NOVEMBER 2009

BALANCING PATIENT AND EMPLOYEE INTERESTS: HEALTH CARE EMPLOYER RESPONSES TO THE H1N1 PANDEMIC

The outbreak of the H1N1 virus along with this year's seasonal flu have left many health care employers considering what steps they should take to protect employees and patients. This is especially true in light of President Obama's recent declaration of a "national emergency" in response to the H1N1 pandemic. Employers face a number of choices in protecting their patients and staff, from vaccination and respiratory protection to modification of paid time off ("PTO") and attendance policies. Further, employers must stay current on ever-changing state and federal regulations. In the unionized environment, certain work rule and job requirement changes may be considered mandatory subjects of bargaining under the National Labor Relations Act ("NLRA"), and rights and obligations may be outlined in the parties' collective bargaining agreement. This *Commentary* discusses these issues and provides suggested options for employers to consider in response to this national emergency.

CURRENT REGULATORY STANDARDS AND GUIDANCE

Vaccines. The Center for Disease Control ("CDC") and the Occupational Safety and Health Administration ("OSHA") have not made seasonal flu or H1N1 vaccines mandatory, but they have released recommendations that encourage health care employers to support and provide vaccines for employees. On October 14, 2009, the CDC released its "Interim Guidance on Infection Control Measures for 2009 H1N1 Influenza in Healthcare Settings, Including Protection of Healthcare Personnel." The CDC states that health care and emergency service personnel are a priority group for the 2009 H1N1 vaccine; further, vaccines should be offered to health care providers free of charge and during working hours. The CDC encourages vaccine "campaigns" with incentives for those who accept the vaccine and also promotes the use of declination forms for those refusing the shot.

While OSHA has not yet released requirements, it released a statement on October 14, 2009, stating that a compliance directive, which will closely model the CDC's guidance, is soon to come. The state of California already requires, by statute, health care employees either to get an annual flu shot or to sign a declination form. Cal. Health & Safety Code § 1288.7. In a letter dated October 1, 2009, the California Department of Health informed hospitals that the law applies equally to the H1N1 vaccination, as it becomes available. Massachusetts recently passed emergency regulations, implemented by the Massachusetts Department of Health, that require licensed hospitals to ensure that all employees are vaccinated against both seasonal flu and H1N1, although employees may refuse the shots and sign a declination form. Other states have similar provisions; Alabama law requires hospitals to establish vaccine requirements for employees consistent with CDC and OSHA recommendations and at a minimum "will require annual influenza vaccinations" (Ala. Adm. Code § 420-5-7), and New Hampshire requires hospitals and residential care facilities to provide "consenting employees" annual influenza vaccinations subject to availability (N.H. Rev. Stat. § 151.9-b).

On August 13, 2009, the New York Department of Health announced emergency regulations requiring covered health care workers to receive the seasonal flu vaccine and the H1N1 vaccine. Three lawsuits were filed challenging the regulations, and in two cases, temporary restraining orders were granted. Most recently, however, on October 22, 2009, the New York Health Commissioner suspended the mandatory flu shot requirement due to limited supplies. Shortly thereafter, the New York state court injunctive litigation was withdrawn. The Commissioner continues to urge hospitals and other health care facilities to encourage employees to be vaccinated against the seasonal flu and H1N1.

Members of the medical community support mandatory vaccination of health care employees. For example, on November 4, 2009, The New England Journal of Medicine published a perspective, *Mandatory Vaccination of Health Care Workers*, in which the author opined that a state's interest in protecting patients outweighs individuals' interest in privacy and personal autonomy. On November 10, 2009, the National Patient Safety Foundation released a statement in support of mandatory influenza vaccination of health care workers "to protect the health of patients, health care workers, and the community."

