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Ohio Northern University Law Review

Student Comments

Can Health Care Facilities Require Their Employees to Receive the Influenza Vaccine?

RACHEL K. BADEN

I. INTRODUCTION

“Take this vaccine or you are fired.”¹ This is the decision that some health care employees face as an increasing number of health care facilities are requiring their employees to receive the influenza vaccine.² This new requirement has resulted in a debate over whether health care facilities can require their employees to receive an influenza vaccine, and what protections are available to employees if they refuse to do so.³

This comment will provide guidance to health care facilities regarding the relevant laws and regulations when considering the implementation of a mandatory influenza vaccine requirement for their employees.⁴ This comment will begin by exploring the history and foundational information regarding the influenza virus and influenza vaccine.⁵ Next, it will discuss why health care facilities are implementing mandatory influenza vaccines for employees.⁶ Further, this comment will discuss the various reasons that

1. See, e.g., Lindsey Tanner, *Hospitals Crack Down on Workers Who Refuse Flu Shots*, NBC NEWS (Jan. 13, 2013), <http://www.nbcnews.com/health/hospitals-crack-down-workers-who-refuse-flu-shots-1B7956764?franchiseSlug=healthmain>.

2. See *Mandatory Influenza Vaccination*, JOHNS HOPKINS SAFETY MANUAL 2 (Aug. 16, 2013), http://www.hopkinsmedicine.org/mandatory_flu_vaccination/docs/JHH_JHU_Flu_Policy.pdf.

3. See Christine Nero Coughlin, et al., *When Doctors Become “Patients”*: *Advocating a Patient-Centered Approach for Health Care Workers in the Context of Mandatory Influenza Vaccinations and Informed Consent*, 45 WAKE FOREST L. REV. 1551, 1556-58 (2010).

4. See *infra* Parts III-IV.

5. See *infra* Parts II.A-B.

6. See *infra* Part II.C.

employees refuse to be vaccinated, and the legal protections that are available when they refuse.⁷ This comment will ultimately provide guidance to health care facilities to avoid encountering trouble with the laws and regulations that protect employees when implementing a mandatory influenza vaccine policy.⁸

II. HISTORY

A. Background Information Regarding the Influenza Virus

Every fall and winter, health care facilities around the nation are busy caring for individuals suffering from the influenza virus.⁹ Each year, more than 200,000 people are hospitalized with influenza-related complications.¹⁰ The influenza virus is commonly referred to as the “flu” and will be referred to as such for the remainder of this comment.¹¹ “The flu is a contagious respiratory illness . . . that [affects]infect[s] the nose, throat, and lungs.”¹² Depending on the individual, the flu can have the symptoms of a minor respiratory cold, or, in some cases, can cause life-threatening complications.¹³ “Complications of flu can include bacterial pneumonia, ear infections, sinus infections, and worsening of chronic medical conditions, such as congestive heart failure, asthma, and diabetes.”¹⁴ Even more concerning, approximately ninety percent of flu-related deaths during flu season are in people who are sixty-five and older.¹⁵

The flu is highly contagious and can be transmitted from person to person through large droplets that pass through the air when a person sneezes or coughs.¹⁶ The Centers for Disease Control and Prevention (“CDC”) recommends taking certain steps to prevent the risk of receiving and spreading the flu.¹⁷ The CDC recommends taking everyday precautions

7. *See infra* Part III.

8. *See infra* Part IV.

9. *See The Flu Season*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/flu/about/season/flu-season.htm> (last updated Sept. 30, 2013); *see also Prevention Strategies for Seasonal Influenza in Healthcare Settings*, CTRS. FOR DISEASE CONTROL & PREVENTION, [http://www.cdc.gov/flu/professionals/infectioncontrol/healthcare settings.htm](http://www.cdc.gov/flu/professionals/infectioncontrol/healthcare%20settings.htm) (last updated Jan. 9, 2013).

10. *Prevention Strategies for Seasonal Influenza in Healthcare Settings*, *supra* note 9.

11. *Key Facts about Influenza (Flu) & Flu Vaccine*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/flu/keyfacts.htm> (last updated Sept. 26, 2013).

12. *Id.*

13. *See id.*

14. *Id.*

15. *What You Should Know and Do this Flu Season if You Are 65 Years and Older*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/flu/about/disease/65over.htm> (last updated Aug. 22, 2013).

16. *Prevention Strategies for Seasonal Influenza in Healthcare Settings*, *supra* note 9.

17. *CDC Says “Take 3” Actions to Fight the Flu*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/flu/protect/preventing.htm> (last updated Feb. 12, 2013).

such as avoiding persons who are ill, covering one's nose and mouth when coughing and sneezing, and practicing good hand hygiene.¹⁸ However, more important than everyday precautions, the CDC recommends that everyone receive the yearly flu vaccine.¹⁹

B. Background Information Regarding the Influenza Vaccine

The CDC and other researchers have proven that the best way to reduce the chances of infection is to receive a flu vaccine.²⁰ The flu vaccine causes antibodies to build up in the body to protect against infections associated with the flu.²¹ Each year, researchers predict the three most common strains of the flu that will be active in the upcoming flu season, and combine those strains to create the flu vaccine.²² Because these strains change from year to year, the CDC recommends that a person receive the flu vaccine every year, just prior to the start of the flu season.²³ The typical flu season "can begin as early as October and last as late as May."²⁴ The flu vaccine is available in two forms: the flu shot, and the nasal-spray flu vaccine.²⁵ The flu shot is the most common form of the vaccine,²⁶ and will be the main focus of this discussion. The flu shot is an "inactivated vaccine" that contains a killed virus, and is approved for all people older than six months.²⁷ The nasal-spray flu vaccine is made with a weakened, but live, version of the virus.²⁸ This "live" virus is approved for healthy people between the ages of two and forty-nine.²⁹

The dispute as to the effectiveness of the flu shot lingers.³⁰ Each year, the CDC conducts an extensive two-study test to determine the

18. *Id.*

19. *Id.*

20. *Key Facts about Influenza (Flu) & Flu Vaccine*, *supra* note 11; *Preventing the Flu*, UNIV. OF ARKANSAS SYSTEM, www.uasys.edu/choosewell/prevent/flu.htm (last visited Nov. 15, 2013); *Influenza (Flu)*, JOHNS HOPKINS MED. HEALTH LIBRARY, www.hopkinsmedicine.org/healthlibrary/conditions/infectious_diseases/influenza_flu_85,P00625/ (last visited Nov. 15, 2013).

21. *Key Facts about Influenza (Flu) & Flu Vaccine*, *supra* note 11.

22. *See Vaccine Development*, FLU.GOV, <http://www.flu.gov/prevention-vaccination/vaccine-development/> (last visited Nov. 17, 2013); *Key Facts about Seasonal Flu Vaccine*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/flu/protect/keyfacts.htm> (last updated Sept. 25, 2013); *Influenza (Flu)*, *supra* note 20.

23. *Key Facts about Seasonal Flu Vaccine*, *supra* note 22.

24. *Id.*

25. *Id.*

26. *See id.*

27. *Id.*

28. *Key Facts about Seasonal Flu Vaccine*, *supra* note 22.

