The annual flu season is upon us, and once again, employers with mandatory flu vaccine programs are wrestling with the prospect of complex employment litigation.

The Centers for Disease Control and Prevention (“CDC”) estimates that annual influenza-related deaths can be in the thousands, if not tens of thousands. The CDC estimates between 9.2 million and 35.6 million flu-related illnesses each year in the United States. The flu season is actually an “annual epidemic,” according to the CDC. It is, therefore, recommended that anyone over the age of six months receive an annual flu vaccine to protect against this serious disease.

Health insurers, employers and the like provide incentives for individuals who seek to protect themselves and others by receiving an annual flu vaccine. Some employers, especially hospitals, even require employees to receive flu vaccines for continued employment. Mandatory flu vaccines have been at the center of employment litigation for a few years, and the Equal Employment Opportunity
Commission ("EEOC") has joined the fight against mandatory flu vaccines.

Title VII of the Civil Rights Act of 1964 prohibits discrimination against a number of protected classes, including individuals with "sincerely held religious beliefs." Employers are required to reasonably accommodate sincerely held religious beliefs unless the accommodation creates more than a *de minimis* undue hardship on the employer's operations.

Individuals across the country claim that their sincerely held religious beliefs prohibit them from receiving a flu vaccine. Many of these individuals work at places of employment implementing mandatory flu vaccines. In order to adhere to their religious beliefs, some of these individuals request religious accommodations and exemptions from mandatory flu vaccines. At the same time, there is a tangible anti-vaccine movement led by celebrities and other alternative medicine leaders throughout the United States. The anti-vaccine movement has led some employers to question the sincerity of requests for religious accommodations when employees refuse to receive an annual flu vaccine. Some employers refuse to provide an accommodation because an employee who is not inoculated against the flu can present a threat to customers and other employees, especially in a hospital setting.

A few notable lawsuits and settlements regarding mandatory flu vaccines have been decided in the last three to four years, but one continues to move forward in Massachusetts. In 2016, the EEOC filed a discrimination lawsuit against Baystate Medical Center claiming that the hospital violated federal law when it refused to accommodate an employee’s religious beliefs regarding a mandatory flu vaccine. There, the employee claims that as a Christian her beliefs forbid her from receiving a flu vaccine. She claims that if she receives a flu vaccine, then she will go to hell. The hospital offered the employee to wear a surgical mask at all times while at work if she refused to receive the flu vaccine. The hospital claims that the employee failed to wear the mask at all times, and she was subsequently terminated. The EEOC filed its lawsuit following administrative proceedings regarding the employee’s termination.

The EEOC and Baystate filed motions for summary judgment in October. Notably, the EEOC requests the court to find, in part, that refusing to receive a flu shot is a “religious practice protected under Title VII.”

Commentators have noted that the EEOC has been particularly aggressive in its enforcement of Title VII when it comes to flu shots. While some cases have been decided in favor of employers, the EEOC has also facilitated large settlements for employees terminated from employment for failing to receive a mandatory flu shot. The Baystate litigation reveals that the EEOC shows no sign of backing down from its aggressive position.

Employers should seek counsel when implementing and executing mandatory flu vaccine programs. Various state laws and federal appellate precedent may come into play as employers weigh the risks of enforcing such policies.

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