of the policy.)

QUESTION

Is the employer's flu policy enforceable?

- A. Yes, because it's justified by reasonable patient safety concerns.
- B. Yes, because all employers must protect workers from workplace hazards, including diseases such as the flu.
- C. No, because it violates workers' privacy rights.
- D. No, because it discriminates against workers who can't get the vaccine for medical reasons or object to immunizations.

ANSWER:

A. The policy reasonably addresses a serious patient safety issue and is therefore enforceable.

EXPLANATION

This hypothetical is based on a decision issued by a BC arbitrator, who concluded that such a flu policy was reasonable because it gave workers a choice between getting immunized and wearing a mask or taking anti-viral medications during an outbreak. Additionally, if workers can't be vaccinated or take the anti-viral medicine for medical reasons, they could be reassigned or excluded with pay during an outbreak. Noting the 'indisputable' fact that influenza can be a serious and even fatal illness for the elderly and patients with underlying medical conditions and that immunization protects healthcare workers and prevents transmission of the flu to vulnerable patients, the arbitrator ruled that the policy was a 'helpful program to reduce patient risk.'

Insider Says: Note that although patient safety is a strong argument that courts and arbitrators may agree support such policies, it isn't a guaranteed justification for any flu policy. The key is to balance patient safety with workers' privacy rights by providing accommodations as in this policy.

WHY THE WRONG ANSWERS ARE WRONG

B is wrong because although the flu could be a workplace hazard, not all work environments warrant a policy requiring either immunization or mask wearing to provide reasonable protection from influenza infection. The healthcare setting in this hypothetical involves heightened safety risks not only to the workers but also to the patients being served, who may have underlying medical conditions that render the flu potentially life-threatening. Similar risks don't exist in other workplaces, such as construction sites or manufacturing plants. So other less intrusive measures to protect workers from the flu might be more appropriate and justifiable in such workplaces. (For more information about what you can do to protect your workers during flu season, visit our Pandemic and Flu Planning Compliance Centre.)

C is wrong because the policy's intrusion into workers' privacy is minimal and supported by the significant patient safety concerns. While workers do have privacy rights, those rights aren't unlimited. When serious safety issues arise, a balancing of interests is required and some intrusion into privacy rights may be permissible if the least intrusive measure is used. For example, this policy doesn't require bodily intrusion workers can choose not to get the vaccine and wear a mask instead. (In the case of an outbreak, the policy allows the worker to take anti-viral medicine if they aren't vaccinated and if they can't be vaccinated or take the anti-viral medicine because of medical reasons, they can be reassigned or excluded with pay.) It also requires only limited disclosure of personal information that is, workers' immunization status. Thus, the policy reasonably balances those interests and is enforceable.

D is wrong because this policy accommodated workers who couldn't get the vaccine due to allergies or other medical conditions and even those who conscientiously objected to immunizations. It allowed workers to choose to wear masks when in patient areas, rather than immunization. (And in the event of an outbreak, workers who didn't get vaccinated could take anti-viral medications.) Thus, the policy made reasonable efforts to accommodate workers who couldn't comply and isn't, on its face, discriminatory.

SHOW YOUR LAWYER

Health Employers Assn. of BC v. Health Sciences Assn. (Influenza Control Program Policy Grievance), [2013] B.C.C.A.A.A. No. 138, Oct. 23, 2013