



Commentary

Mandatory influenza vaccination and religious accommodation for healthcare workers: Lessons from recent legal challenges

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1. Introduction

Every year, US health systems, facilities, and care providers face a daunting public health challenge: preparing for and responding to the spread of seasonal influenza. Health facility administrators, seeking to protect employees, vulnerable patients, facility visitors, and the community from this highly-transmissible, potent infectious disease, must balance these health and safety concerns with consideration of the legal and ethical rights of those they employ. Vaccination represents the cornerstone of occupational health during influenza season, but voluntary adherence of health care providers to public health recommendations that they receive annual influenza vaccinations remains an ongoing challenge [1]. Consequently, many facilities have adopted policies that require employees receive annual influenza vaccinations, with limited opportunities for employees to opt out of such mandates [2]. Today, more than 600 healthcare organizations in the US have instituted mandatory vaccination policies, requiring employees to get the influenza vaccination or to risk losing their jobs [3]. Although such policies have been legally challenged before by healthcare personnel, there has been a notable recent rise in lawsuits challenging hospital influenza vaccination mandates on religious grounds [4]. Most of these newer cases were not dismissed by the judge—they were settled, or were heading toward trial. Also, it is meaningful that the Equal Employment Opportunity Commission (EEOC) filed three related lawsuits [5–7] recently on behalf of the aggrieved employee, as the EEOC typically only injects itself into an individual employee's dispute when it perceives that the employee's case presents an issue of public concern. This indicates a need to understand the claims made in these lawsuits so that hospitals can avoid future legal challenges. Recent challenges brought against Mission Hospital [5], St. Vincent Health Center [6], and Baystate Medical Center [7] before the EEOC may demand that health care facilities reexamine the stringency of such policies, and

highlight concerns related to public health, patient safety, religious freedom, and the balancing of employer and employee rights.

2. Recent challenges on religious ground

On January 12, 2018, Mission Hospital agreed to pay \$89,000 and to furnish other relief as part of a consent decree settling a religious discrimination lawsuit filed by the EEOC [5]. In the original complaint, the EEOC had alleged that the hospital's mandatory vaccination policy—which required employees to get an influenza vaccination by December 1 or file a request for exemption by September 1—violated federal law [5]. Although Mission Hospital had granted 250 timely requests for religious exemptions since 2010, it refused to do so for three employees who missed the deadline. Ultimately the hospital terminated their employment for failure to obtain the vaccination [5]. The EEOC alleged the hospital had treated the employees differently because of their religious beliefs, asserting that “an arbitrary deadline does not protect an employer from its obligation to provide a religious accommodation” [5]. The consent decree is a key mechanism through which the federal agency illuminates and corrects improper activities by employers. Here, the hospital agreed to revise its policy to permit employees to request an exemption during the period in which the vaccines are to be received, to conduct annual Title VII training for managers and supervisors, and to provide periodic reports to the EEOC [5].

This case shows that mandatory vaccination policies are subject to limitation by Title VII of the Civil Rights Act of 1964 which prohibits discrimination based upon race, color, sex, national origin, and religion [5]. This prohibition extends to the disparate treatment or harassment of employees due to their religious beliefs or practices, the denial of a requested reasonable accommodation of an employee's sincerely held beliefs, and retaliation against an employee engaging in a protected religious activity [5]. The law defines religion broadly, encompassing “all aspects of religious observance and practice, as well as belief” [5], even those that are “new, uncommon, not part of formal church or sect, only subscribed to by a small number of people or that seem illogical or unreasonable to others” [5]. Thus, once an employer determines that employee's beliefs fall within this classification, it is required

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to reasonably accommodate that employee without undue hardship on the conduct of its business [5].

The EEOC, to measure the degree of hardship, will consider factors including the assessment of public risk posed at a particular time, the availability of alternative means of infection control, and the number of employees requesting accommodation. If an employer grants a religious accommodation request, it may impose additional infection control measures (i.e. wearing a mask) for legitimate, nondiscriminatory, and nonretaliatory reasons.

Employers may use an objective basis to question whether a belief is religious or sincerely held [5], and may deny an accommodation request by establishing that: the employee behaved in a manner markedly inconsistent with professed belief, that the accommodation sought is a particularly desirable benefit likely to be sought for secular reasons, that the timing of the request is suspect, or that the employer has reason to believe it is not sought for religious reasons [8].

