
**December 2016**

# Five Key Issues Impacting Health Care Employers

Employers in the health care industry are likely to face significant changes under President-elect Donald J. Trump's administration and should expect a healthy dose of uncertainty for the next few months. During his campaign, the President-elect promised to repeal the Affordable Care Act ("ACA") but has hedged on that promise since the election. As we discuss in this edition of *Take 5,* there are areas in which health care employers should focus now.

**For the latest employment, labor, and workforce management news and insights concerning the health care and life sciences industry, please visit and subscribe to Epstein Becker Green's *Health Employment And Labor* law blog.**

The final regulations implementing the nondiscrimination provisions of the ACA (Section 1557) have gone into effect. First, we examine how companies may determine whether they are "Covered Entities" under Section 1557. Second, we explain what employers sponsoring group health plans need to know about Section 1557, even if they aren't Covered Entities.

We then address concerns relating to unions and their aggressive pursuit of health care entities. We expect that trend to continue. Therefore, our third article addresses informational picketing and intermittent strikes. In addition, our fourth article discusses scrutiny by the National Labor Relations Board ("NLRB" or "Board") of no-recording and social media policies—a topic that is relevant to both union and non-union employers.

Finally, we examine multiple lawsuits filed by the U.S. Equal Employment Opportunity Commission ("EEOC") in 2016 alleging that hospitals requiring influenza vaccinations failed to accommodate their employees' religious beliefs. Employers should consider these cases when responding to religious objections by their staff.

The articles in this month's *Take Five* include:

1. **What Does It Mean to Be a Recipient of Federal Financial Assistance for Purposes of Section 1557 Compliance?**
2. **What Employers That Sponsor Group Health Plans (but Are Not Covered Entities) Need to Know About the ACA Nondiscrimination Rules**

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## 1. What Does It Mean to Be a Recipient of Federal Financial Assistance for Purposes of Section 1557 Compliance?

**By Nathaniel M. Glasser; Frank C. Morris, Jr.; Helaine I. Fingold; and Lesley R. Yeung**

In May 2016, the U.S. Department of Health and Human Services ("HHS") published a final rule implementing Section 1557 of the ACA. Section 1557 prohibits discrimination in the health programs and activities of "Covered Entities" on the basis of race, color, national origin, sex, age, or disability. Section 1557 also imposes detailed and specific notice and disclosure requirements on Covered Entities, including, among other things, the requirement to provide information about the use of auxiliary aids and services, the adoption of grievance procedures, and access for individuals with limited English proficiency. Covered Entities are also required to include specific nondiscrimination protections in the design of group health plans.

A "Covered Entity" is one that receives "federal financial assistance" for a health program or activity from HHS. If any part of a health program or activity receives federal financial assistance from HHS, then all of that entity's programs and activities are subject to the nondiscrimination provisions of the final rule.

While the nondiscrimination provisions of the final rule went into effect on July 18, 2016, and "Covered Entities" subject to the final rule were required to comply with the notification and grievance procedures by October 16, 2016, entities are still struggling to determine if they qualify as "Covered Entities" subject to the final rule.

**Is it only federal financial assistance from HHS that matters for this determination?**

In general, Section 1557 of the ACA applies to all health programs and activities, any part of which receives federal financial assistance from any federal agency. However, the requirements in the final rule specifically apply only to recipients of federal financial assistance ***from HHS***.

**What does federal financial assistance include?**

"Federal financial assistance" includes Medicare Parts A, C, and D and Medicaid payments, grants, loans, subsidies, contracts of insurance, and other types of assistance. Such assistance also includes premium tax credits and advance payments of premium tax credits and cost-sharing reductions for health insurance coverage purchased through the federal and state Health Insurance Marketplaces.

Importantly, HHS does ***not*** consider ***Medicare Part B payments*** to be federal financial assistance.

**What are some examples of "Covered Entities"?**

HHS defines "Covered Entities" that are subject to the final rule to include:

- every health program or activity that receives HHS funding;
- every health program or activity administered by HHS, such as the Medicare Part D program; and
- the Health Insurance Marketplaces and all plans offered by issuers that participate in those marketplaces.

