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# Influenza Mandates and Religious Accommodation: Avoiding Legal Pitfalls

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# Influenza Mandates and Religious Accommodation: Avoiding Legal Pitfalls

*Dorit Rubinstein Reiss and V.B. Dubal*

**H**igh vaccination rates of health care workers (“HCW”) confer important benefits in harms prevented and costs saved.<sup>1</sup> However, employers requiring annual influenza vaccines need to consider federal (and state) laws that protect employees from religious discrimination. In the past few years, several lawsuits addressing religious discrimination have been filed against employers imposing a mandate. The policies challenged in these cases, and anecdotal discussion with practitioners, suggest there is some confusion about the state of the law. This article first examines how federal law that protects against religious discrimination in the workplace interacts with influenza mandates. It then goes on to discuss what recent lawsuits teach us about religious exemptions to these mandates. We emphasize that in the case of influenza vaccines, employers may not be required to offer a religious exemption. In fact, we argue that offering such an accommodation may increase the health care institution’s risk of liability. We do not review litigation around collective bargaining agreements and the division of roles between employers and employees, which deserve their own treatment.<sup>2</sup>

## **The Justification for Workplace Influenza Mandates:**

The Centers for Disease Control and Prevention’s Advisory Committee on Immunization Practices recom-

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mends that healthcare workers be vaccinated against influenza both for their own protection and that of vulnerable patients.<sup>3</sup> Indeed, a recent review pointed to direct evidence that healthcare workers transmit influenza to patients and that the vaccination of healthcare workers against influenza decreases mortality. The review suggested it may also confer other benefits in reducing illness.<sup>4</sup> A vaccination requirement by employers is thus an effective way to prevent death and illness. Studies confirm that employers who require that healthcare workers (“HCW”) receive an annual influenza vaccine achieve dramatically higher rates of coverage than employers who do not.<sup>5</sup> Other methods of increasing coverage — improving education, making the vaccines easily accessible — are helpful, but to a much lesser degree.<sup>6</sup> Empirical evidence suggests that influenza vaccination rates among health care institutions (hospitals, hospices, nursing home, and other similar facilities) that require healthcare workers be vaccinated have compliance rates above 90%, while health care institutions without such requirements have rates as low as 44.9%. A review of the literature by Wang et. al. confirms that “only an institutional mandate for influenza vaccination proved to achieve the ... objective of vaccinating 90% of H[earth] C[are] P[roviders].”<sup>7</sup>

For these reasons, multiple medical organizations, including the American Academy of Family Physicians, the American Academy of Pediatrics, the American Hospital Association, the American Medical Directors Association, the American Pharmacists Association, and many others, support mandatory influenza vaccination for HCWs.<sup>8</sup> To complement this empirical reality, scholars have also argued that health care institutions are ethically obligated to mandate influenza vaccination of their staff.<sup>9</sup>

## The Legal Framework

Employers have broad power to institute workplace health and safety regulations, and employees cannot unilaterally reject workplace requirements absent a protective statute or judicial doctrine. What specific federal law should hospital employers be concerned about when considering vaccination mandates?

The most important set of laws governing the scope of workplaces rules and regulations are anti-discrimination statutes. The cases we review below allege religious discrimination under Title VII of the Civil Rights Act of 1964, which applies directly to private employers and, with important limits, requires that employers provide religious accommodations.

Constitutional law also provides religious protections, but for two significant reasons, cases challeng-

ing vaccination mandates are much more likely to arise under Title VII than under the First Amendment's free exercise clause. The First Amendment only applies to state actors, and, therefore, does not cover private employers (like most health care institutions). Second, federal jurisprudence limits the application of the First Amendment to laws (and by implication, policies) that are facially neutral — meaning laws that do not explicitly discriminate against any particular minority group.<sup>10</sup> Vaccine mandates are facially neutral; they are not aimed at a religious group, and hence, can withstand that test. Thus, a claim against an employer alleging a First Amendment violation for failure to provide a religious exemption to a vaccine mandate is likely to fail. Also, the litigation history of cases challenging school immunization requirements suggests that if allegations that mandates violate the First Amendment arise, then they will be unsuccessful.<sup>11</sup> State level constitutional and statutory requirements, like a Religion Freedom Restoration Act, may also exist, but our focus here is on federal law applicable to all health care institutions.