29. *Id.*

30. *See Tanner*, *supra* note 1.

effectiveness of the flu shot.³¹ The Food and Drug Administration (“FDA”) requires the first type of study, the randomized control test (“RCT”), before it will approve a new flu shot for the following year.³² “In a RCT, volunteers are assigned randomly to either a group that receives vaccine or a group that receives a placebo (e.g., a shot of saline), and vaccine efficacy is measured by comparing the frequency of influenza illness in the vaccinated and the unvaccinated groups.”³³ The second type of study is an observational study that involves the comparison of “the frequency of influenza illness in the vaccinated and unvaccinated groups, usually with adjustment for factors (like presence of chronic medical conditions) that may vary between the groups.”³⁴

A recent study suggests “that using serology (a laboratory test which measures the amount of antibody against a particular virus in a person’s body) to determine whether or not study participants have been infected with influenza may potentially overestimate vaccine efficacy.”³⁵ However, according to the CDC, other studies have proven that the use of serology can still provide accurate estimates of the efficacy of the flu shot.³⁶ There are many factors that can alter the estimates of the effectiveness of the flu shot, including “the match between the vaccine [flu] strains and the circulating strains, host factors and the sample size of a specific study.”³⁷ In addition, the effectiveness can vary among age and risk groups, and from year to year due to the strains of the flu that are actually prevalent during each flu season.³⁸ While experts do their best to determine which flu strains are most likely to be active during a flu season, it is impossible to determine the exact strains of the flu virus that will predominate in a particular flu season.³⁹

Even if the flu shot is not an exact match to the flu viruses in a given flu season, the flu shot can still provide protections against the illnesses.⁴⁰ For the 2003–2004 flu season, the CDC confirmed that the flu shot was sixty percent effective among healthy adults.⁴¹ While the flu shot’s effectiveness

31. *Flu Vaccine Effectiveness: Questions and Answers for Health Professionals*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/flu/professionals/vaccination/effectivenessqa.htm> (last updated Oct. 12, 2011).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* (citing Joshua G. Petrie et al., *Efficacy Studies of Influenza Vaccines: Effect of End Points Used and Characteristics of Vaccine Failures*, 203 J. INFECTIOUS DISEASES 1309 (2011)).

36. See *Flu Vaccine Effectiveness: Questions and Answers for Health Professionals*, *supra* note 31.

37. *Id.*

38. See *Key Facts about Seasonal Flu Vaccine*, *supra* note 22.

39. See *id.*

40. *Id.*

41. *Flu Vaccine Effectiveness: Questions and Answers for Health Professionals*, *supra* note 31.

decreases to forty-eight percent for people who have high-risk medical conditions, the flu shot still provides important benefits, and high-risk individuals should still receive the flu shot annually.⁴² An example of a high-risk group is adults sixty-five years and older; essentially, the vast majority of nursing home populations.⁴³ “There is evidence that vaccination prevents respiratory illnesses during periods of influenza circulation for elderly nursing home residents. . . . with a 34% reduction in total respiratory illnesses.”⁴⁴ The protections that the flu shot provides even to high-risk individuals have prompted health care facilities to require all employees to receive a flu shot each year.⁴⁵

C. Health Care Facilities Require Employees to Receive the Flu Shot

Health care facilities have started requiring their employees to receive the flu shot at the beginning of each flu season as a condition of employment.⁴⁶ For the purpose of this discussion, health care facilities include, but are not limited to, hospitals, nursing homes, skilled nursing facilities, physicians’ offices, urgent care centers, outpatient clinics, and home health care providers.⁴⁷ Also for the purposes of this discussion, health care personnel include, but are not limited to, “all persons, paid and unpaid, working in health care settings who have the potential for exposure to patients and/or to infectious materials”⁴⁸

1. Health Care Facilities are Requiring Flu Shots to Reduce the Spread of the Flu and to Improve Operations

Research has proven that “[h]ealth care workers who get vaccinated help to reduce the following: [] transmission of influenza . . . [,] staff illness and absenteeism . . . [, and] influenza-related illness and death. . . .”⁴⁹

According to a survey conducted by the CDC, 63.5% of health care workers received the flu shot during the 2010–2011 flu season,⁵⁰ while 96.5% of health care workers received the flu shot when their employers

42. *See id.*

43. *See id.*

44. *Id.*

45. *See, e.g.,* Memorandum from the Blanchard Valley Health System, Admin. Policy: Assoc. Influenza Vaccine to all Dep’ts, (June 2013) (on file with Ohio Northern Univ. L. Rev).

46. *See* Tanner, *supra* note 1.

47. *Prevention Strategies for Seasonal Influenza in Healthcare Settings, supra* note 9.

48. *Id.*

49. JOINT COMM’N RESOURCES, PATIENT SAFETY POCKET GUIDE 2 (James Parker ed., 3d ed. 2012).

50. *Influenza Vaccination Information for Health Care Workers*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/flu/healthcareworkers.htm> (last updated Sept. 26, 2013).

required it.⁵¹ As of November 2012, the CDC has indicated that about 63% percent of health care workers have received the flu shot for the 2012–2013 flu season.⁵²

Other reasons that health care facilities provide for requiring their employees to receive the flu shot include protecting the health of the patients, and decreasing absenteeism among employees.⁵³ According to the Associate Director of Adult Immunizations at the CDC, “the strongest evidence is from studies in nursing homes, linking flu vaccination among health care workers with fewer patient deaths from all causes.”⁵⁴ Researchers have also seen a correlation between higher flu shot rates and a decrease in absenteeism among employees at health care facilities.⁵⁵ In fact, one study found that the flu shot decreased employee absenteeism due to respiratory infections by 28%.⁵⁶ Because of the protections provided to both patients and employees, the CDC strongly recommends that all health care employees receive the flu shot annually.⁵⁷

2. Regulatory and Accreditation Reasons Hospitals are Requiring the Flu Shot

Many hospitals started implementing a more stringent and organized flu shot program when the Joint Commission on Accreditation of Healthcare Organizations (“the Joint Commission”) implemented guidelines that hospitals must follow for accreditation.⁵⁸ The Joint Commission is one of the largest accreditation organizations in the United States, and it “accredits and certifies more than 20,000 health care organizations and programs.”⁵⁹ The Joint Commission has guidelines known as “Standards” with which a health care facility must comply in order to obtain accreditation and remain accredited.⁶⁰ In January of 2007, the Joint Commission “began requiring, as

51. *Id.*

52. *Health Care Personnel Flu Vaccination*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/flu/fluview/hcp-ips-nov2012.htm> (last updated July 17, 2013).

53. See Tracy Hampton, *H1N1 Vaccine Urged for Health Workers, But Some Resist Getting on Board*, 302 J. AM. MED. ASS’N 1848, 1848 (2009).

54. Tanner, *supra* note 1.

55. See, e.g., H. Saxén & M. Virtanen, *Randomized, Placebo-controlled Double Blind Study on the Efficacy of Influenza Immunization on Absenteeism of Health Care Workers*, 18 PEDIATR. INFECT. DIS. J. 779 (Sept. 18, 1999), available at <http://www.ncbi.nlm.nih.gov/pubmed/10493337>.

56. *See id.*

57. *See Influenza Vaccination Information for Health Care Workers*, *supra* note 50.

58. *See Seasonal Influenza Vaccination - Important Protection for Healthcare Workers Fact Sheet*, U.S. DEP’T OF LABOR, <https://www.osha.gov/Publications/SeasonalInfluenzaVaccination.html> (last visited Oct. 1, 2013).