"Covered Entities" may include entities that receive federal financial assistance through their participation in Medicare or Medicaid (e.g., hospitals, nursing facilities, and home health agencies) or through grants or subsidies from HHS agencies (e.g., health clinics, community health centers, and health-related schools), state Medicaid agencies, state public health agencies, health insurance issuers that participate in the Health Insurance Marketplaces, Medicare Advantage plans and Prescription Drug Plan sponsors, and physician practices receiving Medicaid payments or other payments from HHS (e.g., meaningful use incentive payments).

**What about entities that do not receive funding *directly* from HHS?**

A wide array of entities that provide health-related services do not receive funding directly from HHS but do receive payment for their services through other HHS-funded organizations. The "Covered Entity" status for these entities is more complex and must be examined closely.

By definition, a "recipient of federal financial assistance" is an entity to which such funding is extended ***directly or through another recipient***. However, it is important to look to the ***entity that Congress intended to assist*** or subsidize with certain funds when determining whether a downstream entity is a recipient of federal financial assistance.

Nonetheless, whether a downstream entity is covered under the final rule remains far from clear, as HHS offers only limited guidance. HHS makes some distinctions in the final rule. For example, an issuer participating in a Health Insurance Marketplace receives federal financial assistance, but a health care provider that contracts with such an issuer does not become a recipient of federal financial assistance by virtue of that contract. Similarly, physicians who contract to provide health services to hospitals or clinics that receive federal financial assistance do not become recipients of federal financial assistance by virtue of those contracts. However, HHS has confirmed that providers that receive ***reimbursement from a Medicare Advantage plan*** are subject to the final rule, regardless of whether payments from the plan go directly to the provider or to the patient.

An entity acting as a third-party administrator for an employer's employee health benefit plan may not be a "Covered Entity" if the entity is legally separate from an issuer that receives federal financial assistance for its insurance plans. Nonetheless, if an issuer that receives federal financial assistance also provides third-party administrator services, the final rule would apply to those third-party administrator services.

As a general rule of thumb, downstream entities contracting with a recipient of federal financial assistance may not qualify as a "Covered Entity" by virtue of the contract alone. Entities unsure

of their status should consider whether they are the intended recipient of the federal financial assistance when making this determination. Entities also should be aware that a "Covered Entity" may include provisions regarding compliance with Section 1557's nondiscrimination requirements in its contracts with downstream entities. Finally, HHS has reserved the right to engage in a case-by-case inquiry to evaluate whether an entity is appropriately subject to Section 1557. A highly fact-specific inquiry should be undertaken to determine if an entity that does not directly receive funding from HHS might still be a "Covered Entity" in the eyes of HHS.

**Takeaways**

Entities operating a health program or activity should determine the source of funding for any such program or activity. Those programs or activities receiving federal financial assistance are subject to the nondiscrimination requirements of Section 1557, which include providing a notice of nondiscrimination to the public, implementing a grievance procedure, designating a civil rights coordinator, and providing language assistance to limited English proficiency speakers and appropriate accommodations to individuals with disabilities.

Employers sponsoring group health plans should read the following article by our colleagues to determine the extent to which the Section 1557 nondiscrimination rules apply to them.

## 2. What Employers That Sponsor Group Health Plans (but Are Not Covered Entities) Need to Know About the ACA Nondiscrimination Rules

**By Gretchen Harders and Cassandra Labbees**

While Section 1557 imposes significant nondiscrimination requirements on "Covered Entities" (as discussed in the article above), most employers are not "Covered Entities" as defined under the final rule ("non-covered employers"). The impact of Section 1557 on non-covered employers depends on whether their respective group health plans are insured or self-insured and the level of involvement in the plans by insurance issuers that are "Covered Entities" under the final rule.

**Non-Covered Employers with Fully Insured Group Health Plans**

Nearly all health insurance issuers are Covered Entities under Section 1557 because they offer individual policies on a federal or state Health Insurance Marketplace or otherwise receive federal funds. Non-covered employers that sponsor fully insured group health plans will be subject to Section 1557 through the underlying insurance policy (provided that the insurer offering the policy participates in an exchange or otherwise receives federal financial assistance).

