It's Flu Season Again . . . Are Your Mandatory Vaccination Policies Immune to Legal Challenges?

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With flu season here and reported incidents of deaths caused by diseases thought to have been eradicated by vaccines on the rise, many healthcare providers are considering mandatory vaccination of employees. The Centers for Disease Control and Prevention (CDC) recommends that healthcare workers who work directly with patients or handle material that could spread infection get appropriate vaccines to reduce the chance that they will contract or spread vaccine-preventable diseases. The CDC makes specific vaccine recommendations as to certain diseases affecting healthcare workers, including hepatitis B; influenza; measles, mumps, and rubella (MMR); varicella (chickenpox); tetanus, diphtheria, and pertussis (TdAP); and meningococcal.

Some healthcare industry employers mandate vaccinations with no exemptions, while other employers support vaccinations but do not require them or require them but allow exemptions. While a healthcare provider may think that a mandatory vaccination rule is the simplest approach and the safest choice with respect to public health, such a rule is not without legal risk. Employees, unions, and advocacy groups have consistently attacked mandatory vaccination policies as violating employees' rights to privacy and religious freedom.

In fact, in Hustvet v. Allina Health System, the U.S. Court of Appeals for the Eighth Circuit recently analyzed whether the defendant violated the Americans with Disabilities Act (ADA) and the Minnesota Human Rights Act (MHRA) after it discharged an employee who refused to get the MMR vaccine. The plaintiff, who worked with patients with compromised immune systems, sued Allina, making unlawful inquiry, discrimination, and retaliation claims under both the ADA and the MHRA.

The Eight Circuit granted summary judgment to Allina on the unlawful inquiry claim because Allina's requirement that incoming employees who would work with clients complete an inquiry and exam was job related, consistent with business necessity, and no more intrusive than necessary. The court dismissed the plaintiff's discrimination claim because her alleged chemical sensitivities and allergies did not limit her ability to perform major life activities; thus, they were not disabilities. Finally, the court also granted summary judgment on the plaintiff's retaliation claims, finding that Allina terminated the plaintiff's employment because her job required her to work with potentially immune-compromised clients and she refused to comply with Allina's policy. The plaintiff could not show that Allina's proffered non-retaliatory reason was mere pretext. The Allina case shows the importance of being able to articulate a valid reason for requiring a vaccination in the specific instance that is on review.
Other courts have also upheld a healthcare institution’s right to require mandatory vaccinations and discharge employees who refuse them. In addition, some courts have also found that in a unionized setting, healthcare institutions need to negotiate the implementation of a mandatory vaccination policy. Employers can often institute a mandatory vaccination policy for at-will employees without running afoul of the law. In such instances, employees may either accept the policy or find work that does not require vaccination. Because of this, employers may want to consider giving applicants notice of mandatory vaccination rather than waiting until they become employees. Note that, according to the National Conference of State Legislatures, 18 states recognize a philosophical exemption for those who object to school immunizations because of personal, moral, or other beliefs.

At the federal level, the Occupational Safety and Health Administration’s (OSHA) position is that employers may mandate that employees receive seasonal flu vaccinations, while the Equal Employment Opportunity Commission (EEOC) takes the position that Title VII of the Civil Rights Act of 1964 and the ADA permit an employee to claim an exemption for disabilities; medical conditions, such as a severe egg allergy; a past severe reaction; or sincerely held religious beliefs.

If an institution decides to allow exemptions to the required vaccines, one of the more difficult exemptions to analyze is the religious exemption. Over the last few years, the EEOC has aggressively opposed mandatory flu shots for employees. As described in a 2018 article in the *The New England Journal of Medicine* entitled “Vaccination without Litigation — Addressing Religious Objections to Hospital Influenza-Vaccination Mandates,” the EEOC has routinely sued hospitals that deny employee requests for religious exemptions to vaccination requirements. The article reviews 14 cases where employees sued based on an alleged religious objection to the flu vaccine. The results of these cases were mixed, but they illustrate the potential dangers of a mandatory vaccination policy.

Hospitals may run into trouble because of arbitrariness in evaluating religious objections. The process of trying to determine if someone is entitled to a religious exemption is, by its very nature, a difficult one. Institutions requiring a clergy member to attest to the religious belief in question have drawn the EEOC’s ire, and it is a slippery slope to ask for information to confirm the basis for a religious exemption. Hospitals and nursing homes that require vaccines are often put in a no-win situation when their human resources departments try to determine whether a religious exemption is valid.

Mandatory vaccination in healthcare is undoubtedly a growing issue. Healthcare employers are rightly concerned with the health of their patients and employees, but they need to be aware of the legal risks that may arise from vaccination policies. If a healthcare provider decides to make a vaccination mandatory, it may want to take proactive steps to ensure that it can support its decision. It must also determine how broadly the policy will apply; for instance, a clerical worker does not pose the same risk to patient safety as a nurse might. If exemptions will be allowed, employers may want to also have a clear policy and written guidance regarding the application of those exemptions to ensure consistency. Employers can also provide decisions in writing and articulate a well-founded reason in case the determination is challenged later.

Finally, if an employee who receives an exemption is required to wear a mask in the workplace or work in a different department, the employer may want to ensure that the alternative makes sense and truly advances the purpose of the vaccination so that it is not viewed as punitive. Heavy-handed, context-free policies are likely to lead to scrutiny, whereas well-drafted and reasonably applied policies will stand the best
chance of surviving a legal challenge. Thus, employers may want to review their guidelines and determine whether the basis for the vaccination policy is legitimate and defensible. Further, employers can educate their workforces about the policy and the company's position on vaccination.