59. *About the Joint Commission*, JOINT COMM’N (Oct. 1, 2013), http://www.jointcommission.org/about_us/about_the_joint_commission_main.aspx.

60. *Facts about Hospital Accreditation*, JOINT COMM’N (Aug. 26, 2013), http://www.jointcommission.org/assets/1/18/Hospital_Accreditation_8_26_13.pdf.

part of their accreditation process, that organizations institute annual influenza programs, including offering vaccination on-site and promoting healthcare worker participation.”⁶¹ The relevant Influenza Vaccine Standard is Infection Prevention and Control Standard (“IC”) 02.04.01.⁶²

In 2012, the Joint Commission revised IC 02.04.01 to require health care facilities to: set and achieve increased, incremental vaccine rate goals among health care employees to reach a goal of 90% by 2020; provide a written description of the method the health care facility will use to determine its flu shot rate; and evaluate the reasons given for declining a flu shot.⁶³ Through the elements of IC 02.04.01, the Joint Commission now requires health care facilities to implement a mandatory flu shot policy, while still allowing employees to decline.⁶⁴ However, because health care facilities have to review why employees are refusing to receive the flu shot, and must reach a certain goal each year, health care facilities must do something to obtain a higher flu shot percentage among employees.⁶⁵ This may include disciplinary procedures for those who refuse the flu shot in violation of employer policy, and without a legitimate, protected reason.⁶⁶

In addition to the proven reduction in the spread of the flu throughout a health care facility,⁶⁷ and based on the Joint Commission’s recommendations for a flu vaccine program,⁶⁸ health care facilities also require the flu shot because they will be required to report employee flu vaccination rates.⁶⁹ Beginning in January 2013, the Centers for Medicare and Medicaid Services (“CMS”) required all acute care hospitals that receive reimbursement from CMS to report their employee flu vaccination statistics.⁷⁰ CMS requires hospitals to report information regarding “vaccinations received by healthcare personnel at the facility, vaccinations received outside the facility, medical contraindications and declinations.”⁷¹ “Data must be reported for: . . . all employees on payroll; . . . licensed independent practitioners (who are physicians, advanced practice nurses, and physician assistants affiliated with the hospital but not on payroll); . . .

61. *Seasonal Influenza Vaccination - Important Protection for Healthcare Workers Fact Sheet*, *supra* note 58.

62. *See Joint Commission Revises Influenza Vaccination Standard*, 31 *JOINT COMM’N PERSPECTIVES* 4, 4 (2011).

63. *Id.*

64. *See id.*

65. *See id.*

66. *See Hampton, supra* note 53, at 1848.

67. *See supra* notes 49-57 and accompanying text.

68. *See supra* notes 58-64 and accompanying text.

69. *See Tanner, supra* note 1.

70. *CDC Alert: NHSN Module for HCP Influenza Vaccination Reporting Available Sept 14.*, *ASS’N FOR PROF’LS IN INFECTION CONTROL & EPIDEMIOLOGY* (Aug. 30, 2012), <http://www.apic.org/for-media/news-releases/article?id=b74a94cf-72be-44e3-a594-689327df860e>.

71. *Id.*

[and] students, trainees, and volunteers aged 18 [sic] or older.”⁷² This information will then be used to compare hospitals, and could ultimately impact reimbursement rates from Medicare and Medicaid programs.⁷³

Many states have started mandating that health care employees receive the flu shot.⁷⁴ For example, the Rhode Island Department of Health has mandated that “[e]ach health care facility shall develop a specific plan to require annual influenza vaccination of all health care workers in a timely manner”⁷⁵ The Rhode Island Department of Health also requires health care facilities to report statistics on: “the number of health care [employees] who are eligible for vaccination; . . . the number [] who received the vaccine vaccination; and . . . the number who decline . . . for medical or personal.”⁷⁶ To determine if whether a state has regulations regarding mandatory flu shots for health care employees, visit its health department website.

III. ANALYSIS

As a way to combat a possible flu epidemic in their own workforces, many health care facilities are requiring employees to receive the flu shot as a requirement for obtaining or maintaining employment.⁷⁷ However, there are many legal protections available to employees who oppose receiving the flu shot for religious, medical, and various other reasons.⁷⁸ This comment will examine the various laws and regulations that impact a health care facility when it implements and enforces a mandatory flu shot policy for employees.⁷⁹

In November of 2012, the CDC conducted a survey to determine the reasons people choose to receive the flu shot.⁸⁰ About 48% of people opted to receive the flu shot to protect them from the flu.⁸¹ Other reasons, in order of popularity, were: because their “employer require[d] [them] to be vaccinated[;]” “to protect [their] friends & [sic] family[;]” “to protect

72. *Id.*

73. See Tanner, *supra* note 1; *National Action Plan to Prevent Healthcare-Associated Infections: Roadmap to Elimination*, U.S. DEP’T OF HEALTH & HUMAN SERVS., www.hhs.gov/ash/initiatives/hai/hcpflu/html (last visited Nov. 16, 2013).

74. See Tanner, *supra* note 1.

75. *Rules and Regulations Pertaining to Immunization, Testing, and Health Screening for Health Care Workers*, STATE OF RHODE ISLAND & PROVIDENCE PLANTATIONS DEP’T OF HEALTH 5 (Oct. 2012), <http://sos.ri.gov/documents/archives/regdocs/released/pdf/DOH/7083.pdf>.

76. See *id.*

77. See JOINT COMM’N RESOURCES, *supra* note 49, at 2; see also Tanner, *supra* note 1.

78. See *infra* Parts III.A-B.

79. See *infra* Part IV.

80. *Health Care Personnel Flu Vaccination*, *supra* note 52.

81. *Id.*

patients[;]” and, lastly, because the “vaccine was offered free of charge.”⁸² Fifteen and three tenths percent—15.3%—of people opted to receive the flu shot because their employers required them to do so.⁸³

The CDC also conducted a survey to determine the top five reasons employees refused the flu shot.⁸⁴ A plurality of those surveyed—22%—said they refused the flu shot because they simply did not want the vaccination.⁸⁵ Other popular responses to why they refused the flu shot included: employees did not feel the flu shot works; they were allergic to the flu shot; they did not want to experience side effects; and, lastly, they felt they did not need the flu shot.⁸⁶ Most of these justifications for refusing the flu shot do not protect an employee who refuses to receive a mandatory flu shot.⁸⁷ However, as the reader will see in the following discussion, there are many protections available to an employee with a valid reason for refusing a flu shot.⁸⁸

A. Protections When Refusing the Flu Shot Based on Religious Beliefs

Some employees refuse the flu shot based upon their religious beliefs.⁸⁹ The United States Equal Employment Opportunity Commission (“EEOC”) and Title VII of the Civil Rights Act of 1964 (“Title VII”) protect those who refuse the flu shot due to their religious beliefs.⁹⁰ “Title VII protects workers from employment discrimination based on their race, color, religion, sex, national origin, or protected activity.”⁹¹ This includes treating applicants or employees differently, subjecting them to harassment, denying requested reasonable accommodation, or retaliating against an applicant or employee because of his or her religious beliefs or practices.⁹²

1. What is a Religious Belief? What Protections Does Title VII Provide for a Religious Belief?

The Title VII defines religion as,

82. *Id.*

83. *Id.*

84. *Health Care Personnel Flu Vaccination*, *supra* note 52.