As a Covered Entity, a health insurance issuer must provide special notices to plan participants, make available appropriate translations and auxiliary aids and services, and ensure that the covered benefits offered under the insurance policy are nondiscriminatory. Plan sponsors of fully insured group health plans should expect to see changes to enrollment documents, plan participant communications, and other notices from the health insurance issuer.

One of the most significant changes being made by insurance issuers to comply with Section 1557 is the elimination of any exclusion for benefit coverage of transgender health services under the insurance policy. The final rule makes clear that sex discrimination includes discrimination based on an individual's sex, including gender identity (as well as pregnancy, childbirth, and related medical conditions, and sex stereotyping). Specifically, Covered Entities

may not deny or limit coverage for health services that are ordinarily or exclusively available to persons of one gender because the person's sex assigned at birth, gender identity, or recorded gender is different than the one to which the services are ordinarily or exclusively available. The final rule concludes that broad coverage exclusions or limitations related to gender transition are per se discriminatory and therefore unlawful. For example, many group health plans currently have explicit exclusions of coverage for all care related to gender dysphoria or gender transition, with all treatment related to transition categorized as cosmetic or experimental. Such explicit coverage exclusions under a fully insured group health plan generally are now prohibited.

**Non-Covered Employers with Self-Insured Group Health Plans**

If a health insurance issuer acts as a third-party administrator for a non-covered employer's self-insured group health plan, the issuer is directly subject to Section 1557 and must administer the plan in compliance with the nondiscrimination rules. This means that if the third-party administrator is providing claims services, it must comply with the nondiscrimination rules in making any claims determinations. The non-covered employer, however, is not required to comply. Therefore, any plan coverage design decisions made by the non-covered employer in its capacity as plan sponsor are not subject to the Section 1557 nondiscrimination protections.

Nevertheless, the Section 1557 final rule clarifies that even though HHS lacks jurisdiction over a non-covered employer, HHS has the power to refer any complaint of discrimination to the EEOC and that it intends to do so. Few courts have held that discrimination based on gender identity constitutes a form of sex-based discrimination. However, the EEOC has taken the position that sex discrimination includes discrimination on the basis of gender identity and has already begun investigating allegations of gender identity discrimination in a health program or activity. From a risk perspective, a non-covered employer with a self-insured group health plan may wish to review the plan's benefit design and determine if any changes should be made. If there is an explicit exclusion for coverage of transgender health care, a non-covered employer may choose to remove the exclusion from the plan to minimize the possibility of an EEOC investigation as it relates to the employer's group health plan.

**Employment Discrimination**

Finally, non-covered employers should be reminded of other nondiscrimination rules that might apply to them. For example, Section 1557 borrows from various antidiscrimination laws that apply to the employer directly, such as the requirement to provide auxiliary aids and services under the Americans with Disabilities Act. Although non-covered employers may not be required to comply with Section 1557, they are still required to abide by the various antidiscrimination laws and an employment discrimination complaint could arise through a referral to the EEOC in relation to an employer's group health plan.

**Takeaways**

Although only Covered Entities are required to comply with the Section 1557 final rule, non-covered employers should be aware of the breadth of the final rule and how it affects them. Clearly, in developing the final rule, HHS intended for the nondiscrimination protections to apply to the greatest number of plan participants possible. To manage risk, non-covered employers may wish to review the design and operation of their group health plans to ensure that the plans do not discriminate against individuals, specifically with regards to transgender benefits, and to be aware that group health plan design and administration may be the basis of an employment discrimination complaint or EEOC investigation.

## 3. NLRB Moves to Strengthen Unions' Hand in Bargaining with Informational Picketing and Intermittent Short-Term Strikes

**By Michael F. McGahan**

In recent years, unions representing employees in health care facilities have engaged in activities during contract negotiations to pressure employers into settling, while limiting the cost of engaging in strike activity in the form of lost wages to union employees. The two most common forms of such activity used by unions are informational picketing, and short, sometimes intermittent, strikes, usually lasting only a day or two.

### Informational Picketing

Informational picketing is yet another issue on which the NLRB has recently overturned precedent, in this case favoring union rights over patient rights and health care institutions' property rights.

