THIS PRESENTATION IS UP-TO-DATE ON 26-08-2020; PRACTITIONERS ARE ADVISED THAT AT THE CURRENT RATE OF LEGAL UPDATES BY THE GOVERNMENT, THE STANDARDS FORMULATED IN THIS DOCUMENT MAY HAVE CHANGED

Legal and Ethical Impacts of COVID-19 on the Practice of Occupational Medical Practitioners

Dr JNR Lapere

26-8-2020

Legal and Ethical Impacts of COVID-19 on the Practice of Occupational Medical Practitioners

Thanks for advice, support and reviews to Drs

Haidee Williams

Amy Burdzik

Greg Kew

Daan Kocks

Frank Fox

Andre Kotze

Legal and Ethical Impacts of COVID-19 on the OMP Practice

What makes up the 'new normal'?

Legal

Tested

1. Common law
2. Constitution
3. 'Old' statutes

Untested & ? Always lawful

1. 'Disaster' regulations/directives
2. 'Guidelines'

Ethical

'In the box'

1. HPCSA rules
2. 'Ethical reasoning'

'Out of the box'

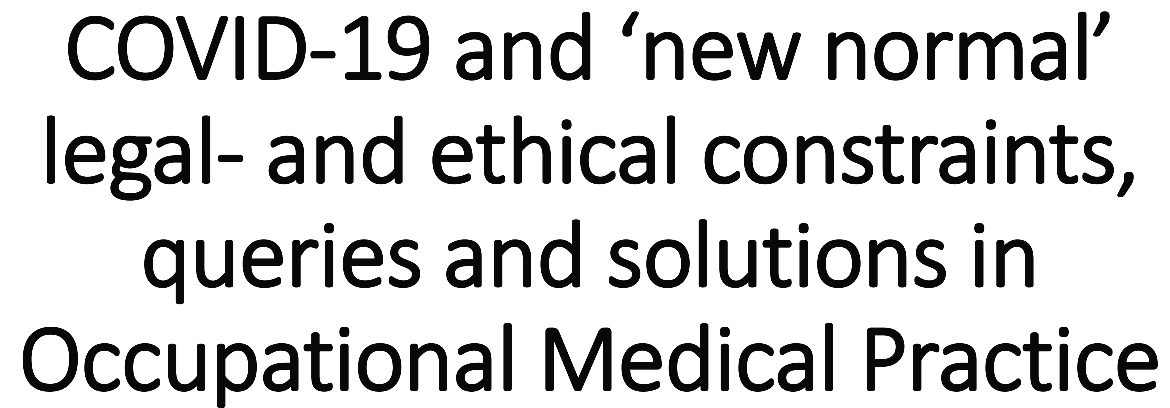
HPCSA 'practitioners may be required to depart from their established procedures, although this should be done responsibly, reasonably and in the best interest of patients'

SARS-CoV-2
Public Health Ethics

Transitioning from medical ethics to public health ethics during COVID-19

1. Transitioning from medical ethics to public health ethics during COVID-19 (26 August)
2. Fair allocation of limited resources (2 September)
3. Immunity passports/certificates (30 September)
4. Research ethics during pandemics (4 November)
5. Pandemic lawsuits (2 December)

- **We invite all our fellow healthcare practitioners to join us on these dates for an hour long discussion. Each talk qualifies for 1 CPD Ethics point.**
- **1st Webinar link (26 August) - Capacity limited to 500 registrants:** https://pathcare-org.zoom.us/webinar/register/WN_Mo2LgqbyTdOViE1L2FF5Ww



Dr JNR Lapere

SARS-CoV-2 applied Statutes and Bioethics in OH

Lawfulness of certain Disaster Management directions?

SARS-CoV-2 applied Statutes and Bioethics in OH

Lawfulness of certain Disaster Management directions

Examples

- Guideline on the submission of COVID-19 related health data from workplaces to the National Department of Health: can any employer comply?
- Director-general: Health - Testing of all persons passing on at home or out of a health facility, 12 August 2020: ‘All persons who die at home must be tested for SARS Cov-2 by a Medical Doctor/ Clinician’?