85. *Id.*

86. *Id.*

87. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, EEOC COMPLIANCE MANUAL 8 (July 22, 2008), available at <http://www.eeoc.gov/policy/docs/religion.pdf> [hereinafter EEOC] (explaining that mere personal preferences are not protected by Title VII as “religious” beliefs).

88. *See infra* Part III.

89. *See, e.g.*, *Chenzira v. Cincinnati Children’s Hosp. Med. Ctr.*, No. 1:11–CV–00917, 2012 WL 6721098, at *1 (S.D. Ohio Dec. 27, 2012).

90. 42 U.S.C. § 2000e-2 (2006).

91. EEOC, *supra* note 87, at 1.

92. *See id.* at 5 (citing 42 U.S.C. § 2000e).

all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business. . . . Religious beliefs, practices, and observances include those that are theistic in nature, as well as non-theistic "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." . . . A belief is "religious" for Title VII purposes if it is "religious" in the person's own scheme of things," *i.e.*, it is "a sincere and meaningful belief that occupies in the life of its possessor a place parallel to that filled by . . . God."⁹³

However, "[s]ocial, political, or economic philosophies, as well as mere personal preferences, are not 'religious' beliefs" protected by Title VII."⁹⁴

"Title VII requires employers to accommodate religious beliefs, practices, and observances if the beliefs are 'sincerely held' and the reasonable accommodation poses no undue hardship on the employer."⁹⁵ The broad definition of religious beliefs makes it difficult for employers to determine whether an employee's religion or beliefs are "sincerely held" or the employee is merely trying to avoid receiving the flu shot.⁹⁶ If there is a doubt regarding whether a particular belief is considered religious, the courts generally tend to find that the belief is religious.⁹⁷

2. *How Does an Employer Determine if a Religious Belief is Sincerely Held?*

For the purposes of Title VII, an employer has to provide accommodations only for a religious belief that is "sincerely held."⁹⁸ Generally, an employer should assume that a religious belief is sincerely held.⁹⁹ However, if an employee refuses the flu shot due to religious beliefs, and the employer has an objective basis for questioning the religious nature or sincerity of those beliefs, the employer is justified in asking for further details.¹⁰⁰ To determine whether a religious belief is sincerely held, an employer or court must look at the employee's motivation, and not the

93. EEOC, *supra* note 87, at 1-2, 6-7 (quoting *United States v. Seeger*, 380 U.S. 163, 176 (1965)).

94. *See* EEOC, *supra* note 87, at 8.

95. *See id.* at 6.

96. *See id.* at 13-14.

97. *See id.* at 7-8.

98. *See id.* at 12 (citing *Seeger*, 380 U.S. at 185).

99. *See* EEOC, *supra* note 87, at 14.

100. *See id.*

nature of the activity.¹⁰¹ This is a case-by-case, fact intensive inquiry, which does not provide employers with a clear framework for determining a religious belief.¹⁰² When conducting this inquiry, employers should consult with legal counsel to ensure it is done in a legally proper manner.¹⁰³

Some factors an employer may consider when determining whether the religious belief is sincerely held are: inconsistent behavior, whether the accommodation sought has a particularly desirable benefit, and whether the timing of the request is suspect.¹⁰⁴ In refusing the flu shot, the biggest factor to consider is the inconsistent behavior of the employee.¹⁰⁵ The timing of the request does not play a large role because an employee will not refuse a flu shot until he or she is required to receive it—just before the start of flu season.

Quite recently in Ohio, there was a debate over whether an employee's veganism constituted a religious belief within the meaning of Title VII and applicable state law.¹⁰⁶ A customer service representative filed a lawsuit after Cincinnati Children's Hospital terminated her employment for refusing to receive the flu shot.¹⁰⁷ The plaintiff employee contended that the hospital discharged her due to her religious beliefs because, as a vegan, she did not believe in ingesting animal products into the body.¹⁰⁸ In the past, the defendant hospital had accommodated her request to refuse the flu shot.¹⁰⁹ The plaintiff brought claims "alleging 1) religious discrimination in violation of Title VII of the Civil Rights Act of 1964, 2) religious discrimination under Chapter 4112 of the Ohio Revised Code, and 3) tortious wrongful discharge in violation of public policy."¹¹⁰ The Defendant filed a motion to dismiss all three claims.¹¹¹

On the claim under Title VII and Chapter 4112 of the Ohio Revised Code, the Defendant argued that "veganism does not qualify as a religion, but rather is no more than a dietary preference or social philosophy."¹¹² The court held that "in the context of a motion to dismiss, it merely needs to

101. *See id.* at 9.

102. *See id.*

103. *See, e.g., id.* at 2-4, 29.

104. *See* EEOC at 13 (citing Equal Employment Opportunity Comm'n v. Union Independent de la Autoridad Acueductos, 279 F.3d 49, 56 (1st Cir. 2002)).

105. *See id.* (citing *Union Independent*, 279 F.3d at 56). The EEOC clearly regards inconsistent behavior as one of many factors to be considered, but it does not seem to regard any one factor as more important than the others. *See id.*

106. *Chenzira*, 2012 WL 6721098, at *1.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. *Chenzira*, 2012 WL 6721098, at *1.

112. *Id.* at *4.

determine whether Plaintiff has alleged a plausible claim.”¹¹³ The court did not make the determination of whether veganism is so sincerely held that it can be considered a religious belief.¹¹⁴ Instead, the court found a plausible claim that veganism could be sincerely held by the Plaintiff, and could, therefore, be considered a religious belief.¹¹⁵ The court denied the Defendant’s motion to dismiss on the state and federal religious claims.¹¹⁶

The plaintiff also argued that the hospital wrongfully discharged her in violation of state public policy,¹¹⁷ saying, “it is well-established that wrongful discharge in violation of state public policy claims fail where other statutes provide adequate protection and remedies.”¹¹⁸ The court held that because the plaintiff had adequate remedies under Title VII and Chapter 4112 of the Ohio Revised Code, she had no claim under the state’s public policy.¹¹⁹

3. *What Accommodations are Required for a Religious Belief?*

As defined by Title VII, “[a] reasonable religious accommodation is any adjustment to the work environment that will allow the employee to comply with his or her religious beliefs.”¹²⁰ An employer should offer alternatives to employees who refuse the flu shot due to their religious beliefs.¹²¹ One alternative is to require employees who refuse the flu shot on religious grounds to wear masks during flu season.¹²² Alexian Brothers Medical Center in Illinois requires unvaccinated employees to wear masks during flu season, and to explain to patients that they are wearing the masks—patient safety.¹²³

If an employer refuses to accommodate an employee based upon his or her religious beliefs, the employer must prove that the accommodation would cause an undue hardship.¹²⁴ Hospitals implementing alternatives to the flu shot must show that the alternatives would reasonably accommodate the employee and that the alternatives would not impose an undue burden on the employee.¹²⁵

113. *Id.*

114. *See id.*

115. *Id.*

116. *Chenzira*, 2012 WL 6721098, at *4.

117. *Id.* at **1, 4.

118. *Id.* at *4.

119. *Id.*

120. EEOC, *supra* note 87, at 46.

121. *Id.* at 86.