Typically, informational picketing is done by employees on their own time, either before or after their scheduled shifts and/or during their break times, or by non-employees. Thus, the picketing does not involve an actual work stoppage. Nonetheless, it can be disruptive of health care operations, involving noise, distraction, and perhaps physical interference with movement in and out of the affected institution. The NLRB's long-standing rule on informational picketing balanced the employees' right to picket against the needs of patient care and held that a hospital may lawfully prohibit on-premises picketing by both employees and non-employees. Thus, the noise and distraction of the picketing would usually be held at locations far removed from areas where patients, their families, and on-duty caregivers were located, such as public sidewalks at the entrances to driveways or parking lots.

This past August, the NLRB, in its decision in *Capital Medical Center and UFCW Local 21*, 364 NLRB No. 69 (August 12, 2016), overturned its long-standing rule and held that hospitals now have the burden of showing that a rule prohibiting on-premises picketing in non-patient care areas is necessary to avoid disruption of health care operations or disturbance of patients. The NLRB noted that such a rule would be examined on a case-by-case basis, and the Board clearly indicated that the measurement of disruption would take into account the actual conduct of the pickets. This ruling will make it extremely difficult for an employer to determine in advance whether a ban on on-site picketing would violate the National Labor Relations Act ("NLRA").

The activity in *Capital Medical Center* involved two employees standing outside the main lobby entrance holding picket signs. They were not patrolling or chanting. The NLRB found that such on-premises picketing did not lose the protection of the NLRA. The Board's ruling makes clear that the facts of this case are not the outer limit of what behavior would stay within the protection of the NLRA. For example, there is no clear explanation of an employer's right to restrict informational picketing, particularly as to exterior locations, such as building entrances or parking lots. Employers should note that this decision does not apply to non-employee pickets nor does it apply to picketing by striking workers.

### Takeaways (Informational Picketing)

Health care employers facing potential informational picketing should, well in advance, identify the areas both inside and outside the institution that are sufficiently close to patient care areas that any form of picketing, even if peaceful, would disturb patients or disrupt patient care, and

amend rules accordingly. A record of the facts supporting such a rule should be made at that time. In addition, if, during the course of informational picketing, the conduct of the pickets becomes disturbing to patients or disrupts patient care, health care employers should collect evidence supporting that conclusion and take steps to stop the disruptive behavior.

Capital Medical Center has petitioned the U.S. Court of Appeals for review of the Board's decision and the Board cross-petitioned for review, so watch for future developments on this issue.

**Short-Term Strikes**

Unions representing health care employees have frequently used one- or two-day strikes against hospitals and other health care institutions as a way to force the target institution to give in to unions' bargaining demands or spend millions of dollars in replacement workers and other preparations to ensure proper care for their sick patients, while the strikes have minimal impact on the wages of the nurses or other health care workers who only lose a day or two of pay.

These strikes typically involve serving a notice under Section 8(g) of the NLRA that tells the institution that the employees will be on strike for a single 24-hour period and includes the employees' unconditional offer to return to work at the end of that period. This forces the institution to scramble to find qualified temporary replacement workers, vet them, train them, and orient them. In order to do so, the institution typically needs to contract with the replacement workers for at least five days and at significant expense. Once the strike is over, often nothing has been resolved and the parties return to the table only for the union to threaten to engage in another short-term strike.

According to current case law under the NLRA, work slowdowns, partial strikes, and intermittent strikes are not permitted; therefore, employees who engage in them are not protected and may potentially be disciplined or discharged. The reason for this long-standing policy is clear—while employees should be free to withhold their labor as economic leverage, they should not be able to do so without any risk or sacrifice. For that reason, "quasi-strikes" (strikes that are "intentionally planned and coordinated so as to effectively reap the benefit of a continuous strike action without assuming the economic risks associated with a continuous forthright strike, i.e., loss of wages and possible replacement") have not been entitled to protection under the NLRA.[1] Therefore, unions have been hesitant to call more than one or two of these short strikes during any single labor dispute/negotiation because of the potential that the third or fourth short strike would be considered intermittent and unprotected under the NLRA.

