

Mandatory H1N1 Employee Immunization: Common-Sense Solution or Slippery Slope?

Susan W. Kline, Esquire
Baker & Daniels LLP
Indianapolis, IN

Although the number of reported H1N1 influenza cases have declined and Congress has shifted its focus away from proposed requirements of mandatory, paid sick leave for employees with H1N1 and other forms of influenza, employers are still looking for effective preventive measures to protect their workers from contracting the flu and to avoid the spread of flu in the workplace. The simple answer may seem to be—make everyone get a flu shot as a condition of employment. Good idea? Read on for some considerations to ponder before adopting a mandatory vaccination program.

May Private Employers Implement Mandatory Vaccination Programs?

This is a hot employment law topic. The government's right to enact mandatory vaccination laws is well established, going back to the early nineteenth century, when states began to require Smallpox vaccinations. The U.S. Supreme Court found that such programs adopted by the states were valid exercises of their police power to protect the public health and safety. Today, school vaccination requirements are almost universal, but the vast majority of states allow exemptions for medical and religious reasons, and nearly half also allow exemptions based on philosophical opposition.

But what about private employers? Organizations that attempt to require vaccination are likely to face the following objections:

- *Medical Objections:* some employees may have medical contraindications to vaccines, for reasons such as having compromised immune systems, allergies to vaccines, or illness at the time of vaccination.
- *Religious Objections:* some religious faiths oppose vaccination on grounds such as a belief that immunization demonstrates a lack of faith in God or another higher being.
- *Philosophical Objections:* some employees may simply believe that being forced to choose between vaccination and their job is an inappropriate intrusion into personal liberty, or they may otherwise object on principle to their employer requiring them to ingest a vaccine, even if it is for their own and the group's good.
- *Scientific Objections:* some employees may have concerns based on studies of varying levels of scientific credibility challenging the efficacy of flu vaccination programs.



Think Before You Act

Employers considering mandatory immunization programs should first reflect upon the following considerations:

- *The Equal Employment Opportunity Commission's (EEOC's) position on medical and religious exemptions.* In a recent technical assistance publication titled "Pandemic Preparedness in the Workplace and the Americans With Disabilities Act," the EEOC, the agency that enforces Title VII and the Americans with Disabilities Act (ADA), addressed the question: "May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?" The answer was:

No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the operation of the employer's business, which is a lower standard than under the ADA).

Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it.

Although courts are not required to accept EEOC interpretations of laws such as the ADA, a mandatory vaccination program with no medical or religious exemption provisions could invite an EEOC unlawful conduct charge. It could even provoke the EEOC into bringing suit against the employer itself, asserting such a claim on behalf of all affected employees.

Either way, the employer is likely to incur significant costs defending against the claim, with no guarantee of success.

- *Whether such a requirement must be bargained.* For employers with unionized workforces, a mandatory vaccination requirement may need to be bargained. A recent order by the New York state health commissioner that all state healthcare workers be vaccinated for seasonal and swine flu prompted a challenge from a union representing hospital workers that the directive violated their labor contracts.
- *The nature of the workplace and available alternative measures.* Employers who provide services to young children, elderly persons, or persons with medical vulnerabilities could face negligence claims for not implementing effective programs to contain the spread of influenza. While such employers would have a stronger argument for mandatory vaccination, other available safeguards may be sufficient for employees who object to or are not good candidates for vaccination on medical or religious grounds. Some healthcare organizations have implemented requirements that employees who are not vaccinated must wear face masks whenever they are in contact with co-workers or patients, and that all employees must follow specified hygiene procedures such as frequent and thorough hand-washing. For employers whose employees do not always have to be on site to perform their job duties, the EEOC has suggested considering the alternative of expanded telecommuting programs.
- *The risk of workers' compensation claims.* Employees who become ill or suffer allergic reactions or adverse side effects to mandatory vaccination could assert claims that would fall under the employer's workers' compensation program.
- *Confidentiality and discrimination concerns.* For organizations that implement mandatory programs but allow exemptions based on medical and religious concerns, the next question becomes what documentation to require from the employee, which can quickly become a Catch-22. Employers who simply ask employees to affirm that they are requesting an exemption based on medical or religious grounds may face abuse from employees who really do not have such objections but simply do not like getting shots. Employers who require specific verification of a medical condition must ensure that the documentation is properly secured in a confidential medical file that is accessible and disclosed only on a need-to-know basis. Even if confidentiality is observed, such disclosures could open the door to discrimination claims based on disability or on allegedly regarding the employee as disabled. For religious objections, employers should not delve into the specific faith and practices, but simply require affirmation that the objection is based on a bona fide religious belief. As with a medical objection, requiring such a statement (even on a general level) could lead the employee to conclude that any perceived mistreatment thereafter is based not on poor performance or misconduct, but on religious belief.

Best Practices

Think through the potential unintended consequences before requiring all of your employees to get flu shots. The better approach may be a proactive immunization promotion program that: (1) offers shots on a voluntary basis at a convenient time and location; (2) educates employees on immunization's benefits and minimal risks (and puts them on notice that if the situation reaches pandemic level, those not immunized might be subject to special preventive measures such as wearing face masks at work); and (3) presents the program in a positive manner as an important benefit for workers. Such an approach can accomplish most of the benefits of a mandatory immunization program, while maintaining a more positive employee morale and minimizing the risk of incurring the cost of defending against legal challenges.

