

## 'TIS THE SEASON: EMPLOYERS AND THE FLU

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This flu season *may* be one of the worst in years, but the experts at the Centers for Disease Control and Prevention (CDC) cannot monitor its severity and scope because of the federal government shutdown. Unofficial flu trackers in the U.S. report elevated instances of flu-like illness in some states already, but are not able to provide a robust national picture of what Americans are facing this season.

In addition to facing an unknown flu season, with the majority of CDC employees furloughed, Americans lack information regarding whether this year's strains of influenza are susceptible to antiviral drugs such as Tamiflu, or whether the current flu vaccine is a good match to combat the illness. This is a frightening position to be in; last year's early and severe flu season resulted in 42 states reporting widespread levels of illness, Boston declaring a public health emergency, and the death of 164 children.

Needless to say, without the benefit of the CDC's monitoring and analysis early in the season, employers may be hit hard by flu-related absences; not knowing what to expect from this year leaves employers particularly blinded. Consequently, employers can expect flu-related challenges to remain steady from last year. Legal issues include the controversy over mandating flu vaccinations; practical issues include implementing measures to prevent the spread of the virus at work.

### **MANDATORY FLU VACCINATIONS: A CONTROVERSIAL ISSUE**

Last year, media reports showed a backlash against mandatory flu-vaccination policies; some employees vehemently objected to vaccinations, and in some instances anti-vaccine support groups formed. Nonetheless, the CDC and the public

health system always remain squarely in favor of the flu vaccination. Normally, this is the time of year when the CDC ramps up its publicity efforts in favor of vaccination. Some healthcare employers have made flu shots mandatory, and are successful in requiring employees to take the flu vaccination as a term of employment.

Unionized healthcare employees are among those objecting to mandatory vaccinations. In a high-profile dispute in Seattle involving Virginia Mason Medical Center and the Washington State Nurses Association, unionized healthcare workers maintained that the Medical Center had a duty to bargain over flu-prevention policies, including vaccinations and mandatory masks for employees who refused vaccinations.

The National Labor Relations Board ruled that the adoption of a masking policy was not unlawful; the employees waived their right to bargain over mandatory masking by agreeing to the collective bargaining agreement's management-rights clause. But take note: this was a narrow decision that turned on the specific terms of one management-rights clause, not on public policy or the employer's core purpose.

## **OTHER LEGAL CONSIDERATIONS**

In determining whether an employer may mandate flu vaccinations or other preventive policies, the Occupational Safety and Health Administration (OSHA), and the Equal Employment Opportunity Commission (EEOC) continue to heavily rely on the CDC's position.

To be safe you should conduct a risk assessment to justify vaccination demands, especially if you are in healthcare, air travel, hospitality, or food service. OSHA notes that a risk assessment should evaluate the nature of the workplace and employee duties. It's easier to justify a mandatory vaccination in these industries, but an employer must still consider the reasons for an employee's objection, and whether any accommodation is feasible for health or religious objections.

Where necessary, conduct an individualized analysis of employee refusals to take vaccinations due to religious or Americans with Disabilities Act concerns. The EEOCs position is that employers must engage in an individual, interactive process with respect to any employee who objects to a flu shot for religious or health reasons. (See the related article "What's An 'Individualized Analysis' – And Why Should I Care?" elsewhere in this issue).

## **PRACTICAL CONSIDERATIONS**

Employers also face practical challenges as they respond to sick employees and seek to maintain a safe workplace. How should employers respond to the flu outbreak?

- continually remind employees to wash their hands for at least 20 seconds, and provide frequent hand-washing opportunities; healthcare professionals also advise keeping hand sanitizer nearby, and to avoid touching one's eyes, nose, and mouth;
- educate employees about the severity of last year's flu strain, and the potential severity for this year's strain. Inform them of the very few risks associated with vaccinations, and provide the guidance offered by the CDC. In short, strongly encourage employees to receive the vaccine;
- mandate vaccinations if necessary and feasible; as noted above, employees who object to vaccinations should be considered on an individual basis; and
- encourage sick employees to stay home if they are feeling poorly! Employers do not need dutiful, but sick employees infecting the entire workplace.

## USE AVAILABLE RESOURCES

Utilize the full array of private and public resources that offer advice on the flu and how to deal with it, from both a practical and legal perspective. Some of these resources include:

- [www.Flu.gov](http://www.Flu.gov) : Health, safety and employment law guidance
- [www.cdc.gov/h1n1flu/business](http://www.cdc.gov/h1n1flu/business): CDC guidance for businesses
- [www.cdc.gov/flu/other\\_flu.htm](http://www.cdc.gov/flu/other_flu.htm) : CDC listing of other flu websites
- [www.cdc.gov/flu/](http://www.cdc.gov/flu/): CDC seasonal influenza site
- [www.osha.gov/dts/guidance/flu/index.html](http://www.osha.gov/dts/guidance/flu/index.html): OSHA information on workplace safety and the flu
- [www.eeoc.gov/facts/pandemic\\_flu.html](http://www.eeoc.gov/facts/pandemic_flu.html) : EEOC information on pandemic preparedness in the workplace and the ADA

Please keep in mind that during the government shutdown, these resources are either unavailable or are not adding new information.

Flu tracking sites that may be helpful during the government shutdown include:

- <https://flunearyou.org/>
- <http://www.google.org/flutrends/us/#US>

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