

THE
NATIONAL LAW REVIEW

As More Health Care Employers Adopt Mandatory Vaccine Policies, DOJ and HHS Push Back on Behalf of Individual Workers

Thursday, March 29, 2018

In the midst of one of the worst flu seasons to date, many hospitals and other health care organizations enforced mandatory flu vaccine policies for their employees to boost vaccination rates. However, recent litigation and governmental actions should serve as a reminder that [health care entities should carefully consider safeguards](#) whenever implementing mandatory vaccine policies and to not categorically deny all requests for religious exemptions based on anti-vaccination beliefs.

In January, the Department of Health and Human Services (HHS) [announced](#) the formation of a new [Conscience and Religious Freedom Division](#) in the HHS Office for Civil Rights (OCR) and released a [proposed rule](#) to provide protections for health care workers who refuse to participate in services that run counter to their religious beliefs or moral conviction. Recent legal challenges to mandatory vaccination policies in the health care context have also gained media attention.

Earlier this month, the United States Department of Justice (DOJ) accused a county-owned skilled nursing facility (SNF) in Wisconsin of violating a certified nursing assistant's religious rights when it required her to be vaccinated or be terminated if she refused. Although the certified nursing assistant believed that the Bible prohibited her from receiving the vaccine, the SNF refused to grant her an exemption from its vaccination policy because she was unable to produce a written statement from the clergy leader supporting her request, as the SNF's exemption policy required. The DOJ [complaint](#) asserts that the SNF's vaccination policy denies religious accommodations to employees who do not belong to churches with clergy leaders and that the SNF unlawfully denied the employee a reasonable accommodation for her religious beliefs when it refused her request for an exemption.

However, [not all requests for accommodation](#) must be honored. In [Fallon v. Mercy Catholic Medical Center](#), an employee sued his hospital employer for wrongful termination alleging religious discrimination and a failure to accommodate in violation of Title VII of the Civil Rights Act of 1964 when the hospital terminated him for refusing to get his annual flu shot. The Third Circuit Court of Appeals sided with the hospital and held that the employee's "sincerely held beliefs" were not religious but based on health concerns, and therefore, the hospital did not violate Title VII.

In another recent development, a Massachusetts state Superior Court [dismissed a lawsuit](#) filed by the Massachusetts Nurses Association against Brigham and Women's Hospital for lack of standing when the union challenged the hospital's flu vaccination policy. The dismissal occurred a few months after the court denied the union's request for an injunction. Thus, a plaintiff's standing to challenge mandatory vaccination policies will be scrutinized.

Key Takeaways



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Article By [Jonathan K. Hoerner](#)
[Nathaniel M. Glasser](#)[Olivia Seraphim](#)
[Epstein Becker & Green, P.C.](#)
[Health Employment And Labor Blog](#)
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Despite the actions of DOJ and HHS, health care employers are well within their rights to implement a mandatory flu vaccination policy, especially considering the potential implications to patient safety. Employers need to be prepared to handle requests for reasonable accommodations made by employees who have sincerely held religious beliefs against flu vaccination. When presented with such a request for accommodation, employers should engage in the interactive process with the employee as outlined in this recent [blog post](#).

To lessen the risk of infringing on worker's rights, many health care entities are employing non-mandatory tools and policies to boost employee vaccine participation through positive enforcement rather than with the threat of being fired. For example, health care entities can ensure that employees are educated and reminded about the benefits of being vaccinated, provide free and convenient access to vaccines, and issue small incentives and rewards to employees who are vaccinated.

Whenever implementing a mandatory vaccination policy, employers should be prepared for a challenge. Essentia Health required its employees to [receive the flu vaccination](#) and sustained a public legal challenge from three hospital unions. Essentia prevailed, discharging 50 workers who refused to be vaccinated.

Lastly, health care entities should review applicable [state-worker vaccination laws](#) to ensure they are in compliance with such laws when deciding upon vaccination policies.

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