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MANDATORY INFLUENZA VACCINATION REQUIREMENT FOR ALL NURSES UPHOLD AT ARBITRATION

Shane Smith
Toronto
416.595.8166
ssmith@millerthomson.com

In a recent decision, an arbitrator was called upon to determine whether a hospital had violated the Ontario Nurses' Association collective agreement when it placed a number of nurses on unpaid leave after they refused to take the influenza vaccine.

Miller Thomson represented the hospital in this dispute (and assisted in the development of the policy at issue) and is pleased to report that the Arbitrator upheld the hospital's decision to implement mandatory influenza vaccination for all registered nurses during a period of high community influenza activity and to place nurses who refused to take the vaccine on an unpaid leave of absence.

This is the first case that has interpreted the meaning and application of Article 18.07 of the central ONA collective agreement which deals with influenza vaccination.

Facts

Prior to the 2007-08 flu season, the hospital revised its Influenza Protocol by introducing new provisions to address concerns around influenza activity in the community. These changes were introduced in consultation with the Medical Office of Health. Historically, the Influenza Protocol focussed on situations where there was an outbreak of nosocomially acquired influenza within the hospital itself.

As a result of these revisions, the hospital established a two phase process for responding to community influenza:

- a) *Phase 1* – triggered when a patient presents to the hospital's Emergency Department with confirmed influenza. The requirement under Phase 1 was for all staff working in the Emergency Department and in other designated departments to have taken the influenza vaccine and/or be taking anti-viral drugs;
- b) *Phase 2* – triggered when the local Medical Officer of Health determined that there is localized influenza activity in the community. The requirement under Phase 2 was for all staff of the hospital to have taken the influenza vaccine and/or be taking antiviral drugs

In both instances, staff that refused the vaccine or anti-viral drugs would be placed off work without pay for the duration of the period that the hospital had the requirement in place (except in circumstances where the staff member had a medically based justification for the refusal).

In December 2007, the local Medical Officer of Health declared that there was widespread influenza in the community and recommended the hospital implement Phase 1. The hospital elected to implement Phase 1 at that time. Phase 2 was later implemented in March in response to significant increase in influenza activity in the community coinciding with a number of patients either attending in the Emergency Department or being admitted to the hospital with influenza. The Medical Officer of Health's recommendation was still outstanding at this time.

The Phase 2 restrictions were ultimately in place between March 12 and April 2, 2008. During this time period, a number of registered nurses refused to be vaccinated and were placed on an unpaid leave of absence. This resulted in a policy grievance and a group grievance filed by ONA on behalf of these nurses.

While there were patients with influenza in the hospital and patients attending at the Emergency Department who had influenza during this time period, at no time was there an outbreak of influenza within the hospital. A 'hospital outbreak' occurs when there are cases of nosocomially acquired influenza occurring within a hospital.

Article 18.07 of the ONA collective agreement has provisions specifically related to influenza vaccination. It was this article that formed the basis of the grievance. The pertinent provisions of Article 18.07 are as follows:

18.07 - The parties agree that influenza vaccinations may be beneficial for patients and nurses. Upon a recommendation pertaining to a facility or a specifically designated area(s) thereof from the Medical Officer of Health or in compliance with applicable provincial legislation, the following rules will apply:

(a) Nurses shall, subject to the following, be required to be vaccinated for influenza.

(d) If a nurse refuses to take the vaccine required under this provision, she or he may be placed on an unpaid leave of absence during any influenza outbreak in the hospital until such time as the nurse is cleared to return to work. If a nurse is placed on unpaid leave, she or he can use banked lieu time or vacation credits in order to keep her or his pay whole.

Position of the Parties

ONA argued that under 18.07(d) of the ONA agreement, nurses could only be placed on an unpaid leave of absence when there was an 'outbreak' and the proper definition of 'outbreak' referred to a hospital outbreak and not a community outbreak. As there was no hospital outbreak, ONA's position was that the hospital was therefore unable to place nurses who refused the vaccine on an unpaid leave of absence.