Lawfulness of certain Disaster Management directions Reporting

Guideline on the submission of COVID-19 related health data from workplaces to the National Department of Health: can any employer comply?
No

1. Statutory permissibility: flawed DMR-, DEL- and DMR references
2. In breach of POPI
    1. Employers are not allowed to process special personal information of a data subject
    2. Flawed purpose of the data collection: ‘to detect, contain and prevent the spread of COVID-19’
3. Required data: duplication of existing reporting to statutory bodies or to DOH, or may not be available to employer or confidential medical data

Lawfulness of certain Disaster Management directions Reporting

Guideline on the submission of COVID-19 related health data from workplaces to the National Department of Health: could employer impute this duty to the OMP?
No

1. HPCSA rules relating to confidentiality apply and prior informed consent for the release of the information is required
2. Automatic transfer of personal information to a registry before informing the patient that information will be passed on is unacceptable
3. Release of information without consent requires a Statutory provision, the instruction of a court, or an identified public interest. To my opinion, none of these are in place
4. Obtaining consent in light of the flawed purpose for this release of medical information would be difficult

Lawfulness of certain Disaster Management directions
Testing of corpses by doctors

Director-general: Health Testing of all persons passing on at home or out of a health facility 12 August 2020: 'All persons who die at home must be tested for SARS Cov-2 by a Medical Doctor/ Clinician'

Law

1. **Regulations relating to surveillance and control of notifiable conditions**: 15 (4) The head of a provincial department must apply to a High Court for an order to conduct an autopsy on the body of a patient who has presumably died of a notifiable medical condition, in order to ascertain the exact cause of death, and only where this is in the interest of public health and is on special request by an interested person.
2. **Disaster Management Act, 2002 SARS-CoV-2-Regulations of 18 March 2020 (GG 43107):** 4. (1) No person who has been ….confirmed as having COVID-19, or who is suspected of having contracted COVID-19, or who has been in contact with a person who is a carrier of COVID–19, may refuse consent to an enforcement officer for (a) submission of that person to a medical examination, including …to the taking of any bodily sample by a person authorised in law to do so

Lawfulness of certain Disaster Management directions Testing of corpses by doctors

Director-general: Health Testing of all persons passing on at home or out of a health facility, 12 August 2020: ‘All persons who die at home must be tested for SARS Cov-2 by a Medical Doctor/ Clinician’

Ethics

1. Testing consent

HPCSA SEEKING PATIENTS’ INFORMED CONSENT: THE ETHICAL CONSIDERATIONS 16.2:

1. Health care practitioners must ensure that anyone considering whether to consent to screening or testing can make a properly informed decision.
2. As far as possible, practitioners should ensure that screening or testing is not contrary to the individual's interests. (?)

Lawfulness of certain Disaster Management directions Testing of corpses by doctors

Director-general: Health Testing of all persons passing on at home or out of a health facility 12 August 2020: ‘All persons who die at home must be tested for SARS Cov-2 by a Medical Doctor/ Clinician’

Ethics

2. Disclosing information

HPCSA CONFIDENTIALITY: PROTECTING AND PROVIDING INFORMATION 9.5 DISCLOSURE AFTER A PATIENT'S DEATH 9.5.1 & 2

1. Health care practitioners have an obligation to keep personal information confidential after a patient dies
2. Health care practitioners should consider whether disclosure may cause distress to, or be of benefit to, the patient's partner or family
3. Circumstances in which health care practitioners may be asked to disclose information about patients who have died:
    1. To assist in connection with an inquest: practitioners are required to provide the relevant information
    2. Clinical audit, education, research: with the approval of a research ethics committee.
    3. On death certificates. The law requires health care practitioners to complete death certificates honestly and fully
    4. For public health surveillance that is approved by a research ethics committee
4. Particular difficulties may arise when there is a conflict of interest between parties affected by the patient's death

SARS-CoV-2 applied Statutes and Bioethics in OH

Lawfulness of instructions by Officials?

SARS-CoV-2 applied Statutes and Bioethics in OH Reporting

Should OMP be involved in 'mandatory' COVID case reporting to DEL, DMR, RSR and now DOH?