Title VII of the Civil Rights Act forbids employers from discriminating against employees based on, among other things, their religion. This prohibition requires that an employer provide “reasonable

### *Reasonable Accommodation*

accommodation” when a work requirement or practice violates an employee’s sincere religious beliefs. Two threshold questions arise in relation to accommodations to influenza mandates: First, what makes a vaccination accommodation “reasonable” under a Title VII? Second, what constitutes a sincere religious belief?

To be reasonable, an accommodation need not be the one preferred by the employee. In fact, the case law suggests that if the accommodation imposes more than minimal costs to the employer, the employer does not have to provide it.<sup>12</sup> As we address separately below, given the high burdens of influenza vaccine accommodations, health care institutions may not be required to provide a religious exemption at all. To date, no good, viable substitute for influenza vaccination prevents transmission of the flu. Masks, the most commonly utilized alternative, have substantial problems. Evidence suggests that mask compliance is limited and that its effectiveness in preventing transmission is mixed.<sup>13</sup> Enforcing a continuous requirement like masks is clearly more onerous and less effective compared to a one-time vaccination. The potential costs of preventable influenza cases include missed workdays and sick or dead patients — both significant burdens for hospital employers.<sup>14</sup>

### *Sincere Belief*

The Equal Employment Opportunity Commission (EEOC) — the government agency tasked with enforcing Title VII — defines religion as “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.”<sup>15</sup> The jurisprudence suggests that religious protection under Title VII is much broader than merely a belief in God. A recent case suggests, for example, that it could be interpreted to include a vegan worldview.<sup>16</sup> However, protection from religious discrimination is not unlimited, as discussed in the next sections. To justify an accommodation, the belief must be “sincerely held.”<sup>17</sup> In making this evaluation, a hospital employer may consider factors that undermine the sincerity of the employee’s religious beliefs, such as an earlier request with a secular reason or behavior inconsistent with regard to the belief.<sup>18</sup>

While the EEOC’s interpretation is not authoritative — courts have and do independently interpret Title VII — its definition is important in two ways. First, the EEOC uses this definition in deciding whether to

sue employers. Because the EEOC is a repeat player with decades of experience interpreting federal anti-discrimination laws, the lawsuits brought by the agency may be a warning sign to health care institutions that there is a real problem. Second, courts may accord deference to reasonable agency interpretations of their own statutes.<sup>19</sup>

#### *Is a Religious Exemption Desirable or Necessary?*

Since the risk of litigation also exists with a religious exemption in place — and, as we describe, may increase if the religious exemption does not meet legal requirements — health care institutions should seriously consider whether it is desirable or necessary to offer a religious exemption at all. Title VII applies whether or not the hospital has an official religious exemption. An employee may request accommodation even without formal exemptions, and the hospital will need to consider what is required under federal law. Offering a formal religious accommodation can have the advantage of institutionalizing procedures and guidance. On the other hand, creating an official exemption can be seen as embracing or legitimizing refusal. Importantly, it may also increase the visibility of refusal and lead to more exemption requests, including by employees who may otherwise not ask for them. Policies can be put in place to address a request for accommodation without creating a formal exemption. The question then becomes whether or not the Civil Rights Act of 1964 requires accommodating an employee who states a religious opposition to influenza vaccines — or whether an accommodation is otherwise desirable or necessary.

During the 2009 H1N1 epidemic, the EEOC issued guidelines regarding influenza mandates in the workplace that may be interpreted to require a religious exemption.<sup>20</sup> Specifically, the guidelines stated that

...under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, *the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII* ('more than *de minimis* cost' to the operation of the employer's business, which is a lower standard than under the ADA).<sup>21</sup> (our italics)

This language, however, does not mean that the EEOC interprets the law to require a religious exemption. The document reiterates that an exemption is only required if it is not an "undue hardship." The bar for what constitutes an undue hardship is low. Our read-

ing is that employers have a strong case that the risks posed by influenza transmission from an unvaccinated hospital employee constitute more than a *de minimis* burden. As we discuss above, masks are not an effective precaution as a substitute, given the mixed evidence on their effectiveness and the difficulty to enforce constant wearing.<sup>22</sup> Reassigning an employee is an option, but is not always feasible. A hospital that concludes that a religious exemption imposes a real burden can likely justify not providing one, though it would still have to consider such requests to comply with Title VII.

