Let the Masking Debate Continue, but Maybe Not in Our Hospitals

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In 2015, long before COVID-19 emerged, a hospital disciplined and discharged a recruiter in its HR department who refused to obtain a hospital-required influenza vaccination or to don a mask at work as an alternative. In a case we started to track three years ago, a federal judge entered summary judgment for the employer this week.

The hospital required employees to obtain an annual flu vaccine—as many healthcare providers do—as a patient safety measure. The recruiter objected to receiving an annual flu vaccine shot due to her religious belief, as a Christian, that she should not receive injections or drugs. The hospital allowed the recruiter to decline the flu shot, but also allowed her to continue working as long as she agreed to wear a mask at all times while at work as an alternative to the immunization.

Nonetheless, the recruiter failed to wear the mask consistently while at work. The
hospital disciplined her for failing to wear the mask, and then terminated her employment after she occasionally and repeatedly pulled her mask down whenever she claimed it got in her way at work.

In 2016, the U.S. Equal Employment Opportunity Commission (EEOC) sued the hospital, on the recruiter’s behalf, claiming that the discharge violated her rights under Title VII of the Civil Rights Act of 1964 because the discharge was based on the recruiter’s religious beliefs and that the masking requirement was not an effective reasonable accommodation for her beliefs. The case, *EEOC v. Baystate Medical Center Inc.*, Case No. 3:16-cv-30086, was filed in the U.S. District Court for the District of Massachusetts.

In a succinct, two-paragraph decision, U.S. District Judge Mark G. Mastroianni entered summary judgment for the hospital. He reasoned that the requirement to wear a mask “was itself the employment requirement, rather than merely an accommodation,” and that the EEOC’s case failed as a result. The EEOC and the recruiter tried to argue that wearing a mask would not effectively prevent the spread of the flu. The court rejected that argument, noting the employee had “no religious objection” to the requirement that she wear a mask, and that the court would defer to the hospital’s “business and health-policy judgment.”

The EEOC also argued that the hospital wanted to maximize the number of employees who received the flu shot, and as a result, retaliated against employees who opted to wear a mask instead. The court found the EEOC had not presented cognizable evidence to back up the theory that the masking requirement was merely a pretext designed to force individuals to get vaccinated because they would not want to wear a mask all the time.

Healthcare providers may relate to the facts of this case as they reflect on how flu vaccine programs have evolved over the years. At least back in 2015, the hospital in this case allowed employees to unilaterally choose between a flu shot or mask. Many hospitals and healthcare providers now require all employees (or those with patient contact) to receive an annual flu shot unless they demonstrate a legal entitlement to either a religious or disability-related accommodation. For employees who need and qualify for an accommodation, wearing a mask is offered as an option. Such a mandatory flu shot policy and accommodation request process has been approved by several courts, for example, the U.S. Court of Appeals for the Third Circuit in a 2017 case.

It is reasonable to anticipate that 2020’s regular influenza season will collide and converge with a continued COVID-19 pandemic (or a possible second wave). Both healthcare providers and employers in other industries can implement and enforce mandatory flu (and COVID-19, when one is developed) vaccine policies, but detailed procedures must be put in place to provide any legally-required exceptions based on sincerely held religious beliefs or disabilities. To defend against the potential viral increase in claims filed with the EEOC or in court, employers may want to ensure their processes and procedures—with respect to each employee and decision—are carefully documented. Accordingly, healthcare organizations may want to review and update their vaccination and masking policies now to prepare for the unavoidable disputes and policy challenges that will begin to spread throughout the workplace in the coming months.
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