NOTICE OF INSPECTION/INVESTIGATION

Please be informed that our office intends to conduct an inspection on your premises on the date mentioned below in terms of the above-mentioned Acts.
We shall also examine the records that you are required to keep in terms of the above-mentioned Acts and Regulations (See Annexure):

Please report all Covid-19 cases - Use the W.Cl.1 (i.e. if the infection was occupationally or socially acquired). Where the infection was not acquired in/from the workplace, you will indicate at point 30 of the W.Cl.1 form.

Is this a legal requirement or DOL overreach for non occupational acquired infections?

SARS-CoV-2 applied Statutes and Bioethics in OH

Good evening Sir,

Only work-related infections must be reported to the Department's inspectors and to the Compensation Fund. Such cases must also be reported to the Department of Health.

Community related infections must be investigated by the employer and record must be kept by the employer.

The case must also be reported to the Department of Health if the employee has not already done so.

Do not report community related infections to the Department of Employment and Labour inspectors or to the Compensation Fund.

Regards

Tibor Szana
Chief Inspector: OHS
Inspections and Enforcement Services Department of Employment and Labour www.labour.gov.za
0123094575
0828835737

SARS-CoV-2 applied Statutes and Bioethics in OH

OMP’s and Health Establishment’s compliance?

SARS-CoV-2 applied Statutes and Bioethics in OH

Employer wants to act as as health establishment?

Good Morning Dr, We wanted to get a lab to do our COVID tests but they require a referral form the Dr. Please advise if we can use your services for the referral or if there are alternative methods we can try?

Sir, Why would you do COVID-19 PCR tests on your employees?

We had our first Confirmed case on site recently. We have a few people that we have identified direct contacts. What we want to do is have a system in place, should any of these direct contact employees have symptoms. We want to set up this system beforehand so that we can send them for testing.
So we won't be sending all employees just the ones that we have identified as close contacts only when they start experiencing symptoms. Hope this gives you a better understanding of why we want to do this

1. It is not for the employer to test employees.
2. Testing must be done through their primary care health provider (clinic or GP).
3. This is a notifiable health condition to which both National Health Act Regulations and Disaster Management Act Regulations apply; in both laws it is only for registered health establishments and health professionals to manage the notifiable condition.

SARS-CoV-2 applied Statutes and Bioethics in OH

Does the Occupational health clinic conform to its duties as health establishment?

1. Are OMP’s in permissible ‘employment’? Corporate involvement within HPCSA rules?
2. Is a manager appointed responsible for implementation and adherence to the Regulations?
3. Health workers:
   1. Risk-based surveillance?
   2. COVID-19 risk containment?
   3. Compliance monitoring?
   4. NA S 56(6) arrangements?
4. If PC and COVID-19 case management:
   1. Are there standard case definitions, SOP, forms, reporting tools?
   2. Notification procedures?
5. Latest DOH Guideline: Covid-19 Outbreak investigation: A practical guide and manual for healthcare facilities

SARS-CoV-2 applied Statutes and Bioethics in OH

Delegation of OMP duties at occ. health establishment?

How to apply Nursing Act S 56(6) in allowing nursing practitioners at the OH service to engage in clinical assessments: e.g. identification of suspect cases at work, evacuation of suspect cases at work, identification of close social contacts and institution of self -quarantine, assessment of RTW employees etc?

Basic legal requirements

1. Authorization by OMP in charge
2. Defined clinical acts and actions
3. After consultation with SANC Council

SARS-CoV-2 applied Statutes and Bioethics in OH

Employers’ authority and dual OMP loyalty?

SARS-CoV-2 applied Statutes and Bioethics in OH

Employer pressure on PCR testing of asymptomatic close contacts? Or testing of SARS-CoV2-naieve employees?

Should the OMP oblige where employers demand asymptomatic employees to be tested?

Or COVID-healed employees to be tested prior to RTW?

Or contractor-employees to be tested prior to being allowed access on site?

Legal duty to comply with National guideline: Clinical management COVID-19 disease Version 4 (May 2020)

1. Asymptomatic close contacts should not routinely be tested.

2. If a high clinical suspicion for COVID-19 persists despite an initial negative test, repeat testing should be considered in consultation with an infectious disease expert, particularly in hospitalised patients for whom management might be significantly altered.