122. *See, e.g.*, Memorandum from the Blanchard Valley Health System, *supra* note 45; *see also* Tanner, *supra* note 1.

123. Tanner, *supra* note 1.

124. EEOC, *supra* note 87, at 56.

125. *See id.* at 6.

B. Protections When Refusing a Flu Shot Based Upon a Medical Condition or Disability

Some people may refuse the flu shot because of medical reasons or a disability.¹²⁶ Others may have medical conditions or reactions to the flu shot that prevent them from receiving it.¹²⁷ The Americans with Disabilities Act (“ADA”) restricts employers’ ability to require employees to receive the flu shot.¹²⁸ “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.”¹²⁹ In addition, the Pregnancy Discrimination Act (“PDA”) may afford protections to employees who refuse to receive the flu shot in certain circumstances.¹³⁰

1. Refusal of the Flu Shot for Medical Reasons

The CDC has generated a list of people with certain medical conditions to whom they recommend against receiving the flu shot.¹³¹ The list of medical conditions includes: a severe allergy to chicken eggs, a severe reaction to an influenza vaccination, less than six months of age, and a history of Guillain-Barré Syndrome (“GBS”).¹³² Some people who have received the flu shot have claimed that it has caused them to get the flu.¹³³ Scientists have proven that the flu shot is safe and cannot cause the flu.¹³⁴ However, the vaccine can cause minor side effects that are similar to flu symptoms.¹³⁵ These symptoms can include fever and aches.¹³⁶ Also, while it is rare, some people may have an allergic reaction that is noticeable within minutes of receiving the flu shot.¹³⁷ Symptoms of a severe allergic

126. See *Health Care Personnel Flu Vaccination*, *supra* note 52.

127. See *id.*

128. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT, available at http://www.eeoc.gov/facts/pandemic_flu.html (last updated Oct. 9, 2009) [hereinafter EEOC, PANDEMIC PREPAREDNESS].

129. *Id.*

130. See Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e-2(b); see also Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2002e-1(k)) (2006).

131. See *Key Facts about Seasonal Flu Vaccine*, *supra* note 22.

132. See *id.*

133. See Heather Brown, *Good Question: Can You Get the Flu from the Flu Shot?*, CBS MINNESOTA (Oct. 2, 2013), <http://minnesota.cbslocal.com/2013/10/02/good-question-can-you-get-the-flu-from-the-flu-shot/>; *Is it True that the Flu Shot can Give You the Flu?*, BABYCENTER, http://www.babycenter.com/404_is-it-true-that-the-flu-shot-can-give-you-the-flu_10338730.bc (last visited Nov. 15, 2013).

134. See *Influenza Vaccination Information for Health Care Workers*, *supra* note 50.

135. See *Seasonal Flu Shot Questions and Answers*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/flu/about/qa/flushot.htm> (last updated Sept. 26, 2013).

136. See *id.*

137. See *id.*

reaction can include difficulty breathing, an increased heart rate, dizziness, and weakness.¹³⁸ These severe reactions are more common in those who have an allergy to chicken eggs because scientists grow the viruses that are used to produce the flu shot in hens' eggs.¹³⁹ Thus, an employee with an egg allergy would be justified in refusing the flu shot, and the employer would be required to make other accommodations for the employee to prevent the transmission of the flu.¹⁴⁰

Also, people who have GBS, or who are at a high risk for developing the Syndrome, are justified in refusing the flu shot and an employer should make other accommodations for such employees.¹⁴¹ GBS is a rare disorder in which the body's immune system attacks its nerves; it is characterized by symptoms of weakness, tingling, and nerve damage.¹⁴² There has also been concern that flu shots may cause GBS because of a link between swine flu and GBS in 1976.¹⁴³ Because of this connection, many patients who supposedly developed GBS after receiving the flu shot have filed lawsuits throughout the United States.¹⁴⁴ However, according to the CDC, only about one or two out of every one million people vaccinated may be at risk for developing GBS from the flu shot.¹⁴⁵

While workers' compensation for injury caused from receiving the mandatory flu shot will not be discussed in this comment, it is important for employers to note that they may be liable under workers' compensation if an employee receives the mandatory flu shot and develops a severe medical condition, such as GBS, as a result.¹⁴⁶

2. Protections Provided by the Americans with Disabilities Act

Some employees refuse to receive the flu shot because of a disability under the ADA.¹⁴⁷ "An employee may be entitled to an exemption from a mandatory vaccination requirement based upon an ADA disability that

138. *See id.*

139. *See id.*

140. *See Seasonal Flu Shot Questions and Answers*, *supra* note 135; *see also supra* notes 139-141 and accompanying text.

141. *See Seasonal Flu Shot Questions and Answers*, *supra* note 135.

142. *Guillain-Barre Syndrome*, MAYO CLINIC (May 28, 2011), <http://www.mayoclinic.com/health/guillain-barre-syndrome/DS00413>.

143. *See Seasonal Flu Shot Questions and Answers*, *supra* note 135; *see also Guillain-Barre Syndrome Questions and Answers*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/flu/protect/vaccine/guillainbarre.htm>, <http://www.cdc.gov/flu/about/qa/flushot.htm> (last visited Nov. 16, 2013).

144. *See AM. LAW OF PRODS. LIAB.*, § 89:132 INFLUENZA VACCINE - DEVELOPMENT OF GUILLAIN-BARRE SYNDROME (GBS) (3d ed. 2013).

145. *See Seasonal Flu Shot Questions and Answers*, *supra* note 135.

146. *See E.I. Dupont De Nemours & Co. v. Faupel*, 859 A.2d 1042, 1044 (Del. 2004).

147. *See EEOC, PANDEMIC PREPAREDNESS*, *supra* note 128.

prevents him from taking the influenza vaccine.”¹⁴⁸ To prevail on a claim under the ADA, the employee must have a disability that the ADA protects.¹⁴⁹ A disability is “a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; . . . a record of such an impairment; or . . . being regarded as having such an impairment.”¹⁵⁰ For a physical impairment to substantially limit a person’s life, it must place substantial limitations on a person’s major life activities, the impairment need not create “utter inabilities.”¹⁵¹ While the ADA provides a definition, the Act explains that each person’s physical impairment should be determined on a case-by-case basis; no bright line test is available to determine if a person’s impairment constitutes a disability.¹⁵² A health care facility should be careful to ensure that it is not requiring an employee with a disability protected under the ADA to receive the flu shot.

3. Protections Provided by the Pregnancy Discrimination Act

Some women who are pregnant may refuse the flu shot for fear of side effects or the harm it may cause to their unborn children.¹⁵³ However, “[i]nactivated influenza vaccine is considered effective during any stage of pregnancy and is proven to benefit both the mother and baby.”¹⁵⁴ If a pregnant employee has concerns regarding the safety of the flu shot, she should discuss her specific case with her obstetrician to determine if there is another cause for her refusal besides pregnancy. Although the flu shot has been deemed safe, a pregnant employee may have protections under the PDA if she refuses the flu shot due to her pregnancy.¹⁵⁵ Under the PDA, the employee would have to prove that the employer permitted male counterparts or females who are not pregnant to refuse the vaccine, and that she was not able to refuse due to her pregnancy.¹⁵⁶ In implementing a mandatory flu shot policy, the health care facility can avoid this issue if its

148. *Id.*

149. 42 U.S.C. § 12102(2) (2006).

