

Will Requiring Flu Vaccinations Leave Employers Feeling Under the Weather?

EPSTEIN
BECKER
GREEN

Article By

[Nathaniel M. Glasser](#)

[Epstein Becker & Green, P.C.](#)

[Health Employment And Labor Blog](#)

- [Labor & Employment](#)
- [1st Circuit \(incl. bankruptcy\)](#)
- [3rd Circuit \(incl. bankruptcy\)](#)
- [4th Circuit \(incl. bankruptcy\)](#)

Wednesday, January 4, 2017

With flu season quickly approaching, health care employers may be considering mandatory influenza vaccinations for their workforce. Mandatory vaccination policies may dramatically increase patient safety, but they may also cause friction within the workforce when employees object on religious grounds to being vaccinated.

While no federal and few state statutes address the legality of enforcing mandatory vaccination policies, the **EEOC** and private litigants recently have moved this issue forward in the courts. Under **Title VII of the Civil Rights Act of 1964 (“Title VII”)**, employees with sincerely held religious beliefs are entitled to a reasonable accommodation of those beliefs, provided that such accommodation does not create an undue hardship for their employer. This year, the EEOC has filed at least three separate lawsuits against hospitals in Pennsylvania, Massachusetts, and North Carolina alleging failure to accommodate religious beliefs in relation to such

hospitals' respective mandatory influenza vaccination policies.^[1]

These lawsuits follow shortly on the heels of a decision in the District Court of Massachusetts, granting summary judgment in favor of a hospital employer that terminated an employee who refused a mandatory flu vaccination because of her religious beliefs. In *Robinson v. Children's Hospital Boston*, Civ. No. 14-10263 (D. Mass. Apr. 5, 2016), the defendant hospital implemented a policy requiring all persons who worked in or accessed patient care areas to be vaccinated against the flu to ensure the safest possible environment and highest possible care for its patients.

The plaintiff, one of the first hospital employees to interact with patients as they entered the emergency room, refused the flu vaccination for religious reasons and was permitted by the hospital to explore whether there was another internal position outside of patient care that would exempt her from the flu vaccine. The court concluded that the hospital's efforts to locate another position for the plaintiff—including allowing her to use earned time off to search for employment elsewhere—and to label her termination a voluntary resignation to preserve her ability to re-apply for other hospital positions in the future, constituted a reasonable accommodation under Title VII.

The court also concluded that granting the plaintiff's request not to be vaccinated would have caused the hospital an undue hardship because it would have increased the risk of transmitting influenza to the hospital's already vulnerable patient population. The admissible evidence led the court to find that (i) health care employees are at a high risk for influenza exposure, which can be fatal to vulnerable patients; (ii) numerous medical organizations support mandatory influenza vaccination for health care workers; and (iii) the medical evidence in the record demonstrated that a vaccination is the single most effective way to prevent the transmission of the flu.

While the hospital's policy in *Robinson* only covered patient-facing employees, health care employers with flu vaccination policies impacting *all employees* should be aware that they will be subject to heightened scrutiny by regulators such as the EEOC. For instance, in *EEOC v. Baystate Medical Inc.*, Civ. No. 3:16-cv-30086 (D. Mass. June 2, 2016), Baystate's policy required employees who refused the flu vaccination to wear a surgical mask at *all times* while working at the hospital's facilities. The employee in question worked in human resources, had no patient contact, and argued that it was not reasonable for her to wear the mask because people complained that they could not understand what she was saying. Following several occasions in which the employee pulled the mask down away from her mouth so that people could understand her, the plaintiff was discharged for violating Baystate's policy. While the facts have yet to be developed, these allegations were sufficient to prompt the EEOC to file suit.

Other courts addressing religious discrimination claims in this context also have indicated the importance of the employee's interaction with patients in determining whether and to what extent a mandatory vaccination policy may be enforced. In *Chenzira v. Cincinnati Children's Hosp. Med. Ctr.*, Civ. No. 1:11-cv-00917 (S.D. Ohio Dec. 27, 2012), the plaintiff-employee alleged that her adherence to veganism

prohibited her from receiving a flu shot. On a motion to dismiss, the court allowed a religious discrimination claim to proceed, finding that the plaintiff could subscribe to veganism with a sincerity equating to that of sincerely held religious views. Notably, the court made a point of stating that the decision did not address the safety of patients at the hospital, which was the hospital's presumed justification for terminating the plaintiff. The court signaled that it would consider this justification in light of what, if any, contact the plaintiff had with patients, and/or what sort of risk her refusal to receive a vaccination could pose in the context of her employment. (The case later settled.)

Employers looking for additional guidance as to whether and to what extent they must accommodate an employee's refusal be vaccinated against seasonal influenza also should look to any state or local laws that may impact their ability to mandate flu vaccinations. For instance, a New York statute requires people to be vaccinated if they are affiliated with or employed by a health care facility and who engage in activities that could potentially expose patients to influenza.^[2] Those who decline the flu shot during flu season must wear a surgical mask while in areas where patients are normally present. The statute also requires health care facilities to supply such masks to personnel free of charge.

Takeaways

Particularly given the implications to patient safety, health care employers are well within their rights to implement a mandatory flu vaccination policy. Nonetheless, employers should be prepared to address requests for reasonable accommodation made by employees who decline a vaccination because of sincerely held religious beliefs. In those circumstances, employers should engage in the interactive process, with the following considerations in mind:

- Consider the nature of the employee's position, as you may have more difficulty in enforcing the policy against employees who do not routinely interact with patients. Courts are more likely to require an alternative accommodation for employees in non-patient-facing roles.
- Determine whether the employee can be accommodated by wearing a surgical mask or by temporarily or permanently transferring that employee to another position that does not implicate patient safety.
- Ensure that any refusal to be vaccinated originates from a sincerely held religious belief, but be aware that challenges to a sincerely held belief have been heavily scrutinized by the courts.

[1] *EEOC v. St. Vincent Health Ctr.*, No. 16-224 (W.D. Pa. Sept. 22, 2016); *EEOC v. Baystate Med. Ctr., Inc.*, No. 3:16-cv-30086 (D. Mass. June 6, 2016); *EEOC v. Mission Hosp., Inc.*, No. 1:16-CV-00118 (W.D.N.C. Apr. 28, 2016).

[2] New York State Sanitary Code, 10 N.Y.C.R.R. § 2.59.

Source URL: <https://www.natlawreview.com/article/will-requiring-flu-vaccinations-leave-employers-feeling-under-weather>