Respirators and Masks. In its recently released guidance, the CDC suggests the use of a number of measures to protect health care employees and patients, including the use of respiratory protection. For employees in close contact with patients who have, or are suspected to have, H1N1, the CDC recommends respirators that are "at least as protective as a fit-tested disposable N95 respirator." OSHA recently released a fact sheet on respirators compared to surgical masks and continues to opine that respirators offer the best protection for workers who are in close contact (within six feet or less) of patients with flu-like symptoms. OSHA has current standards for respirators, located at 29 C.F.R. § 1910.134, mandating that respirators "shall be provided by the employer when such equipment is necessary to protect the health of the employee." Under this regulation, the employer shall "select and provide an appropriate respirator based on the respiratory hazard(s) to which the worker is exposed and user factors that affect respirator performance and reliability."

Both agencies recognize that N95 and comparable respirators have historically been, and continue to be, in short supply. As the CDC explained, appropriate selection and use of respirators, along with source control engineering and administrative measures, is key during the current epidemic. When a shortage exists, the CDC suggests shifting to prioritized respirator mode where respirators are available for personnel most at risk, including those attending aerosol-generating procedures on patients with confirmed or suspected cases of H1N1. Further, the CDC recommends the provision of surgical masks when respirators are not available.

Many states also have respiratory guidelines and standards. For example, California's standards (Title 8 C.C.R. § 5199) require the use of an N95-level respirator in a number of situations where employees are exposed to airborne infections. California's Division of Occupational Safety and Health recently published an enforcement policy stating that surgical masks should be provided when respirators

are unavailable to employees providing care to H1N1 suspected and confirmed cases.

While the governmental preference for respirators over surgical masks is allegedly based on scientific studies, recent published reports have found no significant difference in the rate of seasonal flu contraction in nurses wearing surgical masks compared with those wearing respirators in routine health settings. *See* "Surgical Mask v. N95 Respirator for Preventing Influenza Among Health Care Workers, A Randomized Trial," November 4, 2009, edition of the *Journal of the American Medical Association* ("JAMA"). Another study, performed through the University of New South Wales, resulted in the same conclusion. At the Infectious Disease Society of America's annual meeting on October 31, 2009, the authors of the original study that supported the preference for N95 respirators retracted their earlier report, finding it analytically flawed. The authors announced, consistent with the JAMA study, that there is no significant difference in the rate of seasonal flu contraction between N95 respirators and surgical masks. Based on these latest studies, the CDC and OSHA may well revise their position on this topic.

JOINT COMMISSION REQUIREMENTS

The Joint Commission releases standards that hospitals must meet in order to maintain a safe environment of care. When planning compliance with these regulations, it is important to take influenza-related concerns into consideration. One standard, which requires hospitals to plan activities to minimize risks, requires hospitals to maintain written management plans and to specifically focus on a plan to manage the safety of everyone who enters the facilities. Another requires hospitals to take action to minimize or eliminate identified safety risks within the hospital environment. The Joint Commission has issued guidelines on the transmission of influenza in its *Influenza Vaccination, Providing a Safer Environment for Health Care Personnel and Patients Through Influenza Vaccination, Strategies from Research and Practice* (2009). Hospitals must also collect information to monitor conditions in the hospital environment; within this standard, hospitals are specifically required to monitor, report, and investigate employees' occupational illnesses and injuries.

EMPLOYER IMPLEMENTATION, LITIGATION, AND UNION RESPONSES

Health care employers across the country are addressing H1N1 and seasonal flu issues through various means, including vaccination policies, modification of PTO and attendance policies, and more flexible Family and Medical Leave Act ("FMLA") procedures. Some health care systems are requiring employees with direct patient contact to be vaccinated as a condition of employment, excluding only those with religious or medical exemptions. Others are requiring employees to choose between a vaccine, anti-viral drugs, or wearing a surgical mask.