3. There is no role for repeat “confirmatory” PCR testing on patients who test positive despite the absence of symptoms

4. It is not necessary to repeat PCR testing in order to de-isolate a patient. Patients can remain PCR positive even after they are no longer infectious. A positive PCR test does not equate to an infectious, viable virus.

hot off the press: ?how to incorporate Antibody Testing in the occupational health practices?

SARS-CoV-2 applied Statutes and Bioethics in OH

OMP employment conditions and Resources at health establishment?

SARS-CoV-2 applied Statutes and Bioethics in OH

Resources at health establishment?

Refusal of OMP to deliver service without special HCW PPE supplied by employer as '*the OMP has to have it in any case for own personal use and at own expense*'?

Legal

1. MHSA S 13(3)(b): employer to supply OMP with '*means to perform*'..

2. OHSA-DEL 4 June 2020 No 41
   1. '…workers must be provided with accredited PPE as per DOH Guidelines..'
   2. Worker means '…any person who works in an employer's workplace...'

3. DOH
   1. Clinical management COVID-19 disease Version 4 (May 2020)
      1. 'Healthcare worker PPE consists of gloves, gown (or apron) and a medical mask'
      2. 'Aerosol precautions (…taking respiratory tract samples, intubation, bronchoscopy, open suctioning of the respiratory tract, and cardiopulmonary resuscitation): fit-tested particulate respirator (N95 respirator or equivalent), and eye protection (goggles or face shield).
   2. COVID-19 Disease: Infection Prevention and Control Guidelines Version 2 (21st May 2020)
      1. Surgical Mask for general care of all patients
      2. N95 respirator for aerosol generating procedures

SARS-CoV-2 applied Statutes and Bioethics in OH

Colleagues & Notifiable Medical Condition compliance?

SARS-CoV-2 applied Statutes and Bioethics in OH

Suspected COVID-19 case management by PC providers: acute RTI not tested and RTW with sick certificate ('URTI, Flu')?

Law

1. Reg 8(1) Healthcare provider must adhere to national guidelines on control of notifiable medical conditions
2. Reg 13 (1) (a) Healthcare provider who diagnoses patient with notifiable condition must report immediately
3. National guideline: Clinical management COVID-19 disease Version 4 (May 2020)
    1. Early identification/triage & suspect case definition
    2. Testing: testing for acute COVID-19 infection should be by means of PCR assays
    3. A single positive PCR test is sufficient proof of COVID-19 infection
    4. The differential diagnosis

Ethics

- 12.Professional reputation of colleagues: a practitioner shall not cast reflections on the probity, professional reputation or skill of another person registered under the Act or any other Health Act

versus

- Beneficence (2.3.3): Health care practitioners should act in the best interests of patients even when the interests of the latter conflict with their own personal self-interest.

SARS-CoV-2 applied Statutes and Bioethics in OH

Employees & Notifiable Medical Condition compliance?

SARS-CoV-2 applied Statutes and Bioethics in OH

Reporting by HCW of carrier, case, contact?
Where an OMP identifies that an employee has breached the employer's COVID-19 rules (e.g. did not report a confirmed COVID case in the household), should the OMP communicate this to the employer?

Law

1. Regulations relating to the surveillance and the control of notifiable conditions
    1. Any health worker must report a case, carrier or a person who was in contact with a carrier or case
    2. Any person who has a duty to notify and fails to notify COVID-19 Is guilty of an offence and liable to a term of imprisonment not exceeding 10 years…..

2. Disaster Management Act, 2002 Regulations of 18 March 2020 (GG 43107)
    Any person who intentionally exposes another person to COVID-19 may be prosecuted for an offence, including assault, attempted murder or murder

Ethics: Disclosures for notifiable disease or to endangered third parties

1. Practitioners to seek express consent before disclosing information
2. If all available means of obtaining consent have failed
    1. Personal information may be disclosed in public interest where benefits to individual or to society of the disclosure outweigh public and patient's interest in keeping the information confidential, (e.g. partner of HIV positive patient, who after counselling refuses to disclosure status to partner; e.g. notifiable disease reporting)
    2. Practitioner must weigh possible harm (to patient, and overall trust between practitioners and patients) against benefits that are likely to arise from the release of information (e.g. employee with health condition posing danger to co-workers or clients)

SARS-CoV-2 applied Statutes and Bioethics in OH

Employer's reporting duty imputed to OMP?

