

Mandatory Flu Shots Not Generally Recommended

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By Allen Smith

Despite positive initial results from preliminary clinical trial results of 2009 H1N1 influenza vaccines, for now most U.S. employers should not make flu shots mandatory, according to Steve Biddle, an attorney with Littler Mendelson in Phoenix.

Biddle told *SHRM Online* that "at present, there is no H1N1 flu vaccine available," but one is expected to be made available starting in October. "Employers generally should not require employees to get immunizations because of possible problems with the Americans with Disabilities Act (ADA) and other potential legal issues," he said.

Mandatory for Any Position?

However, Biddle noted that the New York State Department of Health has issued emergency regulations, effective Aug. 13, 2009, requiring health care facilities to vaccinate all personnel for influenza, except those with no patient contact and those with other health conditions preventing immunization. He added that "if the situation becomes more severe than expected and employers are either being required to have their employees get vaccinated or are permitted to mandate it, employees should be paid for this because it arguably would be work time. Also, if a unionized employer does want to mandate vaccinations at some point, it probably is necessary that the employer negotiate the issue with the union first."

If an employer requires flu vaccinations, it could be liable under workers' compensation statutes for adverse reactions to vaccines, Biddle pointed out. And while employers could maintain a list of vaccinated employees, the ADA would require that the list be kept in a confidential medical file separate from other employee records.

"Many state health departments and hospitals have decided to require flu vaccinations," David Barron, an attorney with Epstein Becker & Green, told *SHRM Online*. But aside from legal requirements, mandatory flu vaccinations would place an "obvious strain" on employee relations, he observed. Moreover, in addition to accommodating individuals who might be allergic to vaccinations, employers who make vaccinations mandatory would be required to accommodate individuals who have religious beliefs that forbid immunization. Any mandatory vaccinations should, he said, "be based on legitimate business reasons, for example, critical personnel or persons providing medical care to the public."

And he cautioned that employers "should be very careful in having medical treatment on-site" because of privacy issues under the Health Insurance Portability and Accountability Act (HIPAA).

"Documentation received from an employee is typically not covered under HIPAA, but documents containing protected health information (PHI) received from an on-site provider would be protected by HIPAA and require an appropriate authorization for release."

The Centers for Disease Control and Prevention has [guidelines](#) on people who should not get the vaccine because of the risks they face, notes Douglas Duerr, an attorney with Elarbee Thompson in Atlanta. "I would recommend that, if an employer makes the vaccine mandatory, that a procedure be put in place to accommodate those for whom the vaccine is contraindicated," he said. Duerr added that if vaccines are made mandatory, "I would recommend having it done on-

site during work hours. Also, it is important to remember that for minimum wage employees, including tipped employees, or low wage earners, the cost of the vaccine would likely be considered a work expense and be deemed a deduction from wages."

Employers alternatively could require employees to bring in documentation that they had flu vaccinations. But Duerr said that employers should be very specific about what documentation would be required and should keep any vaccine records in separate medical files. Also, if required to bring in documentation, employees should bring the documentation to HR or a company nurse rather than their supervisors, he added.

Ed Foulke Jr., an attorney with Fisher & Phillips in Atlanta and a former assistant secretary of labor for the Occupational Safety and Health Administration (OSHA), agreed with Biddle that "the better policy is to make vaccinations voluntary and explain why they are in the employees' best interest," except in the health care industry. One concern is that the flu might mutate into something else and that a vaccine might become ineffective, Foulke noted in a Sept. 10 interview.

Employers who are considering mandatory vaccinations for some positions should consider how similar the job is to a health care professional vs. someone at a desk job in an office, according to Dan Chammas, an attorney with Venable in Los Angeles. Most jobs fall somewhere between these two poles. The closer a job is to one or the other should help an employer decide whether to make vaccinations mandatory. Other factors to consider include geography and the severity of the flu outbreak. Chammas thinks that the greatest legal risk employers face by making vaccinations mandatory would be invasion-of-privacy claims.

OSHA's General Duty Clause

"At this point, there is a lot of uncertainty, and I don't think anyone can reliably predict the future," Barron remarked. "That said, making any medical procedure mandatory is always going to be unpopular and fraught with legal risk. Outside of first responders and medical institutions, it is hard to imagine a need for such an extreme policy. Instead of making the flu vaccination mandatory, employers can encourage their employees to get vaccinated and can even facilitate having the vaccination offered on the premises with the assistance of a medical professional."

Barron noted that an employer can coordinate with its health insurance provider to discuss coverage of vaccinations. "This may encourage more employees to get vaccinated if they know they will pay little or nothing out of pocket." Employers can educate employees on how to prevent the spread of the flu by increasing the availability of hygiene products and encouraging constant washing of hands.

"Employers should also maintain an open-door policy, where they encourage employees to come forward and share with them whether they are experiencing flu-like symptoms." Barron said that beyond just being good ideas, these types of basic steps are likely required under the Occupational Safety and Health Act's general duty clause. This clause, he reminded, "requires employers to take reasonable steps to protect employees from known work hazards."

Allen Smith, J.D., is SHRM's manager of workplace law content.

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