



Bradley Cave

Partner
307.778.4210
Cheyenne
bcave@hollandhart.com

Mandatory Flu Vaccines Land Healthcare Facility In Court

Insight — 02/22/2018

After rescinding a job offer to an applicant, a Michigan healthcare provider finds itself in federal court defending a religious accommodation claim. If your organization requires employees to get flu vaccines, your policy should address how to handle religious objections. Here are details from the complaint that resulted in this recent discrimination lawsuit and steps you should take when facing similar circumstances.

Prospective Employee Suggests Reasonable Accommodation to Flu Shot

According to the complaint filed by the Equal Employment Opportunity Commission (EEOC), Yvonne Bair applied for a medical transcriptionist position in early 2016 with Memorial Healthcare, a non-profit corporation located in Owosso, Michigan. The transcription position would involve working from home, but also required two months of training at Memorial Healthcare's hospital in Owosso at the start of employment.

After a successful interview, Memorial Healthcare offered Bair the position and scheduled her to begin training on April 4, 2016. At her medical exam on March 21, 2016, Bair was informed of the company's mandatory flu vaccine program which required flu shots for those working between December 1 and April 1.

Bair informed Memorial Healthcare that because of her religious beliefs as a follower of Jesus Christ, she was prohibited from injecting or ingesting foreign substances in her body. She instead relied on natural methods for her own health care.

Bair offered to wear a mask during flu season. Apparently, Memorial Healthcare's flu vaccine policy authorized the wearing of masks for those unable to take flu shots for medical reasons. A few days later, the company's Human Resources Manager contacted Bair stating that they would look into reasonable accommodations but pushed back her start date to May 1, 2016. On April 1, the Human Resources Manager informed Bair that the company was willing to let her use a nasal spray as an accommodation. Bair indicated that a nasal spray still wouldn't meet her religious beliefs and again offered to wear a mask. Later that same day, Memorial Healthcare withdrew its job offer to Bair.

EEOC Position

The EEOC asserts that Memorial Healthcare deprived Bair of equal employment opportunities and rejected her because of her religious beliefs. The federal agency seeks a permanent injunction to prohibit

Memorial Healthcare from engaging in any employment practice that discriminates on the basis of religion, an order to require the company to create policies, practices, and programs to provide equal employment opportunities to persons of all religions, and an order to make Bair whole, through an award of back pay, and past and future losses including emotional pain and suffering, as well as punitive damages.

This is not the first time that the EEOC has sued over a mandatory flu vaccine program. In fact, the agency has taken a relatively aggressive stance in pursuing healthcare employers who terminate employees who refuse flu shots for religious reasons. The EEOC urges employers to accommodate employees' religious beliefs as they relate to vaccinations.

Religious Accommodation Requirements

Under Title VII, an employer, once on notice, is required to reasonably accommodate an employee whose sincerely held religious belief, practice, or observance conflicts with a work requirement, unless providing an accommodation would create an undue hardship for the employer. Notably, the undue hardship defense for religious accommodations is far less rigorous than for disability accommodations under the Americans with Disabilities Act. Under Title VII, an employer asserting an undue hardship defense to providing religious accommodations must show that the proposed accommodation poses more than a de minimis cost or burden.

According to the EEOC, administrative costs for an accommodation such as rearranging schedules or recording substitutions for payroll purposes or infrequent payment of overtime will be a de minimis cost and therefore, would not typically constitute an undue burden. Frequent overtime or hiring additional workers to provide an accommodation, however, could be more than de minimis and consequently, an undue burden.

Considerations for Your Mandatory Flu Vaccine Program

If you require employees to get a flu shot each year, be prepared to conduct a case-by-case evaluation of any employee request for a religious accommodation. Engage in an interactive process with the applicant/employee to determine potential accommodations. If you allow employees to wear a mask or take other precautions as an exception to a mandatory flu vaccine program based on medical or other concerns, you should consider extending that exception as a reasonable accommodation for those who object to vaccines for religious reasons. If your policy imposes a deadline for requesting an exception to a mandatory flu shot program, consider extending the deadline as an accommodation should an employee request a religious accommodation after the cut-off date.

As always, document your efforts and your communications with employees who request a reasonable accommodation. And before you fire or otherwise take adverse action against an applicant or employee who objects to your mandatory flu shot policy on religious grounds, be sure you have engaged in the interactive accommodation process and have documented costs associated with all potential accommodations to support

an undue hardship defense.

If you have questions about this issue, please contact Brad Cave at BCave@hollandhart.com or feel free to reach out to the Holland & Hart attorney with whom you typically work.

Subscribe to get our Insights delivered to your inbox.

This publication is designed to provide general information on pertinent legal topics. The statements made are provided for educational purposes only. They do not constitute legal or financial advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the author(s). This publication is not intended to create an attorney-client relationship between you and Holland & Hart LLP. Substantive changes in the law subsequent to the date of this publication might affect the analysis or commentary. Similarly, the analysis may differ depending on the jurisdiction or circumstances. If you have specific questions as to the application of the law to your activities, you should seek the advice of your legal counsel.