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Briefly

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A SHOT IN THE ARM: MANDATORY IMMUNIZATION POLICIES

Cathy Shuck

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According to the U.S. Department of Health and Human Services (HHS), nearly 111 million workdays are lost each year due to the flu. The Centers for Disease Control (CDC) recommends that everyone over six months of age receive an annual flu vaccination, with limited exceptions for persons who are severely allergic to the vaccine or components of the vaccine, such as eggs. And the top strategy the CDC recommends for fighting flu in the workplace is for employers to host or sponsor a vaccination clinic.

Many employers do encourage their employees to receive a flu shot. Some employers even pay for the shot. But what about employers who *require* employees to receive a flu shot?

For example, East Tennessee Children's Hospital rolled out a mandatory flu immunization policy in 2013. All employees, physicians, volunteers, and students working at the hospital must receive an annual flu vaccination or obtain an exemption. Additionally, vendors who regularly enter the hospital during flu season are required to be vaccinated or wear a mask.

Nationwide, there is a trend towards mandatory flu immunization among employers that serve vulnerable populations, such as children, the sick, and the elderly. Similarly, athletic trainers, massage therapists, and other workers who are in the business of keeping their clients healthy may be required to have an annual flu shot. Although human resource professionals are typically not thought of in the same category as health workers, human resource professionals who are involved in contact with members of vulnerable populations, or with the agencies and institutions that serve them, could find themselves faced with a mandatory vaccination requirement.

Are such mandatory vaccination policies legal? Yes: in the absence of any specific law to the contrary, an employer can generally require vaccination as a term and condition of employment. Two points of caution, though, are that employers must accommodate employees who cannot comply with an immunization requirement due to a disability protected by the Americans with Disabilities Act (ADA) or due to a religious belief protected by anti-discrimination law.

ADA

The ADA requires employers to provide a reasonable accommodation to an employee if the employee cannot comply with an employer's policy due to a disability. Thus, employers with mandatory vaccination policies must consider whether an employee with an allergic reaction to the flu shot, or for whom the flu shot poses a threat or difficulty due to the employee's disability, must accommodate the employee. An accommodation might be excusing the employee from receiving a flu shot but instead requiring the employee to wear a face mask.

Religious Accommodation

The more interesting question is whether an employee is entitled to a reasonable accommodation when the employee's religious beliefs interfere with mandatory vaccination. Title VII of the federal Civil Rights Act of 1964 protects employees and applicants from discrimination because of religion and defines religions as "all aspects of religious observance and practice, as well as belief." Employees are entitled to a reasonable accommodation of their "religious" beliefs unless the accommodation would work a hardship on the employer.

As to whether a particular belief is entitled to protection, the EEOC's regulations provide that religion includes *moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views. . . .*" Moreover, "[t]he fact that no religious group espouses such beliefs or the fact that the religious group to which the individual

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professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee."

Courts have generally agreed with the EEOC that whether a religion is "traditional" or even "recognized" is not determinative as to whether Title VII's protections apply. Rather, it is the sincerity of the employee's belief, and the fact that it is part of a belief system (instead of a mere personal preference) that is determinative.

This nebulous definition of religion has resulted in employees claiming that they should be exempted from mandatory vaccination policies due to beliefs such as veganism. For example, in *Chenzira v. Cincinnati Children's Hospital Medical Center*, a hospital employee alleged that she was a vegan and that taking the flu vaccine would violate her belief system. She applied for a religious exemption from the immunization policy but the hospital denied it and discharged her. The hospital moved to dismiss the employee's Title VII claim on the grounds that veganism is not protected by Title VII, but the district court refused to dismiss the claim.

The court held that the employee had alleged sufficient facts to support her claim for religious protection. The court noted that employee had submitted an essay entitled "The Biblical Basis of Veganism" and had cited biblical passages supporting her beliefs when she requested a religious accommodation from the hospital. Note that at this stage the court was not ruling on whether the employee *actually did* subscribe to veganism "with a sincerity equating that of traditional religious views," but rather that she had made a plausible claim that was entitled to proceed. Unfortunately (for those of us interested in such things), the case settled and the court did not have the opportunity to decide whether the vegan was actually protected by Title VII.

Conclusion

The take-away is that encouraging rather than requiring flu vaccination is probably sufficient for most employers in most settings. For those employers with a compelling reason to require vaccination, the policy should include an exemption procedure so that employees with a plausible disability or religious belief have the opportunity to apply for an exemption.

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REBECCA (BECKY) BRAKE MURRAY is Of Counsel in the Knoxville, Tennessee office of the Firm, which she joined in March 2010. Becky has been a litigation attorney since 1985, practicing civil litigation with an emphasis in employment law and general liability litigation in state and federal courts. Becky received her undergraduate degree from the University of Michigan with a certificate in physical therapy. She attended Case Western Reserve University where she obtained a Masters Degree in Health Sciences Education. Becky worked as a physical therapist in Detroit and Harrisburg, Pennsylvania before moving to Cleveland, Ohio where she taught in the Physical Therapist Assisting program at Cuyahoga Community College. She attended Cleveland-Marshall College of Law in Cleveland, Ohio, where she was an editor of the Cleveland State Law Review. Becky received her law degree from the University of Tennessee. She is a past president of the Tennessee Defense Lawyers Association and served on the Board of Governors for the Knoxville Bar Association for three years.