SARS-CoV-2 applied Statutes and Bioethics in OH Reporting

Should OMP be involved in 'mandatory' COVID case reporting to DEL, DMR, RSR and now DOH?

Law

Disclosure is defined as an employer duty (not OMP)

HPCSA on Disclosures for reporting to authorities

1. Practitioners must co-operate by providing relevant information wherever possible
2. Notification of some communicable diseases is required by law
3. In other cases, practitioners to provide anonymised form, when that would be sufficient
4. Where it is not practicable to seek consent, practitioners must consider whether disclosure would be justified in the public interest, against possible detriment to patient
5. Automatic transfer of personal information to registry before informing patient is unacceptable, save in exceptions (e.g. court decision)

SARS-CoV-2 applied Statutes and Bioethics in OH

Vulnerable employee management?

SARS-CoV-2 applied Statutes and Bioethics in OH Reporting

Can the OMP divulge the names of vulnerable employees to the employer?

Not without consent, specific for the release of information

What to do with the employee who refuses consent for reporting?

1. No consent = no report
2. If worker withholds consent: OMP to attempt to persuade the worker to consent
3. If consent refused: consequences should be explained to worker
4. Exceptional circumstances in which disclosure without consent could be permissible would include an instance where the disclosure protects the worker or others or can be justified in the public interest

SARS-CoV-2 applied Statutes and Bioethics in OH

- How to deal with the severe (high) risk comorbid employee who refuses sick leave because the sick-benefits do not cover her/his expenses
- Should all employees with co-morbidities be exempted from coming to the workplace?
- How do we manage employees who, due to the nature of their work, cannot work from home and have co-morbidities? (e.g. cleaners)
- Is it compulsory that all employees that have co-morbidities come with a Doctor's /Clinic note about their condition and if they are well controlled or not?

OMP & Vulnerable employees: worker autonomy

1. OMP to respect worker's autonomy and right to voluntary decision-making: worker to determine what is in the workers' best interests
2. OMP to give a balanced view of the options
3. Substance of the information given to the employer
    1. Only information relevant to COVID-19 vulnerability
    2. OMP must, always, be able to substantiate factuality
4. Know that pressure may be put on workers by employers

OMP & Vulnerable employees: HBA- vs Psychosocial risks

1. Medical ethics define:
   1. Permissibility of the release of information to the employer
   2. Duties and obligations of the OMP
2. Workers′ informed consent
3. Protection of confidential information
4. Acceptable method of providing information to employer
5. OMP may be required to disclose information for specific statutory requirement
6. The OMP must not disclose personal information without express and written consent

OMP & Vulnerable employees: communication duty

1. Process and purpose of the examination, screening or test
2. Uncertainties and risks attached to the process
3. Any significant medical, social or financial implications
4. Follow up plans, including the availability of counselling and support services
5. Extent of the information which will be disclosed
6. Likely consequences of the disclosure
7. To whom will the information be given
8. OMP’s duty to ensure that the worker understands the scope of the information requested
9. OMP must check whether workers wish to see report and then share report with workers