Religious freedom is important in the United States, among other things because of historical discrimination against religious groups.<sup>23</sup> However, Title VII has never required unlimited and unrestricted accommodation of religious beliefs because other interests also matter. In the health care institution context, a HCW's desire not to vaccinate against influenza increases the risk of influenza transmitted to fellow employees and patients. This great risk — in a profession that is already highly regulated — is why ethics scholars support mandates.<sup>24</sup> The risk to life is not eliminated or curtailed because the employee's reason not to vaccinate is religious. Even when weighed against the iniquities of religious discrimination, the burden on the hospital — and its patients — likely constitutes an undue hardship.

Despite a strong legal argument that health care institutions need not provide religious accommodations in this context, we found that ironically, all the health care institutions that faced Title VII litigation challenges did, in fact, provide a religious exemption. In some contexts, public (though not private) health care institutions may see no other choice. Religious Freedom Restoration Acts in some states require an exemption.<sup>25</sup> In the cases we review, however, the health care institutions seemed to act out of respect for religious values, or a belief — supported by some — that an exemption is required.<sup>26</sup> HCW complaints focused on the *application* of these accommodations, not on the lack of one. We examine these cases as cautionary tales for health care employers.

#### **Implementing an Existing Religious Exemption: Pitfalls and Solutions**

In 2016, the EEOC has sued three health care institutions for alleged religious discrimination regarding religious exemptions for influenza mandates. Two of these cases settled, and one remains open.<sup>27</sup> Two other cases brought by individual employees were decided against the employees.<sup>28</sup> In 2018 the EEOC brought another case against a hospital, and referred one more to the Department of Justice, which brought

suit against the hospital.<sup>29</sup> The recent involvement of the EEOC, in particular, helps shed light on how the regulatory agency thinks about Title VII liability as it relates to exemptions. Together, these recent lawsuits provide four key lessons in Title VII compliance for employers.<sup>30</sup>

#### *What is a Sincere Religious Belief?*

The first lesson is that health care institutions may be held liable for their evaluation of what constitutes a “sincere religious belief.”<sup>31</sup> A recent consent decree between the Saint Vincent Hospital in Erie, Pennsylvania and the EEOC, underscored that an employer cannot limit religious exemptions to people belonging to an organized religion that prohibits vaccines.<sup>32</sup> Similarly, in *EEOC v. Ozaukee County*, a nursing home was

approach has three important advantages. It allows the hospital to examine the sincerity of the religious belief while avoiding the pitfall of discriminating between organized religions and other sincere religious beliefs. It also reduces the risk of illegally judging the relative merit of a religious belief.<sup>36</sup> Notably, litigation from the school exemptions context teaches us that a member of a religion that supports vaccines — like Catholicism or Judaism — may still claim exemption based on personal religious beliefs against vaccines.<sup>37</sup> This approach helps to address these potential variations and sources of sincerely held religious beliefs.<sup>38</sup>

Of course, not every belief qualifies as religious. In *Fallon v. Mercy Catholic Medical Center*<sup>39</sup> the 3<sup>rd</sup> Circuit examined the limits of what constitutes “religious,” and suggested a clear and useful test. The

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sued because a requirement for an exemption was a letter from a clergy person. Because the HCW did not belong to an organized religion and could not get such a letter, she was denied the exemption.<sup>33</sup> Such limitations discriminate against people who are not part of an organized religion but who hold sincere religious beliefs against vaccines.

We agree that providing equal treatment to people with similarly sincere beliefs, whether or not their beliefs find their roots in an organized religion, is appropriate, and that any other approach would be discriminatory. But we also understand why health care institutions would be inclined to use this approach, which gives them an objective tool to assess “sincerity” that is easier to use than an examination of an employee’s heart and mind. Nevertheless, this approach is clearly impermissible.<sup>34</sup>

A reasonable alternative may be to ask an employee requesting an exemption to write out and explain the beliefs behind the refusal (as suggested in Opel<sup>35</sup>). This

three-part test adopted by the 3<sup>rd</sup> circuit (drawing on *Africa v. Commonwealth of Pennsylvania*<sup>40</sup>) included the following inquiries: (1) does the religion address fundamental and ultimate questions, (2) is it a comprehensive belief system, and (3) is it more than an isolated teaching, as often recognized by formal and external signs.<sup>41</sup>

