
Coates' Canons Blog: Flu Vaccines for Health Care Workers

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Article: <https://canons.sog.unc.edu/flu-vaccines-for-health-care-workers/>

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It's flu shot season in North Carolina. Flu vaccine clinics are underway in physicians' offices, health departments, drug stores, some workplaces, and even the North Carolina State Fair. Unlike last year, the vaccine supply appears to be plentiful and is not being restricted to high risk groups. The **Centers for Disease Control has recommended flu vaccine for everyone over the age of six months**, except for individuals who have a medical contraindication. This year, a single shot (or nasal spray, if you're healthy and between the ages of 2 and 49) provides protection against H1N1 and two other types of flu that are expected this season.

While flu vaccine is recommended and available for almost everyone this year, there are still certain groups for whom public health officials consider vaccination particularly important. Health care workers (HCWs) constitute one of these groups. For years, public health officials and numerous health care provider professional associations have urged HCWs to take the vaccine, but vaccination rates among HCWs have consistently hovered in the 40% range. Some professional associations and commentators have responded to this low rate by recommending mandatory flu vaccination for HCWs. (See, for example, the **American Academy of Pediatrics' recent position statement** on this issue.) Although some of the recommendations—and some mandates—have been around for several years, the 2009 H1N1 pandemic brought increased activity around this issue. Unsurprisingly, legal challenges followed.

Vaccine mandates have been imposed on HCWs in two ways: either by a state statute or regulation mandating vaccination of workers in certain health care facilities; or by a health care facility imposing the requirement upon its own workers as a condition of employment.

State Laws Requiring HCW Vaccination

At the height of the summer 2009 H1N1 outbreak, New York's State Health Department adopted an **emergency regulation** requiring workers with patient contact in certain health care settings to be vaccinated against both H1N1 and seasonal flu. The regulation required employers to provide the vaccine at no charge to the covered workers and provided an exemption for any HCW for whom the vaccine was medically contraindicated. Several HCWs covered by the regulation promptly sued, arguing that the mandate violated their 14th amendment substantive due process rights. In October 2009, a **state court issued a temporary restraining order** to prevent the regulation from taking effect. Within a few days, the state **withdrew the regulation**, maintaining that it was constitutional but that 2009's vaccine shortage made implementation impracticable. The cases were subsequently dismissed.

I was surprised by the state court's TRO. A long line of cases, dating back to the US Supreme Court's 1905 decision in **Jacobson v. Massachusetts**, have upheld various vaccine mandates against a variety of constitutional challenges. It appeared to be settled law that public health officials may impose vaccination requirements on the population at large, or particular subsets of the population, so long as the requirements bear a real and substantial relationship to the protection of the public health. For that reason, I would still expect a substantive due process challenge to a state-imposed vaccination mandate to fail if a case progressed to consideration of the merits.

In North Carolina, there are two statutes (both enacted in 2000) that require flu vaccinations for health care workers in adult care homes (**G.S. 131D-9**) and nursing homes (**G.S. 131E-113**). Each law provides three exemptions from the requirement: a medical-contraindication exemption, a religious-objection exemption, and an exemption for employees who refuse the vaccine "after being fully informed of the health risks of not being immunized." No North Carolina law requires flu vaccine for HCWs in other health care settings. There are no reported cases of challenges to either of the laws imposing the flu vaccination requirement.

Vaccination as a Condition of Employment

Sometimes a health care facility will impose a vaccination requirement as a condition of employment. It is not unusual for a facility to require HCWs to be vaccinated against diseases such as rubella or polio, and many such requirements are long-standing. However, requirements for flu vaccine appear to have been more recent.

It is difficult to track employer-initiated mandates, but according to **one report**, at least 25 health care facilities in 17 states had imposed flu vaccine mandates by 2009. Several lawsuits have been filed as a result, but the reported cases involve alleged violations of collective bargaining agreements and therefore may not resonate much in North Carolina. In the leading case, **Virginia Mason Hospital v. Washington State Nurses' Association**, the Ninth Circuit held that the vaccine mandate could not be unilaterally imposed by the hospital but was subject to collective bargaining.

It is difficult to get a handle on the extent to which North Carolina health care employers may be requiring flu vaccination for workers, but at least one major health care system in the state **established and publicized** such a requirement in 2009. Wake Forest University Baptist Medical Center's policy requires employees, students, trainees and volunteers to receive the flu vaccine annually. The policy states that the vaccine will be provided by WFUBMC free of charge, and it allows for medical and religious exemptions. It's quite possible other health care employers in North Carolina are imposing similar requirements.

To date, there have been no reported cases of challenges to any employer-initiated vaccine mandates in North Carolina. However, there is a N.C. Court of Appeals case upholding the worker's compensation claim of a UNC employee who was injured by a vaccine that was required as a condition of her employment in a research lab. **Fu v. UNC-Chapel Hill**, 188 N.C. App. 610 (2008). The case addresses only the worker's comp issues, not the validity of the employer's vaccination requirement. (Incidentally, the required vaccine was for Venezuelan equine encephalitis. This is not a vaccine that is typically required by employers of HCWs—it apparently was indicated in this case because of the nature of Dr. Fu's research.)

What, if anything, does all of this mean for North Carolina local government agencies? For example, suppose a health department wished to mandate flu vaccine for HCWs as a condition of employment. Could it do so? I think it could. I can't point to a law expressly permitting or prohibiting such a mandate, but it would be consistent with long-standing practices regarding other vaccines. Collective bargaining agreements wouldn't be an issue. However, I would advise an agency considering such a requirement to provide exemptions for medical contraindications and religious objections. The federal Equal Employment Opportunity Commission has indicated in a pandemic flu planning guidance document that such exemptions may be required to accommodate employees' rights under the Americans with Disabilities Act and Title VII of the Civil Rights Act. That document is available **here** (scroll down to question 13). The document also provides some information about how employees who qualify for exemptions could be accommodated.

If you have additional thoughts about this issue or are aware of HCW vaccine mandates in North Carolina, please share them in the comments section of this blog, or send me an email at moore@sog.unc.edu.

Links

- www.cdc.gov/flu/protect/keyfacts.htm
- pediatrics.aappublications.org/cgi/reprint/peds.2010-2376v1
- www.health.state.ny.us/press/releases/2009/2009-09-24_health_care_worker_vaccine_daines_oped.htm
- www.nytimes.com/2009/10/17/nyregion/17vaccine.html
- cityroom.blogs.nytimes.com/2009/10/22/paterson-rescinds-flu-vaccination-rule/?scp=4-b&sq=flu+vaccine+mandate&st=nyt
- caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=197&invol=11
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_131D/GS_131D-9.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_131E/GS_131E-113.html
- www.ncbi.nlm.nih.gov/pmc/articles/PMC2882617/
- caselaw.findlaw.com/us-9th-circuit/1459666.html
- www.wfubmc.edu/News-Releases/2009/Wake_Forest_Baptist_Makes_Flu_Vaccinations_Mandatory.htm



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 - www.eeoc.gov/facts/pandemic_flu.html