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Shoo Flu, Don't Bother Me

By Aaron J. Graf

There can be no doubt that this is one of the worst seasons for contracting influenza (the dreaded "flu") since the H1N1 flu in 2009. Boston recently declared a public health emergency given the tenfold increase in flu cases over 2012, and some hospitals have been forced to set up temporary facilities to deal with the numerous patients seeking treatment for the flu. Since the H1N1 scare in 2009, employers in the medical field have increased their focus and sensitivity to both the flu and flu vaccinations. A significant number of hospitals have instituted varying policies mandating flu vaccinations for their employees to protect patients, especially the vulnerable, against contracting the flu.

Employers outside the medical field (and ancillary services serving the medical field) have generally not yet begun requiring mandatory flu vaccinations, though many employers strongly encourage it. However, one could certainly foresee other industries in which there is a high rate of human contact in an enclosed environment (such as schools, factories, large corporations with office workers, etc.) beginning to institute mandatory flu vaccinations in an attempt to avoid the flu spreading through a workforce and losing productive hours.

Requiring mandatory vaccinations raises several important questions: (1) is it legal, (2) how far can an employer go, and (3) are there reasonable alternatives?

Generally speaking, any employee that is employed "at-will" can be required to receive a vaccination and can be disciplined, or even terminated, for non-compliance with the policy, so long as the policy is not applied discriminatorily and none of the exemptions (discussed below) applies. As to employees that are not employed at-will, such as employees with employment contracts or those working subject to a collective bargaining

agreement, the ability to mandate flu vaccinations will depend upon the contract or collective bargaining agreement at issue.

While requiring flu vaccinations is generally permissible, there are some specific steps and considerations that an employer should take into account when instituting any such policy. Before taking action, an employer should analyze the actual rate of incidence of flu contraction among its workforce; whether categories of employees are in contact with any vulnerable individuals (such as the young, the elderly, and those with compromised immune systems); and whether there has been a significant reduction in productive hours due to the flu. These factors will indicate whether it is desirable to spend the time and resources instituting such a policy and whether the policy should be applied only to certain categories of employees.

In terms of exemptions, any mandatory vaccination policy should include both a religious and medical exemption. If an employee can demonstrate a bona fide and sincerely held religious belief against receiving a vaccination, the employee may be eligible for the granting of a religious accommodation. Similarly, if an employee can demonstrate through medical documentation that there are legitimate medical contraindications, the employee should also be eligible for an exemption. Of course, even if an exemption is granted, the employee should still be required to take protective measures against spreading the flu, such as wearing a protective mask. Not including a specific process for applying and receiving such exemptions may expose an employer to liability for various types of federal and state discrimination claims.

Finally, there are certainly reasonable alternatives an employer can adopt if it does not wish to institute a mandatory flu vaccination policy. Simple steps such as signs reminding employees to wash their hands, placing hand sanitizer throughout the workplace, reducing the occasions on which large groups of employees are required to congregate, and reminding supervisors to send sick employees home can be effective measures. In addition, during flu season employers can encourage working from home, increase available sick time, or ease strict attendance policies to encourage sick employees to stay home and avoid spreading the flu in the workplace.

Here are some other tips and considerations regarding mandatory vaccination policies:

- Make the vaccinations employer-paid/provided.
- Either hold vaccinations during work-time or compensate employees for time spent getting vaccinated as, arguably, the employee is being suffered or permitted to perform services for the employer in obtaining the vaccination, and therefore the time spent receiving the vaccination may be compensable.
- Make the vaccination deadline in fall (such as mid-October) to ensure employees are vaccinated before the flu season starts and to ensure employees are not left with shortages of vaccines.

- If feasible, consider providing the alternative of allowing employees to always wear a protective mask during flu season instead of receiving the vaccination.
- Make sure the religious and medical exemption procedures are specific and well documented.
- Check with your health insurance carrier to see if they may discount your rates if you institute a mandatory vaccination policy.

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