150. *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555, 563 (1999) (quoting 42 U.S.C. § 12102).

151. *Id.* at 563-65 (quoting *Bragdon v. Abbott*, 524 U.S. 624, 641 (1998)).

152. *See id.* at 566 (citing 42 U.S.C. § 12102(2)).

153. *See Influenza Vaccination among Pregnant and Postpartum Women in Ohio: The Importance of the Parental Care Provider*, OHIO DEP’T OF HEALTH (Oct. 2011), available at http://www.odh.ohio.gov/~?media/ODH/ASSETS?Files/prams%20%20pregnancy%20risk%20assessment%20monitoring%20program/issuebrief_influenza.ashx.

154. *See id.*

155. Letter from Peggy R. Mastroianni, Legal Counsel for the Equal Employment Opportunity Comm’n, Informal Discussion Letter (Mar. 5, 2012), available at http://www.eeoc.gov/eeoc/foia/letters/2012/religious_accommodation.html.

156. *See id.*

policy treats all individuals equally, regardless of gender or medical conditions.¹⁵⁷

C. Protections Provided by the National Labor Relations Board

Employees may also look to the National Labor Relations Board (“NLRB”) to protect their jobs if they decide to refuse the flu shot.¹⁵⁸ If two or more employees refuse a flu shot, the NLRB could find that requiring the flu shot is a “protected concerted activity.”¹⁵⁹ For an employee’s refusal to constitute a “protected concerted activity,” he or she must prove that “the employer interfered with, restrained, or coerced an employee in the exercise of a right to engage in an activity that was both concerted and protected”¹⁶⁰ For an employee’s conduct to be concerted it “must appear at the very least that it was engaged in with [sic] the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interests of the employees.”¹⁶¹ Before the requirement of a flu shot can be deemed a concerted activity, the employee must induce fellow employees to protest against the flu shot requirement.¹⁶² For the concerted activity to be considered protected, the employees must prove that they were seeking to improve working conditions.¹⁶³ It is not enough that “two or more employees are working together at the same time and the same place toward a common goal.”¹⁶⁴

1. The Effect of NLRB at Unionized Health Care Facilities

The NLRB provides protections that require a unionized health care facility to take extra steps in implementing a mandatory flu shot policy for employees.¹⁶⁵ Before implementing a mandatory flu shot policy, the health care facility must inform the union of its intentions and allow for negotiation and collective bargaining.¹⁶⁶ If the health care facility does not

157. See 42 U.S.C. § 2000e-2.

158. See *Charge Against Employer, NLRB*, <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-3040/nlrform501.pdf> (last visited Nov. 17, 2013).

159. Karen Gwinn Clay, *Flu Shot Policy Brings Potential Liability*, 18 MISSISSIPPI EMP’T LAW LETTER 3 (2012) (internal quotation marks omitted).

160. *Mobil Exploration & Producing U.S., Inc. v. NLRB*, 200 F.3d 230, 239 (5th Cir. 1999).

161. *Id.* (quoting *NLRB v. Buddies Supermarket, Inc.*, 481 F.2d 714, 718 (5th Cir. 1973)).

162. See *id.* at 238 (citing *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 831 (1984)).

163. See *id.* (citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)).

164. *Id.* (citing *City Disposal Systems*, 465 U.S. at 831).

165. See generally 29 U.S.C. §§ 151-69 (2006) (the NLRB itself being created pursuant to 29 U.S.C. § 153).

166. See *Virginia Mason Hosp. v. Washington State Nurses Ass’n*, 511 F.3d 908, 918 (9th Cir. 2007).

follow the proper protocols with regards to the union, it may find itself in a similar situation to Virginia Mason Hospital.¹⁶⁷

In December of 2007, the United States Court of Appeals for the Ninth Circuit decided a case regarding Virginia Mason Hospital (“Hospital”), an acute care hospital in Seattle, Washington, and its implementation of a mandatory flu shot policy for all employees.¹⁶⁸ The Hospital employed 600 to 700 unionized nurses (“Union”).¹⁶⁹ In 2004, the Hospital announced that it would be requiring all employees to receive the flu shot.¹⁷⁰ After the Union filed a grievance, the Hospital modified this requirement for nurses, and instead it required all unvaccinated employees to wear protective facemasks or take the antiviral medications.¹⁷¹ The Hospital required employees to wear the facemasks at all times, except when in the cafeteria, break rooms, and restrooms.¹⁷² Employees that were not in compliance with the required flu shot policy “would face termination.”¹⁷³

When the Union filed a grievance, the matter was referred to arbitration.¹⁷⁴ The arbitrator ordered that the mandatory flu shot policy be rescinded.¹⁷⁵ He found that the language of the collective bargaining agreement (“CBA”) required the Union and the Hospital “to bargain . . . over all terms and conditions of employment.”¹⁷⁶ He further held that the mandatory flu shot policy constituted a term and condition of employment; thus, it was a mandatory subject for bargaining before the Hospital could implement the policy.¹⁷⁷ The Hospital failed to raise the defense that the policy was exempt from bargaining as a “‘fitness for duty’ policy,” nevertheless, the arbitrator relied on the fact that it was a condition of employment.¹⁷⁸ Lastly, the arbitrator determined that the Union did not waive its right to negotiations regarding the policy because although the new CBA did not expressly address the flu shot policy, the Union’s decision to file a grievance amounted to a process of negotiation.¹⁷⁹

Not satisfied with the arbitrator’s decision, the Hospital then brought an action seeking to overturn “the district court’s decision granting summary judgment to the [Union] and upholding an arbitral award prohibiting [the

167. *See id.*

168. *See id.* at 911-12.

169. *See id.* at 911.

170. *See id.* at 912.

171. *See Virginia Mason*, 511 F.3d at 918 n.3.

172. *See id.*

173. *See id.* at 912.

174. *See id.*

175. *See id.*

176. *See Virginia Mason*, 511 F.3d at 912.

177. *See id.*

178. *See id.* at 912-13.

179. *See id.* at 913.

Hospital] from unilaterally implementing a mandatory flu immunization regime.”¹⁸⁰ The Hospital argued that the arbitrator exceeded his authority in deciding the matter when he interpreted and applied the terms of the CBA in formulating his decision.¹⁸¹ The United States District Court for the Western District of Washington entered summary judgment in favor of the Union but refused to award attorney’s fees.¹⁸² Both parties appealed.¹⁸³ The court of appeals refused to overturn the decision of the arbitrator in holding that the arbitrator acted within his authority to interpret the terms of the CBA.¹⁸⁴ The court of appeals affirmed the judgment of the district court.¹⁸⁵

The Union then filed a case with the NLRB in 2012.¹⁸⁶ The Union:

implementing the influenza policy without affording the Union notice and opportunity to bargain over the decision to implement the policy; . . . failing to bargain over the effects of the decision to implement the policy; . . . providing false and misleading information to the Union regarding its intention to implement the policy; . . . and failing to timely provide information requested by the Union regarding the policy.¹⁸⁷

The administrative law judge dismissed the allegation regarding unlawful implementation of the influenza policy, and found that the policy was lawfully implemented because it “was central to the Hospital’s core purpose, narrowly tailored to achieve that purpose, and appropriately limited to the affected employees, and therefore was exempt from bargaining.”¹⁸⁸ “The judge also dismissed the allegation that the Hospital [did not] bargain over” the flu shot policy with the Union because the General Counsel “failed to allege or litigate [this] issue.”¹⁸⁹

However, the Board adopted the judge’s finding “that the Hospital violated Section 8(a)(5) and (1) [of the National Labor Relations Act (“NLRA”)] by providing false and misleading information” regarding the implementation of the policy.¹⁹⁰ Specifically, the Hospital falsely informed

180. *Id.* at 911.