SARS-CoV-2 applied Statutes and Bioethics in OH

- How to deal with the severe (high) risk comorbid employee who refuses sick leave because the sick-benefits do not cover her/his expenses
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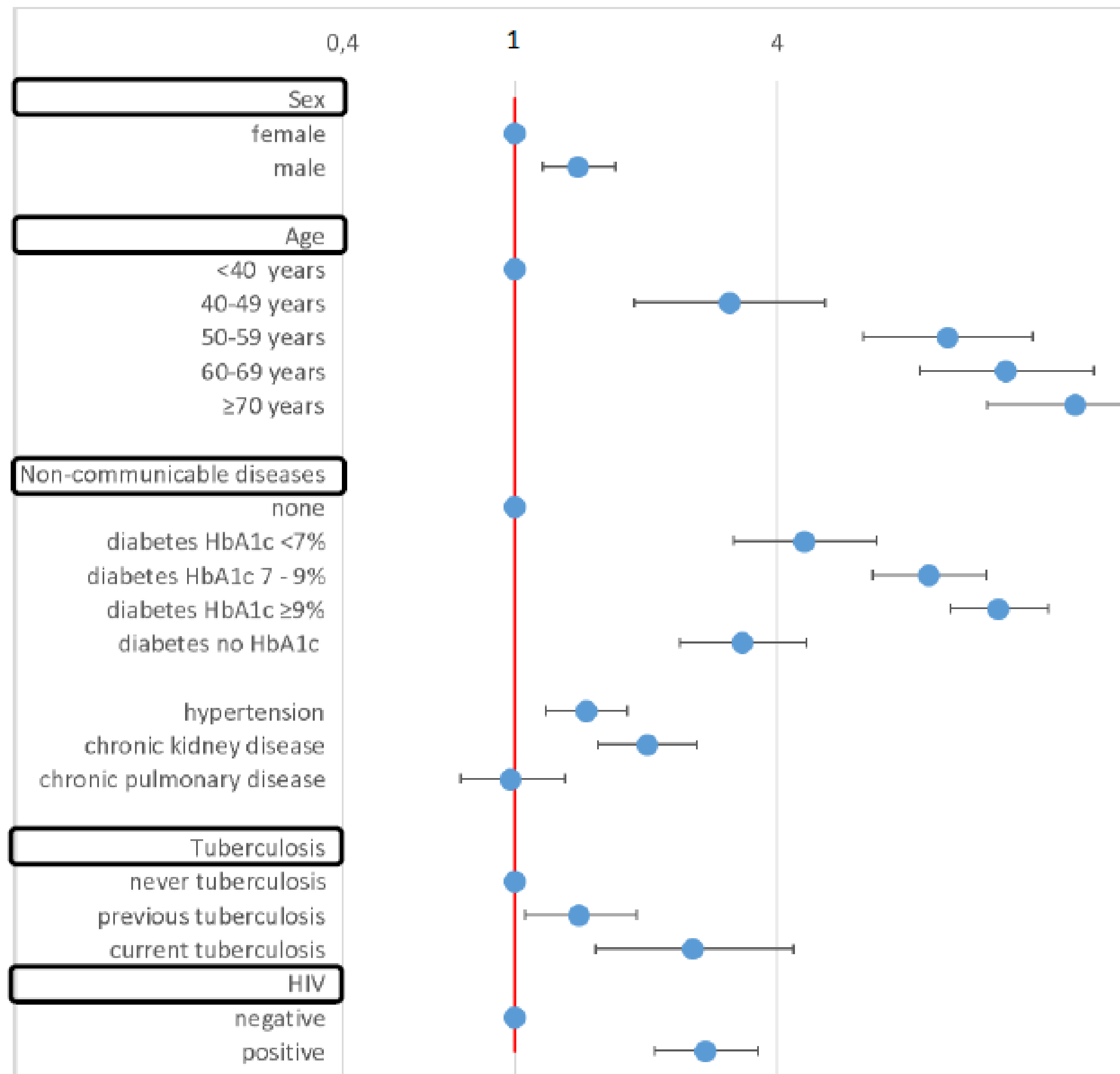

0,4
1
4
Sex
female
male
Age
<40 years
40-49 years
50-59 years
60-69 years
≥70 years
Non-communicable diseases
none
diabetes HbA1c <7%
diabetes HbA1c 7 - 9%
diabetes HbA1c ≥9%
diabetes no HbA1c
hypertension
chronic kidney disease
chronic pulmonary disease
Tuberculosis
never tuberculosis
previous tuberculosis
current tuberculosis
HIV
negative
positive

SARS-CoV-2 applied Statutes and Bioethics in OH

Working from Home

SARS-CoV-2 applied Statutes and Bioethics in OH
Working from home

Remote working/working from home should be properly defined and at least each to ensure their 40 hours of work?

Where does the 46hour work definition come from ?