Other recent EEOC cases provide further guidance as to what the oversight agency will consider the “reasonable accommodation” of religious belief. In *EEOC v. St. Vincent Hospital and Health Center, Inc.*, the hospital paid a \$300,000 fine and was forced to reinstate six employees who had been fired for refusing vaccination after failing to provide clergy attestation with their exemption requests, as had been required by hospital policy (that provision was eliminated under the consent decree) [6]. In *EEOC v. Baystate Medical Center*, a complaint was brought after a human resources employee who had no contact with patients and had been ordered to wear a mask in lieu of vaccination was suspended without pay when the accommodation proved ineffective and impaired the employee’s ability to do her job [7]. In its complaint, the EEOC argued that “[f]or an accommodation to be meaningful under Title VII, it both must respect the employee’s religious beliefs and permit her to do her job effectively” [7]. This action is still pending, so while the impact of the case on future religious discrimination cases is unclear, it does shed light that the agency does not favor a one-size-fits-all-employees patient safety policy.

3. Considerations for mandatory policies

Guidance from the EEOC and from the courts provides employers with important lessons as they craft and implement their mandatory vaccination policies. Close adherence to these rules has become all the more important in the face of an increase in requests for religious accommodations, a rise in the number of different religious practices that need to be accommodated, and an elevated willingness to file a charge or to seek out a lawyer to challenge a denial of religious accommodation. In fact, the EEOC 2017 Enforcement and Litigation Data report indicated 3426 religion-based charges were received during the fiscal year, a statistic up from 1709 in 1997 and 2880 in 2007; in each of the following years, the EEOC received more than 3000 religion-based charges [9]. Such trends are quite surprising as most religions that are implicated in this debate do not actually oppose vaccination [10]. In reviewing purported religious objections, a study concluded that only two religions (Christian Scientists and some branches of the Dutch Reformed Church) have demonstrated a precedent of widely rejecting vaccinations, but even these rejections are not explicitly laid out in their doctrine [10].

Perhaps increased willingness to institute religious discrimination lawsuits can be partly attributed to the political climate. On January 18, 2018, the US Department of Health and Human Services (HHS) announced the creation of a new Conscience and Religious Freedom Division in the department’s Office of Civil Rights meant to “restore federal enforcement of our nation’s laws that protect the fundamental and unalienable rights of conscience and

religious freedom” [11]. The following day, HHS released a proposed rule providing protections for healthcare workers who refuse to participate in services running counter to their religious beliefs or moral convictions. The Division and the proposed rules may be emblematic of a political climate that has been in place for a period of time. Enhanced protections for, and additional publicity surrounding, religious freedom initiatives could help to encourage more discrimination lawsuits.

Health administrators are encouraged to practice respectful institutional stewardship through their development and implementation of just policies that empower, support, and protect staff. At the same time, they must maintain high patient-focused quality and safety standards. Arguments in favor of more rigorous vaccination policies to protect vulnerable patients can find support in the ethical principles of nonmaleficence (do no harm), as well as justice, as such initiatives minimize the likelihood of patients having widely varying risks of exposure dependent upon what particular mix of providers they see within a particular institution [12]. The ethics of public health policy also recognizes that steps must be taken to minimize a policy’s infringement upon individual autonomy, a core value underpinning the right to religious freedom [13]. These cases may indicate an emerging preference by regulators for protecting religious freedom over uniform policy adherence by employees.

As a result, employers should keep several crucial considerations in mind when implementing a mandatory vaccine policy for healthcare workers. Employers should be cognizant and respectful of potential objections to the program and expect some push back. Employers also should avoid openly questioning whether the employee’s reason sounds “religious” as the law defines this term broadly. Deadlines and documentation standards should be the same for all employees; arbitrary deadlines or requirements for clergy certification stand out as blatant violations and attract litigation. Well-drafted policies that are reasonably and flexibly applied can withstand such legal challenges while also safeguarding patient health [4].

4. Conclusion

Employers implementing mandatory influenza vaccination programs must strive to balance protection of patients and the reasonable accommodation for employee religious beliefs. Although these policies have improved vaccination rates, such strategies should be part of a comprehensive program that includes on-site, free, actively promoted influenza vaccinations [14], and other infection prevention measures like hand hygiene, respiratory etiquette, and standard precautions.

Conflict of interest

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