181. *See Virginia Mason*, 511 F.3d at 911.

182. *See id.*

183. *See id.* at 913.

184. *See id.* at 915.

185. *See id.* at 911.

186. *See Virginia Mason & Washington State Nurses Ass’n*, 358 N.L.R.B. No. 64, 2012-2013 NLRB Dec. (CCH) ¶ 15578 (June 25, 2012).

187. *Id.* at *1.

188. *Id.*

189. *See id.*

190. *See id.* at **1-2.

the Union that it would not implement the policy, before later implementing the policy.¹⁹¹ Also, the Hospital delayed for two-and-a-half “months before complying with the Union’s information request for [the] nurses’ comments on the policy”¹⁹² Sections 8(a)(1) and (5)¹⁹³ state that “[i]t shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 “to organize and bargain or for an employer “to refuse to bargain collectively with representatives of his employees.”¹⁹⁴ By providing false, misleading, and untimely information to the Union, the Hospital violated the NLRA.¹⁹⁵ The NLRB, therefore, ordered the Hospital to stop “[p]roviding false and misleading information,” and to stop “[f]ailing and refusing to provide the Union in a timely fashion with requested relevant information for the Union to perform its role as bargaining representative.”¹⁹⁶ This case provides valuable guidance on the steps a unionized hospital must take to avoid litigation when enacting a mandatory flu shot policy. It is important for a unionized health care facility to ensure that the union is well-informed of a decision to implement a mandatory flu shot policy, and to allow negotiations over the policy before its implementation.¹⁹⁷

IV. RESOLUTION

Before implementing a flu shot policy that requires employees to receive the flu shot, there are several legal and regulatory matters that a health care facility should consider.¹⁹⁸ The National Law Review has provided a list of important “Dos and Don’ts” a health care facility should consider prior to implementation of the policy.¹⁹⁹ It is important that a health care facility spend a great deal of time investigating how each part of a proposed mandatory flu shot policy will affect associates, and the legal ramifications it may present.²⁰⁰ Health care facilities should consult legal

191. See Virginia Mason, 358 N.L.R.B. No. 64, 2012-2013 NLRB Dec. (CCH) ¶ 15578, at *1.

192. See *id.*

193. National Labor Relations Act of 1935, ch. 372, § 8(1), (5), 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151-69).

194. 29 U.S.C. § 158(a)(1), (5).

195. See Virginia Mason, 358 N.L.R.B. No. 64, 2012-2013 NLRB Dec. (CCH) ¶ 15578, at *2.

196. *Id.*

197. See generally *id.* at **1-3.

198. See, e.g., Meredith R. Murphy, *The Dos and Don’ts of Implementing a Mandatory Flu Vaccine Policy outside the Hospital Setting*, NAT’L L. REV., <http://www.natlawreview.com/article/dos-and-don-ts-implementing-mandatory-flu-vaccine-policy-outside-hospital-setting> (last visited Sept. 29, 2013).

199. *Id.*

200. See generally *id.*

counsel for assistance in the implementation phase to ensure compliance with all laws and regulations.²⁰¹

A. A Health Care Facility Must Determine that the Implementation of a Mandatory Flu Shot Policy is a Legitimate Business Necessity

First, a health care facility should determine that a mandatory flu shot policy is a legitimate business necessity.²⁰² The Supreme Court of the United States provided the test for the determination of a legitimate business necessity:²⁰³ “[t]o be justified as a business *necessity*, a practice must directly relate to a prospective employee’s ability to perform the job effectively; *i.e.*, it must be necessary to fulfill legitimate business requirements.”²⁰⁴ Research and statistics have proven that requiring employees to receive the flu shot directly relates to the employees’ ability to perform their jobs effectively.²⁰⁵ Receiving the flu shot reduces the risk of passing the virus to a patient or other employees, and it reduces the rate of absenteeism caused by the flu.²⁰⁶

In furtherance of the determination of a legitimate business necessity, the General Duty Clause, as provided by OSHA and codified in 29 U.S.C. § 654, provides statutory support to employers that want to implement a mandatory flu shot policy.²⁰⁷ Under the General Duty Clause “[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees”²⁰⁸ By requiring employees to receive the flu shot, health care facilities decrease the risk that the flu will spread among employees.²⁰⁹ This, in turn, decreases the hazards that could cause death or serious physical harm from the flu or complications related to the flu.²¹⁰ Based upon the evidence and statistics provided by the CDC, a health care facility should be able to establish that a flu shot policy is a business necessity that allows employees to perform their jobs effectively.²¹¹

201. *See id.*

202. *See id.*

203. *See* *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977, 1005 (1988) (Blackmun, J., concurring) (citing *Dothard v. Rawlinson*, 433 U.S. 321, 331-32 (1977)).

204. *Id.* at 980 (syllabus) (emphasis in original).

205. *See* Karen Roush, *Emerging Infections: Preventing Flu Outbreaks*, 105 AM. J. OF NURSING 30, 30 (2005).

206. *See* *Influenza Vaccination Information for Health Care Workers*, *supra* note 50.

207. 29 U.S.C. § 654 (2006).

208. *Id.*

209. *See* Roush, *supra* note 205, at 30.

210. *See id.*

211. *See* *Health Care Personnel Flu Vaccination*, *supra* note 52, at 3; *see also* *Key Facts about Influenza (Flu) & Flu Vaccine*, *supra* note 11.

B. A Health Care Facility Must Determine the Flu Shot Policy that Best Suits Their Needs

Health care facilities also need to determine exactly what type of policy would best satisfy their needs.²¹² Some facilities, as discussed above, have gone to a strict mandatory flu shot policy as part of an employee's terms of employment.²¹³ As we have seen, this can create legal concerns for a health care facility.²¹⁴ Instead of utilizing a strict mandatory flu shot policy, a health care facility could encourage all employees to receive the flu shot, but not require them to do so as part of their employment. Health care facilities could also consider implementing a mandated flu shot policy, while allowing for alternatives when an employee refuses for a protected reason.²¹⁵ For example, Johns Hopkins Medicine has implemented a mandatory flu shot policy that requires all health care personnel to receive the flu shot annually, unless they "possess an approved exception."²¹⁶ This policy requires all employees who refuse the flu shot to complete an extensive form explaining the reasons for their refusal, and how the hospital can still provide adequate accommodations.²¹⁷ If the employee does not complete the form by a specific deadline and subsequently refuses the flu shot, he or she may be subject to disciplinary action.²¹⁸ While this is not the only route hospitals are taking when implementing a mandatory flu shot policy, health care facilities should consider this form or type of policy.