In October 2016, the General Counsel ("GC") of the NLRB issued an Operations-Management Memorandum to Regional Directors and others acknowledging that unions and employees "are more frequently engaging in short-term strikes" and seeking to "clarify and modify the law regarding intermittent and partial strikes" to address concerns that employees face "potential discipline for activities that should be considered protected under Section 7 of the [NLRA]."

The GC Memorandum instructs the NLRB's Regions to take action to again put their thumb on the scales in favor of unions. Specifically, the GC Memorandum instructs Regions litigating this

[1] *WestPac Electric,* 321 NLRB 1322, 1360 (1996).

issue to utilize an Intermittent Strike Brief Insert that advocates for a loosening of the standard to sanction any intermittent or short-term strikes that:

(1) "involve a complete cessation of work" (as opposed to a slowdown or partial work stoppage);

(2) "are not designed to impose permanent conditions of work [i.e., weekend only strikes, refusal to work overtime, etc.], but rather are designed to exert economic pressure; and

(3) the employer is made aware of the employees' purpose in striking."

If this position is accepted by the NLRB and the courts, unions would be free to conduct as many short, intermittent strikes as they desired so long as they called for a complete walkout and they informed the employer what end they were seeking to achieve by striking. Such a ruling would result in the increased use of such tactics.

**Takeaways (Short-Term Strikes)**

At this point, no decision has been reported based on the GC's argument. Nevertheless, health care employers should be aware of the NLRB's position and watch for further developments. Unions representing health care workers are aware of the GC's published instructions to the Regional Directors and likely will be looking to test this theory. Employers should prepare accordingly. While contingency planning is definitely a must, employers may also be able to take advantage of certain bargaining strategies designed to mitigate the impact of these union tactics. Employers should consult with experienced labor counsel to ensure that they are prepared.

## 4. Protecting Patient Privacy in Light of the NLRB's Scrutiny of No-Recording and Social Media Policies

**By Denise Merna Dadika**

The increased use of portable electronic devices in the workplace and the popularity of social media pose unique challenges for health care employers, particularly when the requirements of the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") conflict with the NLRB's position on policies that could infringe upon an employee's right to engage in concerted activity under the NLRA.

HIPAA governs the use and disclosure of protected health information ("PHI") by health care providers. HIPAA violations may occur when health care employees post images of patients or patients' records or vitals on social media. Oftentimes, the disclosure is inadvertent. For example, sharing a photo of co-workers in the workplace without realizing that a patient's file was captured in the photo could result in the unauthorized disclosure of PHI. HIPAA violations may also occur when an employee shares a positive patient experience on social media, with or without an image, as a nursing student recently did to support a three year old who was fighting cancer.

The NLRA applies to all employers, both union and non-union. Section 7 of the NLRA protects "concerted activity," which includes an employee's ability to form, join, or assist a union; choose representatives to bargain with the company on their behalf; and act together with other

employees for mutual benefit and protection. In some circumstances, recording activities in the workplace may be protected, concerted activity.

Recently, the NLRB in *Whole Foods Market, Inc.*, 363 NLRB No. 87 (Dec. 24, 2015), held that the company's no-recording policy unlawfully restrained employees' Section 7 rights. In doing so, the NLRB held that "[p]hotography and audio or video recording in the workplace, as well as the posting of photographs and recordings on social media, are protected by Section 7 if employees are acting in concert for their mutual aid and protection and no overriding employer interest is present." Thus, an employer may not lawfully adopt a work rule prohibiting employees from workplace recording if the employees are acting in concert for mutual aid and protection and the employer cannot demonstrate an overriding business interest. The Board specifically stated that the employer may not prohibit employees from recording the following: protected picketing, unsafe equipment or workplace conditions, discussions with others about terms and conditions of employment, the inconsistent application of employer rules, and recordings that preserve evidence for later use in administrative or judicial forums in employment-related actions.

The Board, however, acknowledged that employers may be able to establish an overriding business interest to justify restrictions on workplace recordings. The NLRB explained, "[W]e do not hold that an employer is prohibited from maintaining any rules regarding recording in the workplace. We hold only that those rules must be narrowly drawn, so that employees will reasonably understand that Section 7 activity is not being restricted."

Health care employers should be able to demonstrate such an overriding business interest to support policies restricting workplace recordings and social media use given their obligations to protect patient privacy and comply with HIPAA.