1. The institution of homework is a risk containment during the COVID-19 epidemic
2. Chapter 1 analyses the actions required of an employer in determining employer-, employee- and common factors on whether and how homework by (some) employees may be instituted. It includes a brief occupational health and risk assessment and a comprehensive homework duty checklist encompassing a range of employment considerations.
3. Homework arrangements, including OHS instructions should preferably be documented in a written agreement which may be based on the proposed checklist.
4. Chapter 2 offers advice to employees who consider homework.
5. This document is supported with:
    1. An analysis whether an employee works at home is covered under the Compensation for Occupational Injuries and Diseases Act, 1993?
    2. A home-office checklist
    3. An emergency contact list
    4. A computer station checklist
    5. A home electrical-safety checklist

The end

Concern for man and his fate must always form the chief interest.

Never forget this.

(Albert Einstein)

SARS-CoV-2 applied Statutes and Bioethics in OH

1. Can the OMP divulge the names of vulnerable employees to the employer? Is such reporting a task that should be initiated by the OMP? Or, if requested by the employer, what to do with the employee who refuses consent for reporting? Or who have not consented thereto in their records?
2. Where an OMP identifies that an employee has breached the Disaster Regulations (e.g. visiting out of household bubble, facebook evidence of partying), should the OMP communicate this to the employer?
3. Where an OMP identifies that an employee has breached the employer's COVID-19 rules (e.g. did not report a confirmed COVID case in the household), should the OMP communicate this to the employer?
4. How to deal with the severe (high) risk comorbid employee who refuses sick leave because the sick-benefits do not cover her/his expenses?
5. What to do when the OMP identifies (blatant) COVID-19 non-conformance at employers: e.g. inadequate pre-access screening, avoidable high risk job placement despite high severity risk, inadequate management of RTW after illness (including after COVID illness).
6. Should the OMP be involved in the 'mandatory' COVID case reporting to DEL, DMR, RSR?

SARS-CoV-2 applied Statutes and Bioethics in OH

6. Should the OMP be involved in the on-site reporting of a positive case to fellow employees/trade unions? Should the OMP act, where the employer does not report this? Or where the employer does not manage casual and/or close contact cases appropriately?
7. Should the OMP oblige where employers demand asymptomatic employees to be tested? Or COVID-healed employees to be tested prior to RTW? Or contractor-employees to be tested prior to being allowed access on site?
8. How to deal with sick certificates 'influenza, but not COVID', where the employee was not PCR tested?
9. How to deal with employees reporting a fellow employee's symptoms at work (e.g. constant cough) to the OMP?
10. How to deal with trade unions demanding access to medical information? Also in the case where an employee (seemingly) consents to this?
11. How should the OMP deal with the combined personal risk assessment of the individual employee's HBA (COVID-19) risk versus psycho-social (income, employment) risk?
12. How to apply Nursing Act S 56(6) in allowing nursing practitioners at the OH service to engage in clinical assessments: e.g. identification of suspect cases at work, evacuation of suspect cases at work, identification of close social contacts and institution of self -quarantine, assessment of RTW employees etc?

SARS-CoV-2 applied Statutes and Bioethics in OH

13. A general response is that Covid-19 as an infectious public/community viral disease has created a different OMP clinical decision making scenario:
14. -A community/social source create an occupational disease – outside work infectious disease of an employee has to be managed in the workplace – Is it the same as TB in the mining industry? TB in hospital for HCW is not relevant argument?,
15. -A "self" diagnosis for isolation of 10-14 days creates work absenteeism without a "sick" certificate and the CFund documents also need to be completed by an OMP on a retrospective basis not the employee doctor,
16. -Stigma fear is used to create a confidentiality definition for the employee versus management/government reporting,
17. -Telemedicine virtual consultation is now the "in-thing" versus direct eye-to-eye consultations as done before,
18. -Covid-19 CFund and fitness decision based on clinical history without laboratory confirmation of the previous SARS-Cov2 positive result – can it be done mandatory for the employers account?,
19. -Refusal of OMP to deliver service without special HCW PPE at different employer premises supplied to him/her because the OMP has to have it in any case for own personal use and at own expense,
20. -Opinions of non-OMP's address the above and then public/community priorities override occupational health practices as defined by DMR/DoEL because of non-historical governmental guidelines – Disaster versus Occupational Health ethics. and
21. -Community/public health arguments (tobacco and alcohol) versus no-positive/zero-tolerance company policy – OMP "police" function.