

SHOULD THE SEVERE START TO FLU SEASON LEAD YOUR WORKPLACE TO REQUIRE FLU SHOTS? 2 MAIN CONSIDERATIONS FOR EMPLOYERS

Insights
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The Centers for Disease Control and Prevention recently reported the start of the most severe flu season in over a decade, leading employers of all types to decide whether they should mandate flu shots for their workforce. The flu season typically runs between October and May with a peak in January and February, but surprisingly high numbers of infection, hospitalizations, and flu-related deaths sprouting in late August has raised the attention of employers. And despite the threat and the CDC's strong encouragement to inoculate against influenza for the past few months, the number of flu shots administered across the country is lagging at this stage in the season. Even outside the healthcare industry – where required annual flu shots are standard practice – some employers who are already facing staffing shortages may therefore be tempted to mandate the flu shot to avoid outbreaks and maintain necessary staffing levels. What are the two main legal and practical considerations you should take into account before making this determination?

Setting the Stage: Law is Nuanced

In a “post-pandemic” workplace where precautionary measures have become familiar, controversial mandatory inoculations continue to represent a double-edged sword in employers' efforts to maximize workplace safety. In fact, the analytical framework for flu shots initially guided the discussion on whether private sector employer could require employees to receive the fast-tracked COVID-19 vaccinations.

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Federal law allows most private employers to mandate flu shots. The Occupational Safety and Health Administration (OSHA), for example, allows mandates. After the 2009 Influenza A (H1N1) Pandemic caused concerns of a heightened seasonal flu outbreak, the agency released guidance enabling employers to require flu shots. However, "employees need to be properly informed of the benefits of the vaccinations."

Meanwhile, the U.S. Equal Employment Opportunity Commission (EEOC) commentary reveals a strong directive to *encourage* rather than *require* them. These two approaches set the stage for your workplace decision.

1. Evaluate and Handle Accommodation Requests on an Individualized Basis

The EEOC and courts have repeatedly emphasized that some employees may be legally entitled to accommodations for medical conditions or sincerely held religious beliefs preventing their inoculation. Failure-to-accommodate legal claims are currently numerous, requiring employers to navigate these challenging legal obstacles. The same is true of mandatory flu shots.

In dealing with medical or religious-based accommodation requests from masking, the same analysis applies. You must evaluate all requests individually to determine whether the proposed accommodation would enable the employee to perform all the essential functions of their job without creating an undue risk of harm or imposing an undue hardship on your workplace.

Take note, however, that varying state laws may affect the legal analysis. Although several states have limited (or even prohibited) mandatory COVID-19 vaccinations, state laws restricting mandatory flu shots are far less common.

2. Even Though Mandatory Flu Shots are *Legal*, They May Not be *Right* For Your Workplace

As employers continue to bounce back from the havoc of the pandemic, the biggest challenge for many has been finding and retaining qualified workers. This challenge continues. However, experience has shown that a segment of most workforces, varying by industry and location, will oppose any sort of mandatory vaccination. Any employer considering mandates must gauge the potential risk of



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losing (or disrupting) employees weighed against the benefits of requiring flu vaccinations, especially where flu shots were not previously required.

This issue must be assessed based on each employer's circumstances and workforce. Even though flu shots have a longer proven track record than COVID-19 vaccines, mandates are almost certain to generate some level of pushback. If you want to avoid such pushback and feel you can get by without a flu shot mandate, consider other alternatives.

- Many employers now have experience in virus outbreaks, and thus have refined their approach in responding to objections and requests for accommodations. You are now well-versed in alternative safety measures to prevent viruses from spreading, and you may want to use this knowledge to good effect when combating the flu this season. You might consider re-introducing measures such as masking, social distancing, and providing antibacterial lotions to the workplace.
- Further, consider a temporary return to the virtual workplace. After all, employers and employees alike are now adept at the work-from-home or hybrid models.
- Our recent experience has also proved that education and incentives to be effective tools in encouraging workers to inoculate.

Conclusion

Nonetheless, there is no one-size-fits-all solution to employee hesitancy. In short, these scenarios can be complicated and will demand individualized attention. Therefore, before implementing flu shot mandates, consider all these variables in light of the risks you wish to mitigate as well as the composition and experiences of your individual workplace.

Fisher Phillips will continue to monitor the developing flu season and provide updates as appropriate for employers wishing to implement similar COVID-19 safety policies for this flu season. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, the authors of this Insight, or any member of our [Workplace Safety Practice Group](#).

The authors would like to thank Law Clerk [Kate Mize](#) for co-authoring this Insight.