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Can health care workers be required to get flu shots?



If you work at a hospital in Massachusetts, you have to get a flu shot — unless you don't want to. That's the confusing state of the law around 105 CMR 130.325.

The regulation requires hospitals to ensure that anyone who works there gets a vaccination. But employees are excused if the vaccine would be detrimental to their health or against their religious beliefs — or, "if the individual declines the vaccine."

Last year, Brigham and Women's Hospital (BWH) adopted a mandatory vaccination policy. Workers had to get a flu shot unless they received a medical or religious exemption. There was no other way out. Anyone who refused could be

terminated.

The Massachusetts Nurses Association sought declaratory relief in Superior Court, arguing that the policy was illegal under Section 130.325. It said the regulation didn't just allow workers to opt out of the state's requirement; it provided an affirmative right not to be vaccinated.

BWH was able to get the suit dismissed, saying that it had not implemented the policy yet and the question wasn't ripe for adjudication. For the time being, nurses at BWH have a choice of getting a flu shot or wearing a mask at work.

While the lawsuit didn't answer the question it raised, I think the hospital has the better argument. The purpose of the regulation is to get workers vaccinated, not to prevent employers from enacting policies with the same goal. The fact that the state has chosen to let workers opt out of this particular regulation does not create a right to decline vaccination generally.

In response to the nurses' suit, the Department of Public Health issued draft regulations that made it clear that 130.325 was not intended to prevent employers from implementing mandatory flu vaccine policies. Before the regulation was finalized, Gov. Patrick left office, and the clarification was put on hold.

A reasonable rule

When you take the regulation out of the mix, the question is just one of employment law. If the worker is an employee at will, the employer can impose any reasonable rule.

It's not unusual to require vaccines for health care workers. Neonatal personnel in Massachusetts need to be immune to measles and rubella under 105 CMR 130.626.

In states such as New York, all hospital workers need those immunizations. And it's very common to require immunizations where the employee can only opt out using a specific written form. That's what OSHA requires to decline hepatitis B shots. And under 130.325, anyone who declines must sign a statement that he or she has been informed of the vaccine's benefits.

At least 15 states have some requirement that health care workers get flu shots. The impetus comes from the Centers for Disease Control, which recommends that all health care workers get vaccinated every year. That's mainly to prevent them from passing the disease to their patients.

Thousands of people die from the flu each year. CDC estimates are imprecise, but there were years when close to 40,000 people died from influenza. The flu poses a particular risk to infants, older adults, pregnant women, people with compromised immune systems, and people with lung or heart ailments — in short, the kind of people who tend to be in hospitals. And a worker can pass the flu to those people even before the worker knows he or she is sick.

In holding that a mandatory vaccination policy was subject to bargaining, the 9th U.S. Circuit Court of Appeals noted: "Studies have shown that staff-to-patient flu transmittal is prevalent in hospitals and other health care facilities because

about half of those infected with influenza are asymptomatic and because as many as 70% of health care workers continue to go to work even when experiencing flu symptoms.”

In 1998, 27 cancer patients became ill with the flu in the bone marrow unit of Memorial Sloan-Kettering Cancer Center in New York. Two died. The outbreak was traced to the workers in the unit. Only 12 percent had been vaccinated.

There have been several outbreaks of flu in neonatal intensive care units. One frequently cited study traces the infection to health care workers in which 19 babies became ill and one died.

The American Hospital Association supports mandatory flu shots. So do the National Business Group on Health, National Vaccine Advisory Committee, American Academy of Pediatrics, American College of Physicians, American Hospital Association, Department of Defense and National Patient Safety Foundation.

OSHA recommends flu shots for health care workers, but does not support a mandatory vaccination program.

Wearing masks

The usual compromise is to require workers to wear masks if they don't take the vaccine. Masks do prevent the spread of droplets that can contain viruses. But viruses are pretty small; they can pass right through the pores in the masks.

“No studies have definitively shown that mask use by ... health-care personnel prevents influenza transmission,” the CDC says.

Experts say it is better to prevent the worker from contracting the disease than trying to prevent a sick worker from spreading the disease.

