

Mandatory Immunization Policies Are Legal, But Are They A Best Practice?
Pitfalls employers face when implementing immunization policies

By: Sarah W. Benedict & Michelle B. Ferguson

Employers desire minimal disruptions to the workforce, such as absences due to various contagious illnesses, and have long considered whether to implement mandatory vaccination policies for its employees. For parks and recreations employers, there are additional concerns for preventing the spread of contagious illnesses given the frequent close contact its employees have with the general public. Given this additional concern, parks and recreations employers should consider whether implementation of a policy requiring immunizations is beneficial. However, they must do so carefully and thoughtfully as there can be risks to adopting a policy that requires employees to get vaccines. The employer should give serious consideration to whether the benefits from the policy outweigh the risks, and whether a policy that only *encourages* employees to receive immunizations would be more appropriate.

It has long been accepted in this country that governments may require immunizations in certain circumstances in order to further public safety.¹ This is most commonly seen in the fact that all states require students to be vaccinated prior to attending school. At various times, governments have also required immunizations for other groups of citizens. *Id.* For instance, the Colorado Department of Public Health and Environment recently adopted new regulations that require *licensed* health care facilities to meet certain flu vaccination rates for its employees. Certain types of facilities that fail to meet these rates will be required to implement a mandatory policy.²

The question, whether employers may require vaccinations, is related to the issue of whether governments can do so, but implicates different concerns. The employer is not mandating the vaccination under any circumstances, but rather is *conditioning* employment upon the receipt of specific immunizations. Few courts have addressed the specific issue of whether such a practice is acceptable, but most commentators and legal authorities agree that it is allowed with certain exceptions. For instance, in a 2009 letter, the Occupational Safety & Health Administration ("OSHA") stated, in regards to the H1N1 vaccine, that "although OSHA does not specifically require employees to take the vaccines, an employer may do so."³ Similarly, the Center for Disease Control has acknowledged that employers sometimes mandate immunizations for their

¹ See generally Kathleen S. Swendiman, *Mandatory Vaccinations: Precedent and Current Laws*, Congressional Research Service, Feb. 24, 2011, www.nacua.org/documents/CRS_MandatoryVaccinations.pdf.

² See *Board of Health Ruling Regarding Influenza Vaccinations for Health Care Workers*, Feb. 15, 2012, <http://www.healthcareemploymentcounsel.com/files/2012/02/ColoradoBoardOfHealthRule.pdf>.

³ Letter from Jordan Barab, Acting Assistant Secretary, OSHA, to Congresswoman Marcy Kaptur (Nov. 9, 2009), http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=INTERPRETATIONS&p_id=27284.

employees stating "some employers require certain immunizations for those employees who work with people who are sick or vulnerable to disease, or those who handle or are exposed to dangerous substances, such as certain bacteria or viruses."⁴ In addition, at least one court has upheld the military's right to require immunizations for civilian employees when such vaccines are determined to be necessary in regards to the employees' duties.⁵

If an employer chooses to implement a mandatory immunization policy, it should have exceptions to avoid discrimination claims or claims based on the Americans with Disabilities Act ("ADA"). For instance, guidance published by the Equal Employment Opportunity Commission ("EEOC") states:

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?

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).⁶

Similarly, a Maryland court recently allowed a claim brought by a terminated employee who was denied a religious exemption from immunization requirements to proceed under the ADA.⁷ As such, employers must be aware of this potential claim by employees.

While religious discrimination claims and claims based on the ADA are likely the most obvious claims that an employee can bring against an employer in relation to mandatory immunizations, employees have been known to claim that they were discriminated against in other respects. In at least one case, an employee filed a claim alleging (i) discrimination on the basis of sex because only staff members (which were primarily female) were required to receive rubella vaccinations, while the doctors (who were mostly male) were not; and (ii) discrimination on the basis of age because the rubella vaccination caused more serious side effects in older woman

⁴ See National Vaccine Program Office: Immunization Laws website, <http://www.hhs.gov/nvpo/law.htm>

⁵ See *Mazares v. Dept. of the Navy*, 302 F.3d 1382, 1385 (Fed. Cir. 2002).

⁶ EEOC, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, Oct. 9, 2009, http://www.eeoc.gov/facts/pandemic_flu.html#36 (internal citations omitted) [hereinafter *EEOC Guidance*];

⁷ *Zell v. Donley*, 757 F.Supp.2d 540 (D. Maryland 2010)

than younger woman, and because older woman were less likely to have had the vaccine in their youth.⁸

There are other reasons that a mandatory immunization policy may not be enforceable. For example, an employee could declare that a mandatory immunization requirement violates a collective bargaining agreement.⁹ Similarly, in the case of employees who are not at-will, an employee could assert that the requirement imposes an additional condition on the employee that was not in the employment agreement.¹⁰ Finally, a mandatory immunization provision may be unenforceable against a government employee who may not be terminated except for cause. Specifically, courts have held that public employees who may not be terminated except for cause, or who otherwise have some sort of guarantee of continued employment (i.e. not "at will" employees), have a property right that may not be terminated without due process.¹¹ Therefore government employers may not be able to mandate immunizations for employees who have such a guarantee of continued employment, especially if there is no public health rationale for implementing the requirement.

Even though mandatory immunization requirements may technically be allowed, employees tend not to like them, so caution is recommended when implementing such a policy. The *EEOC Guidance* cited earlier states "[g]enerally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it," and position that is supported by the Society for Human Resource Management, which stated in a recent article that "[u]nless your organization falls under a federal or state regulation mandate, it is not recommended that employers make vaccinations a requirement of continued employment."¹² At times, however, vaccines may be in the best interest of public safety, so an employer should carefully weigh the benefit against the potential claims and backlash it may face from employees. , employers should realize that in the event an employee experiences an adverse reaction to an employer-required vaccine, the employee likely will be entitled to workers' compensation.¹³

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⁸ *Blonder v. Evanston Hospital Corp.*, 91 C 3846, 1992 U.S. Dist. LEXIS 2252, at *2-3 (N.D. Ill. Feb. 7, 1992) (denying the employer's motion to dismiss, holding that the employee "pled sufficient facts to allege a disparate impact case." *Id.*, at *9-10).

⁹ See *Virginia Mason Hospital v. Washington State Nurses Ass'n*, 511 F.3d 908 (9th Cir. 2007).

¹⁰ See Lawyers.com, *Forcing Flu Shots, Employees and Health at Work*, <http://labor-employment-law.lawyers.com/human-resources-law/Forcing-Flu-Shots-Employees-and-Health-at-Work.html>.

¹¹ See *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (U.S. 1985); *Derda v. City of Brighton*, 53 F.3d 1162, 1165 (10th Cir. 1995); *Ewers v. Bd. of County Comm'rs of the County of Curry*, 874 F.2d 736, 738 (10th Cir. 1989); *Bailey v. Kirk*, 777 F.2d 567, 574 (10th Cir. 1985).

¹² Society for Human Resource Management, *Contagious Disease: Testing/Vaccines: Can Employers Require Employees To Be Vaccinated for Communicable Diseases and, if so, Must They Pay For It?*, Sept. 9, 2009, http://www.shrm.org/TemplatesTools/hrqa/Pages/require_H1N1vaccination.aspx

¹³ See *Alewine v. Tobin Quarries, Inc.*, 33 S.E.2d 81, 87 (S.C. 1945); *In re Sanders*, 238 A.D. 746, 749-50 (N.Y. App. Div. 1933).