Labor unions have also publicized alleged concerns about influenza-related issues. For example, the California Nurses Association ("CNA") initially announced that it would hold a one-day strike on October 30, 2009, in order to protest "poor readiness" by several hospitals in confronting H1N1. CNA thereafter cancelled its strike notice and soon afterward announced a contract settlement with a large California-based health care system, trumpeting a new joint labor-management task force to address pandemics. Various locals of the Service Employees International Union ("SEIU") have filed suit against hospitals in California and Nevada over policies requiring employees either to be vaccinated or to wear surgical masks while in patient care areas. SEIU alleges the policies violate provisions in their collective bargaining agreements with the hospitals. To date, SEIU has not been successful in enjoining the policies. Further, there have been various arbitration proceedings involving hospitals and their unions regarding influenza vaccination policies and procedures.

Groups opposed to vaccinations are encouraging supporters to file litigation against mandatory vaccination policies. For example, a group calling itself the "Vaccine Injury Coalition" has used its web site to distribute templates for lawsuits to challenge vaccination policies.

PUBLIC POLICY CONSIDERATIONS

Hospitals that face challenges over their H1N1 and flu vaccination policies should note that health care workers are routinely subjected to special health and safety requirements given the special needs of the patient care environment. For example, hospital policies (and often state laws) require employee medical exams as a condition of employment. Although employees may sometimes object to such exams, courts have held that hospitals have a strong interest in protecting the health of patients and their employees by preventing the spread of infectious disease.

OSHA regulations may also support employers' actions in this regard. OSHA imposes a general duty on each employer to "furnish 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." 29 C.F.R. § 1977.1(a). Although H1N1 and seasonal flu have not been declared "recognized hazards" by OSHA, employers could soon be faced with a duty to protect their employees from the flu.

BARGAINING OBLIGATIONS FOR UNIONIZED EMPLOYERS

Significant questions for unionized health care employers are whether the employer has an obligation to bargain about its vaccination policy with the labor union and whether the employer's collective bargaining agreement imposes restrictions on the employer's ability to unilaterally introduce a new or revised vaccination policy.

The status of a health care employer's bargaining obligations under the NLRA with regard to employer vaccination and other flu-related policies is currently under review by the National Labor Relations Board ("NLRB" or "Board"). A 2006 decision by an NLRB administrative law judge (2006 WL 2647513 (NLRB Div. of Judges 2006)) held that a hospital's policy requiring vaccinations or signed declinations by employees was not a mandatory subject of bargaining, because patient care protocols are within the core managerial decisions of hospital employers. That decision has, however, been appealed to the NLRB in Washington, D.C., where President Obama's new appointees are widely expected to issues decisions less favorable to employers than did the Board in the prior administration.

Existing labor agreements may provide employers with clear management rights that may override bargaining obligations under the law. A clear contractual management right to issue or revise patient care policies should provide more leeway to health care employers to promulgate new influenza policies without having to bargain with the union. On the other hand, labor contracts may impose obligations even where the NLRA does not. For example, one arbitrator held that a hospital's mandatory vaccination policy violated a collective bargaining agreement, because the contract was interpreted by the arbitrator to require bargaining with the union over all "conditions" of employment. The employer's subsequent effort to overturn the arbitrator's award was unsuccessful. *Virginia Mason Hospital v. Washington State Nurses Association*, 511 F.3d 908 (9th Cir. 2007). An employer that refuses to bargain with a union about a policy that allegedly violates an applicable labor agreement risks an injunction proceeding to prevent the employer from proceeding with the policy pending arbitration over the dispute and also other potential remedies.

Whether a particular policy will require advance bargaining with the union depends on several factors, including the relevant contract language, past practice, and whether the policy at issue affects a mandatory subject of bargaining. Of course, if the policy is adopted merely to comply with applicable law (for example, California's law requiring vaccination or a declination form), the employer should be exempt from having to bargain over the decision to implement the policy.

