

## EMPLOYER LIABILITY FOR FLU INFECTION

Urgent message: While urgent care centers benefit from exaggerated seasonal demand when a flu epidemic strikes, the risk is that the center's own employees will get infected by contagious patients, incur medical costs, and lose time from work when they're needed most.

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### Introduction

*It's not uncommon for an urgent care nonclinical employee (eg, an hourly front desk receptionist) to become infected with the flu and miss work due to their illness. The employee may blame her employer for the illness—demanding she not pay for medical treatment and that she also not be penalized for using “paid time off” (which is both vacation and sick pay benefits). She claims that during flu season she was exposed to many patients with flu and that the facility was also contaminated with virus. This employee, however, didn't receive a flu shot, which was mandatory for all employees.*

*How would you proceed if presented with this issue?*

In 2017, the Centers for Disease Control and Prevention reported that 80,000 people died as result of the flu.<sup>1</sup> However, many of these deaths could have been prevented. As Johns Hopkins notes, “[r]equiring that our physicians and staff who enter clinical areas receive an annual flu vaccine protects our patients, visitors, coworkers and families. Making the flu vaccine mandatory is a step that has already been taken by many of the healthcare systems in Maryland and by many hospitals throughout the nation.”<sup>2</sup>

This article will look at the potential liability for an urgent care owner in exposing its employees to influenza, and the consequences of requiring employees to receive a mandatory flu shot.

### Employer Liability

Generally, “when an employer actually undertakes to furnish aid or assistance to an ill employee, he must exercise reasonable care in rendering such aid and assistance.”<sup>3</sup> Thus, if an employee attempts to respond to a medical emergency but does so inadequately, the employer and the

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employee may be subject to a claim for having negligently rendered emergency medical services.<sup>4,5</sup>

According to the Occupational Safety and Health Administration, federal regulations stipulate that employers must provide a safe workplace for their employees. Further, employers have a duty to protect their employees from recognized hazards.<sup>6</sup> Nonetheless, there's no specific duty that mandates specific actions an employer must take to protect employees from an infectious disease.<sup>7</sup>

For example, a Florida employee alleged that while she worked for her employer, a coworker tested positive for tuberculosis. The employee alleged that the employer was on notice about the positive tuberculosis test, but that the employer failed to take any action to protect the employee, her family and friends, the employer's customers, and the general public from exposure to tuberculosis.<sup>8</sup> A federal district court held that the plaintiff hadn't stated an actionable claim because the State of Florida did not recognize a cause of action for a negligent transmission of a contagious or infectious disease.<sup>8</sup> The court stated that the employer could not be held liable for negligence or tort.<sup>8</sup>

#### *"Occupational Disease" or "Workplace Exposure" Liability*

One argument to be made on behalf of an employee is that the flu is an "occupational disease" that arises from the conditions to which a specific type of worker is exposed. However, the disease typically must be produced as a *natural incident of a particular occupation*, like asbestosis from asbestos removal.<sup>9</sup>

However, causation and liability are difficult to prove because it is nearly impossible to know where an employee contracted the illness. It's equally as likely that an urgent care employee contracted the flu at a church service on Sunday as it at work on Monday morning. Because influenza is so common and prevalent in society, a plaintiff will be faced with an impractical task of showing with sufficient evidence that indeed they contracted the flu at work.<sup>10,11</sup>

Indeed, as one court stated, "ordinary diseases of life" are not compensable because they develop without exposure to a hazard particular and peculiar to the workplace.<sup>12</sup> The flu would be an ordinary disease of life because "the employer has not placed the employee at a greater risk of contracting the disease at work. Because the risk of contracting the flu is ubiquitous, the flu is not an occupational disease."<sup>13</sup>

Although an employer may be liable for the spread of a contagious disease through the negligence of its employees acting within the scope of their authority, again, an afflicted employee would have to show she was injured as the proximate result of such negligence.<sup>14</sup> Even so, when examining the scenario of an urgent care employee who has the flu (or presents with flu systems), some states, like Florida do not recognize a cause of action for negligent transmission of a contagious or infectious disease.<sup>15</sup>

#### **"Mandatory" Flu Shot**

Although the CDC recommends that all healthcare workers receive an annual flu vaccine, individual hospitals and health systems have some latitude to create and implement policies based on their own strategies within state law.<sup>16-18</sup>

OSHA acknowledges that healthcare workers are at high risk for contracting influenza through their exposure to high risk patients.<sup>19</sup> The CDC has classified healthcare workers as a high priority group for yearly vaccinations that are highly effective at preventing influenza. In addition to healthcare workers being in danger of contracting influenza, they can also spread the illness to their family and to patients.<sup>19</sup>