In fact, the NLRB previously upheld a recording restriction implemented to protect patient privacy in *Flagstaff Medical Center*, 357 NLRB No. 65 (Aug., 26, 2011), a decision which was upheld by the U.S. Court of Appeals for the District of Columbia. In that case, the NLRB ruled that a hospital's policy prohibiting the recording of images of patients, hospital equipment, property, or facilities was lawful because "the privacy interests of hospital patients are weighty," and the hospital had a "significant interest in preventing the wrongful disclosure of individually identifiable health information." The Board in *Whole Foods* acknowledged the *Flagstaff* ruling and distinguished its rule from the one in *Whole Foods,* noting that the business interests at issue in *Flagstaff* were more pervasive and compelling. Thus, the implementation of narrowly tailored no-recording policies in the health care setting should pass the NLRB's scrutiny.

The Board should find that health care employers' interest in protecting patient privacy and complying with federal law justifies appropriately tailored restrictions on workplace recordings. Therefore, to prevent the disclosure of PHI and to protect patient privacy, health care employers should implement policies restricting employees from recording and sharing patients' images, conversations, or information on social media. Such policies should restrict employees from recording (video, still images, or audio) in patient rooms or settings, and sharing patient images or information on social media. Restricting recordings in non-patient settings (e.g., break rooms, cafeterias, and administrative offices) should be limited to those that will not infringe upon employees' Section 7 rights.

**Takeaways**

- Review and revise no-recording and social media policies to ensure that they are narrowly tailored to protect patient privacy and the disclosure of PHI. Be sure that the policies clearly explain that any restrictions on workplace recordings are due to patient privacy and HIPAA obligations and are not intended to infringe upon employees' Section 7 rights.

- Consider revising existing policies on HIPAA compliance to address the use and restrictions of social media.

- Regularly train employees on recording and social media policies and on HIPAA compliance to ensure that every employee has a working knowledge of the foundational privacy and security regulations issued under HIPAA, and understands how such privacy can be compromised by workplace recording and social media use.

- Consult with counsel before disciplining an employee for making a workplace recording or posting patient information on social media.

## 5. Will Requiring Flu Vaccinations Leave *Employers* Feeling Under the Weather?

**By Nathaniel M. Glasser and Gregg Settembrino**

With flu season quickly approaching, health care employers may be considering mandatory influenza vaccinations for their workforce. Mandatory vaccination policies may dramatically increase patient safety, but they may also cause friction within the workforce when employees object on religious grounds to being vaccinated.

While no federal and few state statutes address the legality of enforcing mandatory vaccination policies, the EEOC and private litigants recently have moved this issue forward in the courts. Under Title VII of the Civil Rights Act of 1964 ("Title VII"), employees with sincerely held religious beliefs are entitled to a reasonable accommodation of those beliefs, provided that such accommodation does not create an undue hardship for their employer. This year, the EEOC has filed at least three separate lawsuits against hospitals in Pennsylvania, Massachusetts, and North Carolina alleging failure to accommodate religious beliefs in relation to such hospitals' respective mandatory influenza vaccination policies.[2]

These lawsuits follow shortly on the heels of a decision in the District Court of Massachusetts, granting summary judgment in favor of a hospital employer that terminated an employee who refused a mandatory flu vaccination because of her religious beliefs. In *Robinson v. Children's Hospital Boston*, Civ. No. 14-10263 (D. Mass. Apr. 5, 2016), the defendant hospital implemented a policy requiring all persons who worked in or accessed patient care areas to be vaccinated against the flu to ensure the safest possible environment and highest possible care for its patients.

The plaintiff, one of the first hospital employees to interact with patients as they entered the emergency room, refused the flu vaccination for religious reasons and was permitted by the hospital to explore whether there was another internal position outside of patient care that would

[2] *EEOC v. St. Vincent Health Ctr.*, No. 16-224 (W.D. Pa. Sept. 22, 2016); *EEOC v. Baystate Med. Ctr., Inc.*, No. 3:16-cv-30086 (D. Mass. June 6, 2016); *EEOC v. Mission Hosp., Inc.*, No. 1:16-CV-00118 (W.D.N.C. Apr. 28, 2016).

exempt her from the flu vaccine. The court concluded that the hospital's efforts to locate another position for the plaintiff—including allowing her to use earned time off to search for employment elsewhere—and to label her termination a voluntary resignation to preserve her ability to re-apply for other hospital positions in the future, constituted a reasonable accommodation under Title VII.

