

Blog Post

Mandatory Flu Vaccination Policies: Time for a Check-Up

September 25, 2017

After a measles outbreak at Disneyland spread to 134 Californians and residents in six other states and two other countries, California adopted a law removing “personal belief” exemptions from vaccinating children in public or private schools or childcare centers. But employers faced with choosing between wanting a healthy work-site and respecting individual worker’s beliefs about vaccines lack such clear direction. Both federal and state laws impact employers’ ability to enforce mandatory vaccine policies, and the EEOC has wasted no time suing employers for religious discrimination over mandatory flu shots.

As readers of the HR Defense blog know, the EEOC filed suit last year on behalf of six former employees of a hospital who were fired after refusing the flu vaccine on religious grounds. The employer allowed for an exemption, but required employees to obtain a certification by a clergy member or other third party that the employee “practices a religion where influenza vaccination is contraindicated according to doctrine or accepted religious practices.”

While the hospital may have doubted the legitimacy of the employees’ claimed religious beliefs, requiring clergy certification proved to be the employer’s downfall. Title VII requires employers to provide a reasonable accommodation to employees with sincerely held religious beliefs unless the

Related People

Sarah J. Lis

Related Work

Employment Training
and Compliance
Labor and Employment

HR Defense Blog

Akerman Perspectives
on the Latest
Developments in Labor
& Employment Law

[Visit this Akerman blog](#)

accommodation would create an undue hardship; it does not require employees to prove their sincerely held religious belief is based on a religious “doctrine or accepted religious practice.” Just three months after the EEOC’s complaint was filed, the hospital entered into a Consent Decree under which it agreed, among other things, to pay \$300,000 in back pay and compensatory damages to the six former employees.

The EEOC’s Pandemic Preparedness in the Workplace and the Americans with Disabilities Act Fact Sheet notes that an employee may be entitled to an exemption from a mandatory vaccination if a sincerely held religious belief prevents the employee from taking the influenza vaccine. In such circumstance, the EEOC says the employer must provide a reasonable accommodation unless it would pose an undue hardship under the Title VII standard (“more than de minimis cost”) to the operation of the employer’s business. (An employee with a medical condition where a flu shot is contraindicated would also be entitled to an exemption under the ADA, barring undue hardship under the much higher ADA standard of “significant difficulty or expense.”)

But offering to provide a reasonable accommodation for a religious belief or practice or medical reason may not go far enough. Indeed, a North Carolina federal court recently denied summary judgment, allowing a similar lawsuit against another hospital to proceed to trial even though the employer’s policy offered employees the opportunity to request an accommodation by September 1 or be vaccinated by December 1. The employees who sued failed to timely submit exemption requests, failed to be timely vaccinated, and were thereafter terminated for failure to comply with the employer’s policy.

The EEOC says employers should encourage, but not require, flu shots. But for hospitals and healthcare providers, that advice would be contrary to advice from another government agency, and in some

instances, state law. The Center for Disease Control recommends that all U.S. healthcare workers get vaccinated annually against influenza, including not only those involved in direct patient care, but also those who can be exposed to infectious agents transmitted by others, such as food service, housekeeping, administrative, and billing personnel. The CDC warns that you can get the flu from patients and coworkers who are sick with the flu and you can spread it to others even if you are symptom-free.

Significantly, 18 states have established flu vaccination requirements for hospital healthcare workers and 24 states have established such requirements for workers in long-term care facilities such as nursing homes and skilled nursing facilities.

So what's an employer to do? If you are not in an industry subject to mandatory vaccination requirements, you may want to encourage, but not require, the vaccine. If you are in such an industry, adopt a policy and process for requesting accommodations consistent with your state's laws, engage in the interactive process with the employee to explore accommodations and document that you did so.

If someone seeks an exemption based on a sincerely held religious belief or practice, it's best not to challenge the legitimacy of the religious belief or practice. (Remember, the EEOC says that a Seventh Day Adventist who follows a vegetarian diet based on the Biblical passage "[b]ut flesh with the life thereof, which is the blood thereof, shall ye not eat," is following a religious practice, even though not all Seventh-day Adventists share that belief or follow that practice.)

If the employee's position involves patient contact, you may want to explore whether the employee's duties could be modified, the employee could be transferred to another position, find acceptable alternative to the flu shot, or wear a mask. But, a

word of warning about a mask as an accommodation: the EEOC sued a Boston hospital just last year after it granted a religious accommodation from the flu shot to an employee, allowing her to wear a mask instead. The employee complained that others expressed that they could not understand her when she spoke to them through the mask, and therefore she removed it. As a result of her failing to wear the mask, the employee was placed on indefinite unpaid leave and ultimately terminated. The case remains pending.

So when it comes to requiring vaccines, proceed with caution.

This information is intended to inform clients and friends about legal developments, including recent decisions of various courts and administrative bodies. This should not be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this email without seeking the advice of legal counsel.