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Again, employers have a duty to create a safe work environment, and encouraging flu vaccination for their healthcare employees is one way of doing this. Employees increase their risk of contracting the flu if they decide to decline vaccination.<sup>20</sup> Influenza vaccination has been determined to be an important protection for healthcare workers because they have a greater risk of exposure. In addition, healthcare workers can pass the virus to vulnerable patients and take the infection home to their families.<sup>20</sup>

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One study revealed that from 2013 to 2017, the number of hospitals in the United States requiring annual influenza vaccinations for healthcare personnel significantly increased.<sup>21</sup> The increase was driven by non-Veterans Affairs (VA) hospitals, more than two-thirds of which had mandatory influenza vaccine policies in place in 2017.<sup>22</sup> In the study, all 368 hospitals with mandatory influenza vaccination policies also provided staff with options to decline vaccination, although acceptable reasons for not receiving the vaccine varied. Overall, 96.2% of hospitals let healthcare personnel decline vaccination for medical contraindications, 78% allowed healthcare personnel to decline vaccination for religious reasons, and 12.8% of hospitals did not require a reason.

More than 80% of hospitals with mandatory vaccination policies required unvaccinated healthcare personnel to use a mask when providing care to patients during an influenza season. But nearly 75% of hospitals had no set penalties for noncompliance with hospital vaccination policies.<sup>22</sup>

One of the authors of the study, M. Todd Greene, MD, PhD, assistant research scientist in the division of hospital medicine at the University of Michigan Medical School, stated, "Studies have shown that vaccination mandates, coupled with an option of declining vaccination in favor of wearing a mask, are most effective in reaching high percentages of vaccination."<sup>22</sup>

One critic, however, noted that the study did not define the term "mandate." This, she said, may skew the overall results of the research.<sup>23</sup>

Duluth, Minnesota-Essentia Health decided to switch in 2017 from a voluntary to a mandatory flu vaccine policy after studying the experiences of other institutions across the country.<sup>24</sup> Under the old policy, almost all Essentia employees participated as directed, with about 82% answering "yes" and getting the flu vaccine. Under the new policy, Essentia raised its flu vaccination rate to nearly 98% for the current season, including staff involved in direct patient care, vendors, and volunteers. However, the success didn't come without a fight, as three unions filed legal challenges—and Essentia fired roughly 50 of its more than 14,000 employees for their failure to comply.<sup>25,26</sup>

In the same vein, several cases have upheld the decision not to extend unemployment benefits to employees who were terminated for refusing to receive a flu shot.<sup>27,28</sup> In a recent Minnesota case, the administrative law judge was found not to have erred in its determination that the employee's proffered beliefs for refusing vaccination were not sincerely held religious beliefs.<sup>27</sup>

## Analysis

The front desk worker who contracted the flu allegedly from her employment at an urgent care would have an uphill battle trying to secure compensation from her employer. While employers have a duty to protect their employees from recognized hazards, arguably the employer has satisfied this obligation by offering a flu shot and by keeping the facility clean.

OSHA again counsels that the flu vaccination is highly effective, and adverse effects are rare.<sup>28</sup> It's common for employers in healthcare settings to make the flu vaccine conveniently available to employees during their normal work hours.<sup>28</sup>

However, if an urgent care operator is going to implement a mandatory flu vaccine policy, it must be cognizant of some important issues. Mandating a flu shot could violate worker rights due to religious exceptions. Failing to account for this could leave the employer at risk for a lawsuit for

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unlawful religious discrimination and failing to reasonably accommodate an employee's religious belief.<sup>29</sup>

An employer should review requests for religious exemptions in light of the EEOC's guidance,<sup>30</sup> as well as medical exemption requests (where an employee is allergic to the vaccine), and the Americans with Disabilities Act (ADA).<sup>31</sup>

Further, urgent care owners should create a policy for workers and clients who become ill in the workplace. The policy should address how to deal with workers and patients who may be ill with the flu and communicate it to all workers. Consult the CDC's *Seasonal Flu Information for Businesses and Employees* for information about how to develop this kind of policy.<sup>32</sup> Look at how to isolate urgent care employees (if practical) from others or give them a surgical mask to wear.<sup>33</sup> Encourage employees to stay home if they experience a respiratory illness of any sort, and to always practice proper hand hygiene, regardless of their vaccination status.<sup>31</sup>

An urgent care can incentivize employees through several nonmandatory tools, like providing free and convenient access to vaccination, issuing small monetary and nonmonetary incentives, or actively promoting the benefits of vaccination through education and frequent regular reminders.

### Takeaway

Urgent care owners should enjoy a reasonable level of comfort of not being sued for flu contagion by its employees if it takes reasonable steps to ensure a safe working environment.

If the urgent care is adopting a policy of mandatory flu shots, it should bear in mind the accepted legal exceptions in refusing to receive a shot.

Finally, legal counsel should be engaged to review the policy because state laws vary on constitutional rights and privacy.<sup>34</sup>

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