“There's not good science to recommend masking,” said DeAnn McEwen, of the National Nurses United union. “Masking is also targeting the individual for exercising her rights to refuse medical treatment and, I think, violates privacy laws. It's not good policy for hospitals, for patients seeing everyone wearing masks — it's a facade of protection that doesn't really benefit the public.”

It may be that hospitals are hoping that the masks will be so uncomfortable that workers will just give in and take the shot, speculated David LaHoda of the OSHA Healthcare Advisor. He quoted one consultant as saying the masks are “like wearing a scarlet letter” and “the employees hate it.”

Collective bargaining

Many hospitals and other health care organizations have decided to make vaccination mandatory. And studies show these policies work better than state regulations.

Some hospitals — such as Loyola in Illinois, Children's Hospital of Philadelphia and Johns Hopkins in Maryland — have managed to immunize virtually the entire staff with these policies. By now, more than 150 hospitals and health care systems across the country have mandatory vaccination policies. Typically the policies provide for religious or medical exemptions.

As mandatory vaccination becomes more common, lawyers for infected patients will argue that vaccination of all workers is the standard of care. Hospitals with high rates of noncompliance will be at risk. Nurses may sue if vaccination is required; patients may sue if it is not.

While the Massachusetts regulation probably doesn't bar a mandatory vaccination policy, there are other factors to consider. The first is that this requirement may be a change in working conditions.

The National Labor Relations Act says that a flu vaccination is a mandatory subject of bargaining. Unions in New York and New Mexico have obtained injunctions preventing hospitals from firing workers who decline the vaccination.

In 2007, the 9th Circuit upheld an arbitrator's ruling barring Virginia Mason Hospital from unilaterally implementing mandatory immunization. The decision was based on whether the arbitrator's interpretation of the union contract was plausible. It does not answer the question for all time. *Virginia Mason Hospital v. Washington State Nurses Ass'n*, 511 F3d 908 (2007).

Thus, a few years later, the National Labor Relations Board made the opposite finding and held that Virginia Mason was not required to bargain with the union over a policy that required nurses to be immunized or wear masks when interacting with patients.

The board found that the union “clearly and unmistakably” waived its right to bargain when it agreed to a broad management rights clause in the collective bargaining agreement.

So there's an open question whether an employer can require its union workers to be vaccinated. The answer is going to depend on what it says in the collective bargaining agreement and how the tribunal balances collective bargaining rights against patient safety.

Conscientious objectors

None of the policies require people to get a flu shot if it will make them sick. The CDC says people with life-threatening allergies to any ingredient in the vaccine — such as gelatin, antibiotics or eggs — should not get it.

These allergies may be considered handicaps under state or federal law, and the employer should enter into a dialogue

about what accommodations would be appropriate. For example, if the employer does not think masks will protect patients, it could assign noncompliant employees to wards where patients are not at great risk of infection.

We have all heard the term “conscientious objector.” It first came into use to describe parents who resisted Britain’s Compulsory Vaccination Act of 1853. It distinguished people with moral scruples from careless parents who had not bothered to vaccinate their children. And today, there are still people who have a moral or religious objection to the vaccine.

Typically, people who object to medical care on religious grounds don’t end up as doctors or nurses. So the religious objections tend to be like those in *Chenzira v. Cincinnati Children’s Medical Center*, No. 11-917 (S.D. Ohio, Dec. 27, 2012), in which an employee successfully argued that veganism was a sincerely held belief akin to a religion, which excused a worker from accepting a vaccine that contained egg protein. The decision was a memorandum on a motion to dismiss. Under that liberal standard, the court held that the employee’s claim was “plausible.”

Until there is a dispositive opinion, vaccination policies typically allow for religious objections under general principles against discrimination.

Conclusion

An employer who plans to implement a mandatory vaccination policy should consider whether there is a collective bargaining agreement and whether it permits this requirement.

The policy should make vaccination available at no charge, should provide information on the risks and benefits of the vaccine, and should have exceptions for people who decline the vaccine for religious or medical reasons. For those people who object, the employer should determine what accommodations are reasonable.

At the very least, unvaccinated health care workers should wear masks, and there may be populations of patients for whom the risk of infection is so great that masks are not sufficient. In those cases, the workers should be reassigned to care for less susceptible patients or should be placed on leave until the flu season is over.

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