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Can an Employer's Mandatory Flu Vaccine Policy Violate an Employee's Rights?

By Jeffrey Campolongo All Articles

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Jeffrey Campolongo

From all accounts, this has been a particularly troublesome flu season. The debate lingers on whether to have the flu shot; not have the flu shot, and so it goes. For those of us who do not work in the health care profession, the decision on whether or not to get vaccinated for the flu rarely impacts our job security. Such was allegedly not the case for 61-year-old Ethel Hoover, who was a nurse at Indiana University (IU) Health Goshen Hospital for 22 years, until she was recently fired for refusing a flu shot. (See "Eight Hospital Employees Fired for Refusing Flu Vaccines" by Sydney Lupkin, ABC News, January 3; "Goshen Hospital Employees Fired After Refusing Mandatory Flu Shot" by Ryan Grenoble, *The Huffington Post*, January 7.)

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According to a hospital press release, the Influenza Patient Safety Program began in 2011 and has become "a condition of employment with IU Health" starting with the 2012-13 flu season.

Applications for an exemption from the requirement were permitted, as well as the right to an appeal. The press release states that a total of about 175 employees are expected to be terminated for noncompliance with the vaccination mandate. According to the ABC News article, Hoover filed two medical exemptions, which were denied, and unsuccessfully appealed both decisions.

The right to apply for an exemption is a tool that assists the hospital in complying with Title VII of the

Civil Rights Act, which makes it unlawful to discriminate against employees on the basis of their religion. "Religion" under Title VII is defined to include "all aspects of religious observance and practice, as well as belief." An employer may avoid permitting religious exemptions if the employer "demonstrates that he is unable to reasonably accommodate to an employee's ... religious observance or practice without undue hardship on the conduct of the employer's business."

Thus, if the flu vaccine is against the tenets of an employee's religion, or against an employee's personal firmly held religious beliefs, the employee may be exempt from a required vaccine unless it would cause the employer undue hardship. Of course, even beyond the issue of Title VII protections for religious beliefs is the fact that a flu vaccine in this case was made a prerequisite to continued employment. For the IU Hospital, the purported, and obviously justified concern was for patient safety.

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According to news reports, documentation of Hoover's requested exemptions filed with the hospital do not appear to have been made public, therefore the basis of the "religious belief" put forth in support of her requested exemption is unknown. From her statements reported by the press, it is unclear whether she has personal objections to the veracity of the vaccine or is against vaccines as a part of her religious beliefs. *The Huffington Post* reports that Hoover, a Mennonite, rested her objections based upon God's creation of the body. "God gave us a body. ... He gave us, He made our body uniquely that we can — if we live a healthful life — that our chances of being able to fight it off with our own immune system is very likely."

In a statement to *The Huffington Post*, hospital spokeswoman Melanie McDonald defended the hospital's terminations, explaining that, "if it were religious beliefs as defined by the EEOC, they would not have been terminated." She went on to state, "Sometimes there can be a little bit of gray area, and people who have very personally held religious beliefs will present those as religious opportunities for exemption." The hospital's press release also defends the decision, stating that its "top priority is the health and well-being of our patients." In fact, the IU Hospital also "mandates other vaccines, tests and proof of immunity such as MMR, DPT and TB skin testing," according to the hospital press release.

The public statements from the hospital's spokesperson are somewhat curious, in light of the existing EEOC publications addressing vaccinations in the workplace for health care workers. For example, on March 5, 2012, the EEOC issued an informal discussion letter from its legal counsel, Peggy Mastroianni, wherein the commission cautioned that mandatory flu vaccine programs, like the one at IU Hospital, create complicated legal issues that must comply with Title VII as well as the Americans with Disabilities Act. (A copy of the EEOC's informal letter can be found online at: <http://goo.gl/AcwBd>.)

Interestingly, the EEOC has already addressed matters related to pandemic influenza and vaccinations in its technical assistance document titled "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act (2009)" (http://www.eeoc.gov/facts/pandemic_flu.html). One of the questions posed (and answered) in the informal letter and technical assistance manual is:

"13. 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?"

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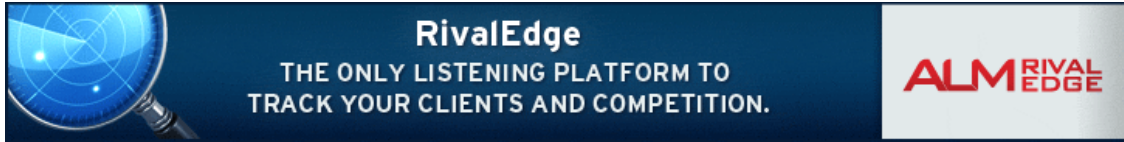
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Can an Employer's Mandatory Flu Vaccine Policy Violate an Employee's Rights?

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"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).

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vaccine rather than requiring them to take it.

The EEOC letter also reminds employers that the commission itself and courts alike have "consistently found that Title VII defines religion very broadly to include not only traditional, organized religions ... but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonably to others." The letter confirms that employers are entitled to scrutinize a health care worker's beliefs to determine if the employee has a sincerely held religious belief that would entitle the employee to an exemption from a mandatory flu vaccine program. The letter states "because the definition of religion is broad and protects beliefs and practices with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely-held religious belief ... [unless] an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief or practice."

When you contrast the scope of the scrutiny that the EEOC permits with respect to "sincerely held religious beliefs" with the explanation given by the IU Hospital spokesperson (that "people who have very personally held religious beliefs will present those as religious opportunities for exemption"), it would seem the hospital's very own explanation violates Title VII. According to the EEOC, it does not matter whether the "religious beliefs" are "personally held" or not. Most religious beliefs are "personally held" anyway. What matters is whether they are "sincerely held." In this context, and in light of the purported Mennonite faith of Hoover, one could reasonably conclude that the hospital is going to have an expensive legal battle on its hands. Issues that pit employee rights versus public safety are not unusual in employment law (cf. the colloquial term "going postal"). The importance of having a plan that complies with all facets of the law is once again underscored by this situation in Indiana. Let's hope it does not spread like the flu across state lines to Pennsylvania. •

Jeffrey Campolongo concentrates his practice in the areas of employment discrimination, specializing in the Americans with Disabilities Act, the Family and Medical Leave Act and Title VII of the Civil Rights Act of 1964.



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