Finally, even if a *decision* to implement a flu-related policy may not require bargaining, the employer should still notify in advance union leadership of any policies it intends to implement in this area that may affect bargaining unit employees. Absent a bargaining waiver in the applicable labor contract, a hospital may still need to bargain with the union over the *effects* of such a policy.

RECOMMENDATIONS AND OPTIONS FOR CONSIDERATION

In light of the above, employers should consider the following when implementing a new or revised vaccination policy:

- Ensure that the organization keeps up to date on the latest guidance from CDC, OSHA, and other applicable agencies on this quickly evolving area. Implement all applicable federal, state, and regulatory requirements.
- Educate staff regarding CDC, OSHA, and other directives. Continue to provide updated information as it becomes available.
- Encourage employees with flu-like symptoms not to report to work, and revisit how the employer's time and attendance policy is to be applied during the epidemic.
- Consider modification or suspension of policies regarding the use of PTO and other leave in order to allow caregivers to take time off if they become infected with influenza.
- Evaluate policies regarding vaccination for both seasonal flu and H1N1, including whether state-law standards would permit a mandatory vaccination policy and/or a policy requiring that employees who refuse to be immunized sign a declaration. The consequences an employee faces for not complying with such a policy should be clearly anticipated. For example, employers should keep in mind that if a policy requires mandatory time off without pay, this might affect the FLSA status of exempt employees.
- Implement incentives for employees to be vaccinated and continue to educate employees about the overwhelming data that establishes vaccinations are safe and that they significantly improve patient safety and overall employee health. See the Joint Commission's *Influenza Vaccination, Providing a Safer Environment for Health Care Personnel and Patients Through Influenza Vaccination, Strategies from Research and Practice* (2009).
- Be cautious in considering identification or labeling of employees to reflect vaccination status.
- For caregivers who choose not to be vaccinated, consider having such employees wear ventilators or masks or be transferred to non-patient care areas.
- When vaccines are not made mandatory, consider having those who decline the vaccination sign a declination form.
- Work with contractors and other nonemployees to encourage vaccination.
- Provide respirators for employees in areas of high risk of exposure, in compliance with OSHA regulations. To the extent that a sufficient number of such respirators are not available, have a priority plan in place.
- Consult with medical staff leadership to obtain appropriate recommendations and gain their support for any policy that is to be implemented.
- Prospectively write job descriptions to require, as a condition of employment, that employees (absent medical or religious exemption) become vaccinated for various illnesses including H1N1 or, in the alternative, wear respirators or masks when in caregiver roles with certain patient populations.

In addition to the above, unionized employers should consider the following:

- Notify in advance union leadership of changes in hospital policies and procedures regarding the influenza epidemic, including H1N1 policies, and attempt to secure union leadership support for such policies.
- Depending on contractual restrictions and past practice, employers may need to meet and discuss, or arguably even meet and bargain, over issues regarding immunization policies, respiratory protection, and attendance policies before implementation.
- Establish appropriate timelines for any bargaining that occurs, consistent with the urgency of the situation and the applicable bargaining obligations under the law. Assistance from the Federal Mediation and Conciliation Service may be helpful.
- Even if a vaccination policy is not a mandatory subject of bargaining (an issue currently under review by the National Labor Relations Board), be prepared to engage in "effects" bargaining regarding the policy.

LAWYER CONTACTS

For further information regarding this developing area, please contact your principal Firm representative or one of the lawyers listed below. General email messages may be sent using our "Contact Us" form, which can be found at www.jonesday.com.

Robert L. Ford
+1.415.875.5740
rlford@jonesday.com

G. Roger King
+1.614.281.3874
rking@jonesday.com

F. Curt Kirschner
+1.415.875.5769
ckirschner@jonesday.com

Christopher T. Scanlan
+1.415.875.5746
cscanlan@jonesday.com

Elizabeth L. Dicus
+1.614.281.3873
eldicus@jonesday.com

Michael S. Ferrell
+1.312.269.4226
mferrell@jonesday.com