



## **EEOC Sues Hospital Over Flu Shot Dispute**

Insights

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In its continuing effort to press employers to accommodate workers under a variety of circumstances, the Equal Employment Opportunity Commission (EEOC) recently sued a Massachusetts hospital over its flu shot policy. The June 2, 2016 lawsuit alleges that Baystate Medical Center violated an employee's rights by requiring her to either get a flu shot or wear a facemask over her nose and mouth while working.

The EEOC does not allege disparate treatment, apparently conceding that all hospital employees are subject to the same policy. Instead, the controversy appears to focus on whether the hospital unlawfully failed to reasonably accommodate the sincerely held religious beliefs of Stephanie Clarke, a human resources employee.

The controversy once again highlights the importance of documenting a thorough, interactive exchange with employees requesting workplace accommodations, whether the requests are based on religion or presented as a plea for accommodation under the Americans with Disabilities Act (ADA). The EEOC's position sounds a warning for all employers that denial of an accommodation request may spark official scrutiny and second-guessing.

### **Employee's Flu Shot Refusal Leads To Termination And Lawsuit**

The lawsuit claims that Baystate permitted employees to refuse annual flu shots, but required those who did to wear a facemask while on duty to prevent spread of the flu. Employees who refused both options were told they would be placed on unpaid leave through the flu season and that their jobs would not be protected during the leave.

Clarke, a Christian, refused the vaccination on the basis of her specific religious beliefs. After subsequently being seen not wearing the mask on a few occasions, the hospital suspended her. Based upon her refusal to comply with Baystate's policy, communications broke down and her continued absence was eventually treated as a resignation. It is not clear from the lawsuit why she was terminated instead of being placed on leave.

Clarke and the EEOC contend that the hospital should have done more to accommodate her, such as considering allowing her to perform her human resources duties from home or to remove her mask when needed to communicate with someone. The lawsuit may also challenge the effectiveness of facemasks in preventing the spread of the flu or other illnesses.

The EEOC asserts that to be meaningful under Title VII, an employer's proposed accommodation must both "respect the employee's religious beliefs and permit her to do her job effectively." The Commission has not yet addressed in detail the hospital's concerns over preventing the spread of the flu.

Although Clarke apparently had no direct patient contact, she had contact with applicants and other employees, at least some of whom were required to be free of the flu when participating in patient care. In other words, the EEOC may be taking a narrow view of the hospital's needs, focusing strictly on the direct patient contact issue.

### **Lessons For Healthcare Employers**

This scenario highlights several important takeaways for employers responding to requests for accommodations. First, it is vital for supervisors to escalate such requests to human resources as opposed to dismissing them out of hand, whatever the supervisor may personally think about the merits of the request. This does not appear to have been a problem in the Baystate case, but it is always a critical step in the process and often becomes an issue in litigation. It is common for a plaintiff to allege that a supervisor was aware of a need for accommodation but did nothing about it.

Second, you must identify the basis for the employee's request. In other words, why does the employee contend that an accommodation is necessary? If the basis of the request has nothing to do with religion or disability, there may be no legal duty to consider the substance of the accommodation request. This does not mean that you should do nothing in response to the employee's request, but it does mean that your legal exposure could be greatly reduced.

Third, if the employee's request implicates Title VII (through a request for a religious accommodation) or the ADA, you must thoroughly define and evaluate what the employee is requesting and why. Specifically, ask yourself how the proposed accommodation would affect both your organization and the employee.

While you may not be required to grant the employee's specific requests, you must communicate interactively to evaluate the details and anticipated effects of the request. You must then consider what, if any, accommodations (including but not limited to those requested by the employee) would enable the employee to perform the essential functions of the job. Finally, you must determine whether any alternatives may accomplish the same goal and whether the possible accommodations are reasonable.

Ultimately, you must be able to articulate the rationale for your conclusion. This process must be documented to demonstrate your good faith in attempting to identify and, if reasonable, implement accommodations.

### **The Accommodation Challenge**

Although the standards for what constitutes a reasonable accommodation or an undue hardship are somewhat different under Title VII (religion) and the ADA (a purported disability), your challenge is

somewhat different under Title VII (religion) and the ADA (a purported disability), your challenge is similar under either scenario. You must be prepared to demonstrate that you participated in an interactive exchange with the employee and that you seriously considered the employee's request.

You must also be prepared to support with facts the reasons for your conclusions, recognizing that the EEOC and plaintiffs' lawyers are increasingly prepared to second guess your judgment. This is especially true when exploring, with the benefit of hindsight, whether you considered alternatives. Some might contend that you were not serious about identifying and offering reasonable alternatives.

Therefore, you would be well served by implementing resources and flexible checklists to help you fulfill your legal duties and to prove that you did so, especially as this year's flu season takes hold in a few short months.

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