The Side Effects of Mandatory Flu Vaccine Policies

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Given the severity of the influenza outbreak this season, employers are dealing with worse than normal staffing and leave issues. One solution, aimed at cutting down on employee absences during flu season, is to require all employees to get the flu vaccine. Requiring employees to get vaccinations is, in fact, a common practice among health care employers—but not just to curb employee absenteeism. Employees in the health care industry have close and frequent contact with vulnerable patients, and the vaccine would be aimed at reducing the spread of the flu. But, what if you're not in the health care industry? Could a mandatory flu vaccine policy be right for your workplace?

While uncommon in other industries, a mandatory vaccine policy would not be unlawful. As a general rule, most employers may institute a mandatory vaccine policy and fire workers for not complying with the policy in accordance with the employment at will doctrine (according to which employers may fire employees for any reason—save several unlawful ones). Exceptions include instances in which the employee is working under a contract or a labor agreement that bars such a policy. Additionally, employers must be wary of violating anti-discrimination laws, particularly in cases where an employee's religious beliefs prevent him or her from taking the vaccine.

Such policies have come under attack recently as falling under one of these exceptions. For example, a group of hospital workers in Rhode Island recently complained about such a rule and attempted to stop their employer "from implementing a regulation which permits the Director to mandate vaccinations, declare a 'flu emergency,' require health care workers to wear surgical masks, and punish workers who decline, in violation of the United States and Rhode Island Constitutions." As a result, in December of 2012 a labor organization representing the workers filed a lawsuit against the employer in federal court.

In another recent case, an Ohio worker who was fired after refusing to get a flu shot is accusing her employer of religious discrimination. The customer service representative, who is vegan, objected to her employer's mandatory vaccine policy because the vaccine contains animal products. The worker is accusing her employer of violating her civil rights and discriminating against her. Recently, a federal judge allowed her religious discrimination claim to go forward, reasoning that it is plausible that the worker "could subscribe to veganism with a sincerity equating that of traditional religious views." To read more about this case, click here.

Fortunately, employers have many alternatives to instituting a mandatory vaccine policy that still promote a healthy workplace. Employers may strongly encourage rather than mandate that their employees get the flu shot. In that vein, some employers make it easier for employees to get the vaccine by hosting a flu shot clinic.
in the workplace or by offering employees discounts or vouchers on vaccinations.

Some companies ease their attendance policies during the height of flu season. Alternatively, employers might increase the number of sick days available to employees or allow workers to work from home if their job duties permit. The latter alternatives have the benefit of encouraging workers who are exhibiting flu-like symptoms to stay home rather than come to work and risk infecting co-workers. The Centers for Disease Control and Prevention recommends many of these options in its materials for businesses including an educational toolkit called "Make It Your Business To Fight The Flu: A Toolkit for Businesses and Employers." Employers should consider these alternative strategies to maintain a healthy work environment.

Mandatory flu vaccination policies are most often seen in the health care industry where there is a significant issue of patient safety. Studies show that voluntary policies simply have not produced sufficient participation. Mandatory policies have largely withstood challenges with the exception of when the employer has attempted to make a unilateral change when the issue is covered by a collective bargaining agreement. Beyond this, employers must keep in mind the protections of the Americans with Disabilities Act and Title VII of the Civil Rights Act (i.e., relating to one's religious beliefs). In these instances, the employer has been able to enforce the alternative requirement of wearing a mask in the workplace.

According to Kathy Dudley Helms, a shareholder in Ogletree Deakins' Columbia office: "Although many health care professionals now consider the 'flu season' to be year round, the worst is believed to be over for this year. Even so, it is wise for employers considering mandatory policies or policies of any form for next year's flu season to begin to plan now and begin now to educate their employees. Employers that have been successful in implementing such policies generally have had strong education efforts informing their employees of the reason for the policy, requirements of the policy, and consequences for failing to comply."

Helms continued, "As an aside, employers reviewing issues such as requiring vaccinations for their employees traveling abroad frequently look to the case law being developed with regard to mandatory flu vaccinations for guidance. While the context may vary, this issue of an employer wanting to protect both patients/customers and its own employees with regard to potentially dangerous infections no longer seems to be the rare legal and human resources issue."