The court also concluded that granting the plaintiff's request not to be vaccinated would have caused the hospital an undue hardship because it would have increased the risk of transmitting influenza to the hospital's already vulnerable patient population. The admissible evidence led the court to find that (i) health care employees are at a high risk for influenza exposure, which can be fatal to vulnerable patients; (ii) numerous medical organizations support mandatory influenza vaccination for health care workers; and (iii) the medical evidence in the record demonstrated that a vaccination is the single most effective way to prevent the transmission of the flu.

While the hospital's policy in *Robinson* only covered patient-facing employees, health care employers with flu vaccination policies impacting *all employees* should be aware that they will be subject to heightened scrutiny by regulators such as the EEOC. For instance, in *EEOC v. Baystate Medical Inc.*, Civ. No. 3:16-cv-30086 (D. Mass. June 2, 2016), Baystate's policy required employees who refused the flu vaccination to wear a surgical mask at *all times* while working at the hospital's facilities. The employee in question worked in human resources, had no patient contact, and argued that it was not reasonable for her to wear the mask because people complained that they could not understand what she was saying. Following several occasions in which the employee pulled the mask down away from her mouth so that people could understand her, the plaintiff was discharged for violating Baystate's policy. While the facts have yet to be developed, these allegations were sufficient to prompt the EEOC to file suit.

Other courts addressing religious discrimination claims in this context also have indicated the importance of the employee's interaction with patients in determining whether and to what extent a mandatory vaccination policy may be enforced. In *Chenzira v. Cincinnati Children's Hosp. Med. Ctr.*, Civ. No. 1:11-cv-00917 (S.D. Ohio Dec. 27, 2012), the plaintiff-employee alleged that her adherence to veganism prohibited her from receiving a flu shot. On a motion to dismiss, the court allowed a religious discrimination claim to proceed, finding that the plaintiff could subscribe to veganism with a sincerity equating to that of sincerely held religious views. Notably, the court made a point of stating that the decision did not address the safety of patients at the hospital, which was the hospital's presumed justification for terminating the plaintiff. The court signaled that it would consider this justification in light of what, if any, contact the plaintiff had with patients, and/or what sort of risk her refusal to receive a vaccination could pose in the context of her employment. (The case later settled.)

Employers looking for additional guidance as to whether and to what extent they must accommodate an employee's refusal be vaccinated against seasonal influenza also should look to any state or local laws that may impact their ability to mandate flu vaccinations. For instance, a New York statute requires people to be vaccinated if they are affiliated with or employed by a health care facility and who engage in activities that could potentially expose patients to influenza.[3] Those who decline the flu shot during flu season must wear a surgical mask while in areas where patients are normally present. The statute also requires health care facilities to supply such masks to personnel free of charge.

[3] New York State Sanitary Code, 10 N.Y.C.R.R. § 2.59.

**Takeaways**

Particularly given the implications to patient safety, health care employers are well within their rights to implement a mandatory flu vaccination policy. Nonetheless, employers should be prepared to address requests for reasonable accommodation made by employees who decline a vaccination because of sincerely held religious beliefs. In those circumstances, employers should engage in the interactive process, with the following considerations in mind:

- Consider the nature of the employee's position, as you may have more difficulty in enforcing the policy against employees who do not routinely interact with patients. Courts are more likely to require an alternative accommodation for employees in non-patient-facing roles.

- Determine whether the employee can be accommodated by wearing a surgical mask or by temporarily or permanently transferring that employee to another position that does not implicate patient safety.

- Ensure that any refusal to be vaccinated originates from a sincerely held religious belief, but be aware that challenges to a sincerely held belief have been heavily scrutinized by the courts.

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For additional information about the issues discussed above, please contact the Epstein Becker Green attorney who regularly handles your legal matters or any of the authors of this *Take 5:*


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