



# What's Worse – Getting The Flu, Or Getting Sued?

MANAGING THE RISK OF MANDATORY FLU SHOTS

Insights

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If the goals for the healthcare industry could be distilled to a single word, that word would be “quality.” But the manner in which a provider achieves this varies widely. What works for a large system may not be appropriate for a smaller operation, and the best strategy for an ambulatory surgical center may not be a good fit for a skilled nursing facility.

Regardless of size or type, a universal component in the quest for quality is the workforce, and many healthcare employers focus on the wellness of their workforce as a result. Each year, though, a pesky little virus – influenza – tries to derail these efforts. One way to combat the disease that infects up to 20% of the population each year? Require a flu shot.

## **Brace Yourselves: Flu Season Is Coming**

Influenza, or the flu, is a serious disease that can lead to hospitalization or even death. In the healthcare industry, this presents a vicious cycle of cause and effect. On the one hand, your infected patients could pass the flu along to your uninfected employees. On the other hand, any employees who are already infected with the flu are at risk of passing it on to your uninfected patients (who are often more susceptible than the general population), which could start the cycle all over again.

To break this cycle, healthcare employers increasingly require employees to receive an annual flu vaccine – the single best way to protect against the flu according to the Centers for Disease Control. In theory, a flu shot requirement seems like a win-win, with healthcare providers able to protect both employee and patient populations.

But in reality, what appears to be a “no-brainer” step in the quest for quality comes with its own perils. Thus, employers who are interested in mandating flu shots (or that already do) should consider a variety of factors – and quickly. While “flu season” peaks from December to February, it actually begins in October, which is just a few short months away.

## **Legal Considerations For Every Healthcare Employer**

The healthcare industry is no stranger to the myriad compliance issues governed by state and federal laws. Mandatory flu shots are no exception. On the federal level, you must pay attention to the following non-exhaustive list: the Family and Medical Leave Act (FMLA), the Americans with Disabilities Act (ADA), the Occupational Safety and Health Act (OSHA), Title VII of the Civil Rights Act

Employee Retirement, the Occupational Safety and Health Act (OSHA), Title VII of the Civil Rights Act of 1964 (Title VII), the Health Insurance Portability and Accountability Act (HIPAA), and Medicare/Medicaid regulations.

Additionally, several nurses' unions have come out in opposition of mandatory flu vaccines. This may result in additional headaches under the National Labor Relations Act if your workforce is unionized (or even if it is not). Fortunately, at least for now, the National Labor Relations Board has not found that mandatory flu shot policies are unlawful.

There are also legal considerations on the state level that apply to a healthcare provider's patients, workers, or both. Numerous states require a provider to assess the status of immunizations, to offer or even require immunization, or to require workers to wear surgical masks if not vaccinated. Not to mention workers' compensation requirements and state privacy laws must also be on your radar.

### **Practical Considerations For Every Healthcare Employer**

If you are going to require flu shots, you should first implement a policy that specifies certain details:

1. Who is subject to the policy? In the healthcare industry, the "who" can be quite extensive (all employees with direct patient access, volunteers, administrative staff, vendors, etc.). Moreover, this decision must be made with a variety of factors in mind, such as medical staff bylaws, physician contracts, and the impact on a unionized workforce.
2. Can an employee become exempt from the policy? No policy is complete without an exemption process. An employer will need to determine the types of exemptions it will offer (medical, religious, veganism, etc.), how an employee may request one, and whether the request must be made by a certain date.

You will also need to decide the types of accommodations you will offer if you grant the request. Common accommodations include requiring surgical masks at all times (or just around patients), providing paid or unpaid time off until the conclusion of flu season, and transferring a worker to a different position or facility.

3. How will the policy be enforced? Some employers may be inclined to take a hardline stance, threatening termination for noncompliance. Others may prefer to discipline in accordance with an existing progressive discipline policy. Others still may choose to suspend the employee for the remainder of flu season.

Regardless of the choice made, you should always enforce the policy consistently so as to avoid running afoul of applicable state and federal laws.

4. You will also need to decide how to obtain proof of compliance, such as requiring a vaccination record from the employee's personal healthcare provider or administering the vaccinations to the employee yourself, and whether you intend to pay or reimburse for the vaccine. It may also be

prudent for any policy to provide information about the virus, the vaccine, and why the vaccine is being required. Finally, you should have all subject employees sign and date the policy, evidencing they received, read, and understood its contents.

5. Almost as critical as the policy is the attendant training. You must thoroughly train supervisors who will be in line to receive a complaint or accommodation request. These frontline supervisors should be instructed to bring all inquiries to the attention of human resources (which should also be specified in the policy). Repeat this training often, and ensure new supervisors are trained at hire or promotion.

### **You Have Options**

It may be that, upon consideration of all the above, you decide that a mandatory policy is too forceful. You are not foreclosed from engaging in a “strongly encouraged” approach in which you could use incentives like gift cards or bonuses instead of mandates. But even this approach comes with certain pitfalls, and you should obtain a blessing from legal counsel before implementing a voluntary or quasi-mandatory policy.

With all the moving parts, it is critical to carefully evaluate what is important to your operation, your strategy in offering quality care, and the corresponding legal issues. Reward is never without risk – mandatory flu shot policies are no exception.

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