

Blog Post

# Can Employers Require that Employees Get the Flu Shot?

October 20, 2020

Flu season is upon us. Can employers require a flu shot? More importantly, should they?

The Centers for Disease Control and Prevention (CDC) emphasizes that getting a flu vaccine this year is “more important than ever during 2020-2021 to protect yourself and the people around you from flu, and to help reduce the strain on healthcare systems responding to the COVID-19 pandemic.”

The CDC recommends that, with rare exceptions, everyone six (6) months and older should get a flu vaccine every season.

The Equal Employment Opportunity Commission (EEOC) has long taken the position that employers should *encourage, but not require* employees to get the influenza vaccine. Back in 2009, the EEOC issued guidance on “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act.” The Pandemic Guidance posed this specific question and answer:

**May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?**

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*No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him/her from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him/her from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the operation of the employer's business, which is a lower standard than under the ADA).*

*Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it.*

The same is true today. Following the declaration of the COVID-19 pandemic, the EEOC in March 2020, updated its Pandemic Guidance, urging employers and employees to follow guidance from the CDC, as well as state/local public health authorities on how best to slow the spread of COVID-19 and protect workers, customers, clients, and the general public. The updated Pandemic Guidance did not change the Q&A above.

The updated Pandemic Guidance, acknowledging the significance of the threat posed, did authorize additional actions on the part of employers to protect workers and slow the spread of the virus. The updated Pandemic Guidance noted, "If an individual with a disability poses a 'direct threat' despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA. A 'direct threat' is 'a significant risk of substantial harm to the health or safety of the

individual or others that cannot be eliminated or reduced by reasonable accommodation.” The EEOC concluded that based on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic met the direct threat standard. That finding allows employers to take measures that would not otherwise be permitted, such as taking employees’ temperatures and inquiring about whether they had symptoms of COVID-19, so long as they maintain the confidentiality of the medical information obtained.

## Healthcare Workers

The healthcare environment poses special concerns. Healthcare facilities have often required healthcare workers to be vaccinated for vaccine-preventable diseases, including the flu, in order to prevent outbreaks. A flu or other vaccine is sometimes required by state statute or regulation; at other times, it is mandated by employers as a condition of employment. For example, in Rhode Island, an annual influenza vaccination is required for all healthcare workers and each healthcare facility is required to actively track and record influenza vaccination levels. And although not required by statute in Maryland, all of John Hopkins Medicine entities have adopted a mandatory vaccination policy. The policy applies across the board to all individuals, employees, faculty, staff, residents and fellows, temporary workers, trainees, volunteers, students, vendors, and voluntary medical staff, regardless of employer, who provide services to patients or work in patient care or clinical care areas, including acute and chronic care hospitals, outpatient facilities, and clinics. Similar policies are common in other healthcare workplaces.

However, even in healthcare industries, an employer covered under the ADA and Title VII is required to accommodate an applicant’s or employee’s disability or religious beliefs in accordance with applicable law.

If an employee requests an exemption from a mandatory flu shot based on a medical condition, the employer's first step should be to engage in the interactive process to determine whether there is a reasonable accommodation that would not pose an undue hardship. Under the ADA, an undue hardship means a significant difficulty or expense with a focus on the resources and circumstances of the employer in relation to the nature, cost, or difficulty of providing the accommodation.

Likewise, under Title VII, an employee may be entitled to an exemption if the employee has a sincerely held religious belief, practice, or observance which prevents the employee from getting the vaccine. Under Title VII, the employer is required to provide an accommodation unless it poses an undue hardship; *however*, as noted in the Q&A from the EEOC's Pandemic Guidance above, the Title VII undue hardship standard is significantly different from that standard under the ADA. A Title VII religious accommodation is unreasonable if it would impose more than a *de minimis cost* on the employer's business. Facts relevant to undue hardship in this context would likely include factors such as the employee's particular duties, the assessment of the public risk posed at a particular time, the availability of effective alternative means of infection control, and potentially the number of employees who actually request accommodation.

Note that religious accommodation exemptions continue to be the subject of litigation. In multiple cases against hospitals and medical centers over the past few years, the EEOC has brought religious discrimination and failure to accommodate claims when the employer either refused to hire an applicant or fired an employee after the employee requested an exemption from receiving the flu shot due to religious beliefs.

For example, in 2019 the EEOC settled a case with a Michigan hospital which refused to accommodate an applicant who refused a flu vaccine on religious

grounds. Being vaccinated was a condition of employment at the hospital. The applicant offered to wear a face mask at the hospital during flu season since it was an acceptable alternative under the employer's policy for those with medical problems, but the hospital refused and rescinded her job offer. In addition to monetary damages, the employer was required to permit those with religious objections to wear masks in lieu of the flu vaccine and to train their managerial staff on the religious accommodation process.

## Best Practices

Whether an employer should mandate the flu vaccine may depend on the workplace-at-issue and the level of potential exposure to the flu. Where employees are regularly exposed to people whom may have the flu, such as healthcare facilities, or where required by state law, an employer may mandate the flu vaccine, but must be prepared to accommodate those with medical or religious objections.

Where the workforce is unionized, employers must first consider any applicable collective bargaining agreements to determine the extent of their duty to bargain with union(s) regarding a vaccine policy.

Employers mandating the vaccine where it is not required by state law should ensure that the mandate is based upon objective facts and related to job duties and workplace needs. The policy should be clearly communicated to employees and uniformly enforced. Managers and supervisors should be trained to recognize and respond to requests for accommodation, even where the employee/applicant does not use the word "accommodation." Employers should ensure that they have a process for addressing such requests for accommodations and that the process is followed and documented. And as always, any medical information must be kept confidential and

maintained separate from an employee's personnel file.

For assistance with vaccine policies, contact your Akerman attorney

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