The 3<sup>rd</sup> circuit concluded that the plaintiff, Mr. Fallon, failed this test because his beliefs did not address fundamental matters, but rather were based on disbelief of the scientific consensus that the vaccine is safe. The court wrote, “the basis of his refusal of the flu vaccine — his concern that the flu vaccine may do more harm than good — is a medical belief, not a religious one.” The decision also pointed out that the one moral commandment Mr. Fallon relied on—that he should not do harm to his body — was “an “isolated moral teaching”; by itself, this belief was not a comprehensive system of beliefs about fundamental or ultimate matters.”<sup>42</sup>

*When is a Religious Accommodation “Reasonable”?*

A second lesson gleaned from recent cases is that if a hospital provides religious accommodations, it may face litigation over what is “reasonable.” In *Robinson v. Children’s Hospital Boston*, a HCW claimed that her religion opposed vaccines and asked for an accommodation. The hospital attempted to locate a position outside of patient areas for the HCW. When no such position was found, the employer treated her termina-

other employees. It also promised to inform employees more clearly of the influenza mandate policy, including exemptions.<sup>43</sup>

Ultimately, the core issue in *Mission Hospital* was the differential treatment of employees seeking exemption from the mandate and employees not seeking an exemption. Employees who intended to get vaccinated, but who missed the deadline, were offered a grace period to comply.<sup>44</sup> Those who missed the deadline and intended to request an exemption, were not offered the same grace period. The EEOC used this treatment as a yardstick by which to evaluate whether there was underlying religious discrimination.

In *Memorial Hospital*, a similar case involving disparate treatment — the latest to date — the EEOC brought suit against a hospital in Michigan which rescinded an employment offer to a medical transcriptionist who claimed religious opposition to influenza vaccines.<sup>45</sup> The basis of the claim was that the prospective employee offered to wear a mask during influenza season. While the hospital refused her accommodation, it did allow other employees with medical problems to wear a mask.

Thus, a third lesson is that different treatment of employees requesting religious exemptions compared to employees seeking medical exemptions or unexempt employees may trigger EEOC scrutiny. That does not mean employers cannot make distinctions. It just means that health care institutions need to be mindful and make sure distinctions can be well justified. At least two justifications may support, for example, distinguishing between employees seeking religious exemptions and those seeking medical exemptions. First, legally, the framework for seeking medical and religious exemptions is different — while the standard for undue burden under Title VII is very low, as described, the standard for refusing exemptions under the Americans With Disabilities Act, which would govern medical exemptions, is much higher.<sup>46</sup> On the merits, too, employers may justifiably see medical exemptions as less potentially common than religious ones. The acknowledged medical barriers to receiving flu vaccines are very few, and the number of healthcare workers in that category should be minute, but any number may claim a religious exemption. Health care institutions need to be aware, however, that disparate treatment among employees can lead to closer scrutiny from the EEOC and potentially increase the chances of litigation.

**Our review of recent lawsuits suggests important lessons for how health care institutions can properly administer religious exemptions and avoid some of the mistakes associated with litigation. Based on our review, we also maintain that any religious exemptions to flu mandates granted a HCW with patient contact may, one, pose an unreasonable burden to the healthcare facility and thus not be required under federal laws, and two, open the employer up to additional legal scrutiny.**

tion as a resignation, which allowed her to apply to open positions in the future. After costly litigation, the federal district court ruled for the hospital, finding that the employer had gone above and beyond its duty under Title VII. *Robinson* thus also suggests that efforts to reassign an employee to another position can be a reasonable accommodation, even if such efforts are not successful.

*When is Disparate Treatment a Problem?*

Note that health care institutions may face litigation even when policies, on their face, appear reasonable, especially if there is any disparate treatment between employees seeking an exemption and those not treating an exemption. In *EEOC v. Mission Hospital*, for example, the EEOC claimed that the hospital’s September 1<sup>st</sup> deadline to request an exemption from an influenza vaccine mandate was unreasonable, even though the deadline corresponded with flu season. The court denied summary judgment, and the parties settled, with the hospital compensating the employees — though not reinstating them — and agreeing to offer employees seeking a medical and religious exemption the same grace period that it offered all

### What about HCWs without Patient Interaction?

Finally, a fourth important lesson from recent litigation is that health care institutions should carefully evaluate the benefits of vaccine or masking requirements for employees who do not interact with patients, and consider whether a requirement that these employees vaccinate or mask is appropriate. For such employees, accommodation may be considered a *de minimis* burden, since the risk of harm is relatively remote. In an open case, *EEOC v. Baystate*, a HCW with religious objections to vaccines was terminated after she did not wear the required mask during work hours. She then sued. The EEOC's complaint on her behalf emphasized that the employee was not working in areas in which she had contact with patients. We do not know how the court will rule, but health care institutions should consider whether a masking requirement (or even a vaccination requirement) for employees who do not interact with patients can be justified, substantively and legally.