When constructing the policy, health care facilities must also consider the scope of the employees it wishes to cover. They must consider whether to require all employees to receive the flu shot, or only include those employees who have patient contact. Many hospitals are moving toward requiring all employees to receive the flu shot.²¹⁹ Requiring all employees to receive the flu shot makes sense for a couple of reasons. First, as we have seen above, requiring all employees to receive the flu shot eliminates the possibility for discrimination claims.²²⁰ Employees will not be able to argue that other employees were treated differently because they were not required to receive the flu shot. Second, all employees are at risk to spread

212. See Murphy, *supra* note 198.

213. See Memorandum from Blanchard Valley Health System, *supra* note 45; see also Tanner, *supra* note 1.

214. See *supra* Part III.C.1.

215. See, e.g., *Mandatory Influenza Vaccination*, *supra* note 2.

216. *Id.*

217. See *id.*

218. See *id.*

219. See *id.*; see also Memorandum from Blanchard Valley Health System, *supra* note 45.

220. See *supra* Part III.C.1 (discussing *Virginia Mason*, 511 F.3d 908, although the case was ultimately decided on terms and conditions of employment grounds, not discrimination).

the flu regardless of whether they are in a clinical position.²²¹ Even employees in maintenance and administrative positions can come into contact with patients while walking through the halls or through certain responsibilities of their jobs. Also, when an employee receives a flu shot, it reduces the chances that he or she will spread the flu to clinical employees or patients he or she comes into contact with on the job.²²² For the foregoing reasons, health care facilities that implement a mandatory flu shot policy should require all employees to receive the flu shot.

C. A Unionized Health Care Facility Should Review All Collective Bargaining Agreements

Next, the health care facility should review any and all CBAs prior to implementing a mandatory flu shot policy.²²³ As *Virginia Mason Hospital* demonstrates, it is important that a health care facility review its CBA before implementing a mandatory flu shot policy.²²⁴ The health care facility must ensure that it follows all the steps required by the CBA prior to implementing the policy to avoid issues with the union and possible litigation.²²⁵ Since the court of appeals in the *Virginia Mason Hospital* case affirmed the arbitrator's ruling that a mandatory flu shot policy is a term and condition of employment, compliance with the CBA is especially important if the CBA requires that all terms and conditions of employment be negotiated prior to the implementation of the policy.²²⁶

D. A Health Care Facility Should Engage in an Interactive Process When an Employee Refuses the Flu Shot

The National Law Review has also published a list of actions a company should avoid when implementing a mandatory flu shot policy.²²⁷ First, a company should not "refuse to engage in an interactive process with" employees who object to the flu shot.²²⁸ Second, a company should not terminate an employee who refuses the flu shot without engaging in an investigative process to discover whether the employee is objecting for lawful reasons.²²⁹ We will discuss these two in conjunction with one another. The first step in an interactive process is to determine the reason

221. See *Key Facts about Seasonal Flu Vaccine*, *supra* note 22.

222. See Roush, *supra* note 205, at 30.

223. See Murphy, *supra* note 198.

224. See *supra* Part III.C.

225. See *Virginia Mason*, 511 F.3d at 912-13.

226. See *supra* notes 178-179 and accompanying text.

227. See Murphy, *supra* note 198.

228. See *id.*

229. See *id.*

the employee refused the flu shot. One way to do this is to require all employees who refuse to receive the flu shot to decline with a signed writing. Johns Hopkins uses exception forms, which an employee must complete if he or she declines the flu shot for medical or religious reasons.²³⁰ The medical exception form requires a physician to certify that the employee is unable to receive the flu shot due to a medical condition.²³¹ The religious exception form requires an employee to provide the reason he or she is declining the flu shot, and to identify acceptable accommodations that will respect the employee's religious beliefs.²³²

Requiring the written declination has provided additional benefits beyond investigative purposes. The Joint Commission requires, and CMS encourages, health care facilities to report the reasons for declination; by requiring employees to decline in writing, health care facilities can keep and maintain an accurate database of these reasons.²³³ Also, the Chair of the Infectious Diseases Society of America's ("IDSA") National and Global Public Health Committee explained that "facilities that require the written declination for seasonal influenza vaccine have seen dramatic increases in vaccination rates—from 40 percent to 90 percent, [sic] in some cases."²³⁴ The Chair for IDSA's Pandemic Influenza Task Force explained that the signed declination can also be used as a form of education.²³⁵ She further explained, "you are still going to have people decline, and it is absolutely their right to do so. But at least you know by that signature that they have received basic information about the vaccine."²³⁶ Because there are many valuable uses for a written declination, a health care facility should consider adding this as a component of its mandatory flu shot policy.

230. See *Mandatory Influenza Vaccination*, *supra* note 2, at apps. 3-4b.

231. See *id.* at app. 3.

232. See *id.* at app. 4a.

233. See Joint Commission FAQ Page, JOINT COMM'N, <http://www.jointcommission.org/about/JointCommissionFaqs.aspx?CategoryId=32#604> (last visited Oct. 20, 2013) (explaining that reasons for declination must be submitted to the Joint Commission by "Critical Access Hospitals, Hospitals, and Long Term Care facilities"); *Healthcare Personnel (HCP) Influenza Vaccination Summary Reporting in NHSN: Frequently Asked Questions*, CTRS. FOR DISEASE CONTROL & PREVENTION, <http://www.cdc.gov/nhsn/faqs/FAQ-Influenza-Vaccination-Summary-Reporting.html#q28> (last updated Sept. 6, 2013) (explaining that documentation is not required when reporting a declination, and verbal statements suffice to satisfy the reporting requirements).

234. *Infectious Disease Experts Say Health Care Workers Should Receive Flu Vaccine or Decline in Writing*, 14 NURSING HOME REGULATIONS MANUAL NEWSLETTER 4 (Mar. 2007).

235. See *id.*

236. *Id.*

E. A Health Care Facility Should Offer Alternative Solutions to Protect Patients and Employees from the Flu When an Employee Refuses the Flu Shot

In addition to a written declination, the second step that a health care facility can take is to provide alternatives to prevent the spread of the flu. Blanchard Valley Health System in northwest Ohio requires employees who refuse the flu shot to attend an educational program and wear a facemask when working within six feet of a patient during flu season.²³⁷ Many health care facilities also require employees who do not receive the flu shot to wear a facemask during flu season.²³⁸ These alternatives are essentially suitable religious belief accommodations under Title VII, and also reduce the spread of the flu to associates and patients.

V. CONCLUSION

Employees may be subject to discipline, or even termination, if they refuse a flu shot in violation of an employer's policy.²³⁹ To avoid legal ramifications, health care facilities must be diligent in the implementation and execution of mandatory flu shot policies, as there are many protections available to an who refuses for religious and medical reasons.²⁴⁰ Also, a unionized health care facility must ensure it is not in violation of a collective bargaining agreement when implementing a flu shot policy.²⁴¹ If a health care facility is diligent and involves legal counsel in its determinations, it will likely be successful in implementing a flu shot policy that provides great protections to patients and employees.

237. See Denise Grant, *Flu Shots Required for Health Workers*, COURIER (Nov. 1, 2011), http://www.thecourier.com/templates/print.asp?d=110111_story3,2011,Nov,01&c=n; see also Memorandum from Blanchard Valley Health System, *supra* note 45.

238. See, e.g., Memorandum from Blanchard Valley Health System, *supra* note 45; Tanner, *supra* note 1.

239. See *supra* Part I.

240. See *supra* Part IV.

241. See *supra* Part IV.C.