The primary position of the hospital was that the trigger for the application of 18.07 was a recommendation from the Medical Officer of Health. Further, the hospital argued that the word 'outbreak' in 18.07(d) must be read in the context of the entire clause and that it included a community outbreak. Given that there was a recommendation in place from the Medical Officer of Health, and there was an outbreak in the community, the hospital's position was that Article 18.07 was properly triggered and applied in the circumstances.

Decision

The Arbitrator noted that the hospital's Influenza Protocol set out two different procedures to be implemented - one in the case of community influenza, and the other in the case of a hospital outbreak of influenza – and that the procedures in respect of a hospital outbreak were much more elaborate and onerous than the procedures related to community influenza.

The Arbitrator ruled that the trigger for the operation of Article 18.07 was a recommendation from a Medical Officer of Health. With respect to the word 'outbreak' in 18.07(d), the Arbitrator concluded that when read in the context of the entire collective agreement, an 'outbreak' occurs when a Medical Officer of Health has made a recommendation that a hospital implement influenza measures. In reaching this determination, the Arbitrator noted based on the expert evidence presented at the hearing that there was no standard definition of an 'outbreak' when dealing with influenza, and this was deliberate so as to not restrict the ability to deal with any particular situation from an infection control perspective.

In light of the above, the Arbitrator concluded on the facts before him that:

- (a) the local Medical Officer of Health had declared that there was widespread influenza in the community and had recommended that the hospital implement Phase 2;
- (b) because of this recommendation, Article 18.07 had been triggered and there was an outbreak for the purposes of Article 18.07(d); and
- (c) with Article 18.07 being applicable, the individual nurses were required to take the influenza vaccination, and failing that, the hospital was within its rights to place the nurses on an unpaid leave of absence by the hospital.

Importance

While this decision deals with a specific fact situation, the interpretation and application of Article 18.07 set out in the award are important for many other hospitals and health care employers.

The language in Article 18.07 of the ONA central agreement is identical or very similar to language appearing in other collective agreements in the health sector, including in the OPSEU (Article 7.16), CUPE (Letter of Understanding), and SEIU (Article 19.03) central hospital agreements. In light of the commonality of this type of language, the reasoning advanced by the Arbitrator in this case should also apply to the influenza vaccination provisions in other agreements.

Based on this decision, hospitals and other health care employers are likely in a position to be more demanding of staff in relation to requiring influenza vaccination during periods of high influenza activity – both within a facility and in the community. Given the importance of a recommendation from the Medical Officer of Health to the application of the influenza vaccination provisions, employers should be looking to establish or maintain good working relationships with local public health officials in respect of influenza.

For more information on the issue of staff vaccination requirements and this decision, please contact Shane Smith at Miller Thomson. Our Health Industry Practice Group would be pleased to assist you with the development or enforcement of policies and procedures on infection control.

About the Author

Shane Smith is a partner in the Health Industry Practice Group at Miller Thomson LLP and also a member of the firm's Labour and Employment Group.

Mr. Smith's practice is focused on providing legal advice and support to health sector employers in all matters relating to labour and employment law. Before joining the Health Industry Practice Group, Shane was the Director, Labour Relations and in-house labour and employment counsel for two large hospital corporations. Prior to that, he practiced for a number of years in the labour and employment law area, advising management clients in all sectors.

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REGIONAL CONTACTS

National Chair

Joshua Liswood
416.595.8525
jliswood@millerthomson.com

Edmonton

Brian Curial
780.429.9788
bcurial@millerthomson.com

Vancouver

David Martin
604.643.1229
dmartin@millerthomson.com

Toronto/Markham

Kathryn Frelick
416.595.2979
kfrelick@millerthomson.com

Calgary

Ivan Bernardo
403.298.2425
ibernardo@millerthomson.com

Montréal

André Dugas
514.871.5410
adugas@millerthomson.com

Southwestern Ontario

Glenn F. Jones
519.931.3508
gjones@millerthomson.com

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