### Conclusion

Reducing influenza in healthcare facilities is an important public health goal. Workplace mandates are an effective tool to achieve this, and being mindful of the law can make implementing these requirements easier and more effective. While hospital employers can never completely insulate themselves from legal challenges associated with such mandates, understanding the contours of recent lawsuits can reduce the risk of litigation and increase the chances of defeating any claims that are brought. Our review of recent lawsuits suggests important lessons for how health care institutions can properly administer religious exemptions and avoid some of the mistakes associated with litigation. Based on our review, we also maintain that any religious exemptions to flu mandates granted a HCW with patient contact may, one, pose an unreasonable burden to the healthcare facility and thus not be required under federal laws, and two, open the employer up to additional legal scrutiny.<sup>47</sup>

### Note

Dorit Reiss owns regular stock in GSK.

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  28. Opel, Sonne, and Mello, *supra* note 16, provide an overview of a larger number of cases, going back further in time. Their conclusions are not in tension with ours, though they do not seem to support not providing a religious exemption.
  29. *EEOC v. Memorial Healthcare*, No. 2:18-cv-10523 (E.D. Mich. filed Feb. 13, 2018) (brought by the EEOC) [hereinafter Memorial]; *United States v. Ozakee Cty.*, No. 2:18-cv-00343-DEJ (E.D. Wisc. filed Mar. 6, 2018). Both cases are ongoing.
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  33. *Ozakee Cty.*, No. 2:18-cv-00343-DE.
  34. *Dalli v. Bd. of Educ.*, 358 Mass. 753, 267 N.E.2d 219 (1971). See also Reiss, *supra* note 11.
  35. Opel, Sonne, and Mello, *supra* note 16.
  36. *Saint Vincent Health Ctr.*, 2016 WL 7438696.
  37. *Berg v. Glen Cove City Sch. Dist.*, 853 F. Supp. 651 (E.D.N.Y. 1994).
  38. Health care institutions choosing that route may want to be on the lookout for internet sites offering pre-prepared documents to submit for the purpose, the use of which may suggest lack of sincerity.
  39. 877 F.3d 487, 490-491 (3d Cir. 2017).
  40. 662 F.2d 1025, 1032 (3d Cir. 1981).
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  42. *Fallon*, 877 F.3d at 490-491.
  43. *EEOC v. Mission Hosp.*, No. 16-CV-00118, 2018 WL 401505 (W.D. N.C. Jan. 12, 2018).
  44. Opel, Sonne, and Mello, *supra* note 16.
  45. See Memorial, *supra* note 19.
  46. Najera and Reiss, *supra* note 2, at 391-394.
  47. On January 18, 2018 the Department of Health and Human Services announced the creation of a New Conscience and Religious Freedom Division in its Office of Civil Rights (*available at* <<https://www.hhs.gov/about/news/2018/01/18/hhs-ocr-announces-new-conscience-and-religious-freedom-division.html>> (last visited July 20, 2018); see also N.M. Glasser and K. Smith, “A Shot in the Arm for Employer Vaccine Requirements for Health Care Workers,” *National Law Review*, January 29, 2018. The Division’s first proposed rulemaking makes it clear that its goal is to tighten protections for workers seeking religious accommodation (Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 83 Fed. Reg. 3880 (proposed Jan. 26, 2018) (to be codified at 45 C.F.R. pt. 88), *available at* <<https://s3.amazonaws.com/public-inspection.federalregister.gov/2018-01226.pdf>> (last visited July 20, 2018)). It is too early to know what, exactly, the department would do, and whether it would affect the situation in relation to influenza mandates. We live this for future examination, both because this is outside the scope of the paper and because it is not yet clear whether it would affect the legal situation, and in which ways.

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