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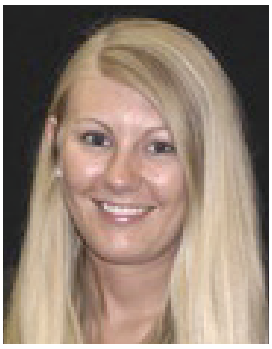
RECORDS RETENTION: TO KEEP OR NOT TO KEEP



Ashley R. Griffith

"While no single policy can meet every organization's unique needs regarding document management, some general guidelines should be considered."

The decision as to whether an employer should retain records is fairly complicated given the number of laws employers must consult. For instance, and just to a name a few, Title VII of the Civil Rights Act of 1964 ("Title VII"), the Fair Labor Standards Act, the Occupational Safety and Health Act ("OSHA"), and the Employee Retirement Income Security Act ("ERISA") all have certain retention requirements. In addition, certain federal statutes establishing civil and employment rights, such as the Family and Medical Leave Act ("FMLA"), the Genetic Information Non-Discrimination Act ("GINA") and the Americans with Disabilities Act ("ADA"), require information, medical records, and related information to be maintained on separate forms, kept in separate employee medical files, and treated as confidential medical records. Obviously, these laws can be overwhelming for employers.

Because federal and state employment laws create something of a "patchwork" of record-keeping requirements, for simplicity's sake many employers opt to keep personnel-related records, including hiring, performance, and promotion records, as well as payroll records, until four years after the employee has terminated because this will meet or exceed the required coverage in most cases, with several exceptions. For example, benefits records should be kept until six years after termination, as ERISA requires records to be retained for six years after filing. In addition, OSHA-mandated records should be maintained for five years, with the exception of records relating to toxic exposure, which must be maintained for 30 years. Finally, payroll records and workers' compensation records are subject to individual state laws, and employers should consult these laws before implementing a records retention policy.

Alternatively, in the interest of simplicity, the employer could decide to retain all personnel records for more than four years. In any event, it is important to have a policy addressing record retention. While no single policy can meet every organization's unique needs regarding document management, some general guidelines should be considered. Below are a few questions and issues employers should consider when drafting such a policy:

a. Ease of administration. Although the required retention period for your records likely varies from 1 year to 30 years or longer, consider whether it would be simpler to divide records into broad categories and choose the longest-applicable retention period. For example, you might consider simply retaining all personnel records for six years following termination. Some records, such as tax and business records, might be placed into a "permanent" retention category. Records such as e-mails with no business purpose could be deleted annually.

b. Where are the records? This is a deceptively simple question. "Records" include all pieces of paper created or received by your company, as well as "electronically-stored information," which includes e-mails, databases, presentations, documents, spreadsheets, and the like. Additionally, consider whether company records all reside on a single server or group of servers, or if they reside on individual computers (including employees' home computers) or Blackberries and the like. Finally, interpretations of the federal rule requiring preservation of electronically-stored information extend the scope of your preservation duty to things like text messages, Tweets, instant messaging, and web pages and postings.

c. How will you ensure that records are retained? This is the key to an effective policy. Employers must create a system for filing, whether in hard copy or electronically, all records to be retained. You likely already have workable filing systems in place for your hard copy records. Online and electronic information tends to be more problematic. One method that some companies use is to create e-mail accounts for different types of records, e.g. administrative, personnel, financial, customer, etc. Employees are then instructed to copy the appropriate e-mail account (or send files to the account) whenever the file and/or correspondence falls into a category that must be retained. So for example, all customer correspondence might be copied to an e-mail account. All financial and/or tax information might be copied to an account. All personnel data would be copied to an account. Obviously, the keystones in such a system are (1) getting employees to use it consistently, and (2) buy-in from the I.T. department to maintain the appropriate e-mail accounts and archive the information.

d. How will employees be trained on the policy? Records retention must be the responsibility of everyone who creates or receives records. Consider how you will "roll out" the procedures, and how you will ensure that they are followed.

e. Who are the key personnel who will implement and maintain the policy? As mentioned above, I.T. and key administrative personnel must be on board to keep the policy functioning.

f. How will records be archived, backed-up, and accessed if necessary? Again, I.T. is the key component in creating a workable system for protecting archived electronic records, as well as ensuring that they can be retrieved with a minimum of inconvenience should they be necessary. As far as paper records, consider whether you should use (or are using) off-site storage and/or conversion of paper documents to electronic storage (e.g., pdfs).

g. When will records be culled for destruction, and by whom? Someone must be in charge of reviewing records on a regular basis—preferably twice per year, but at the very least once per year—and culling those records to be destroyed.

h. Method of destruction. Consider how documents will be destroyed once the retention period expires. Most hard copy records should probably be shredded; electronic copies should probably be destroyed in a manner that prevents a third party from reconstructing them.

Keep in mind that retention periods are based on regulatory or statutory requirements and are considered minimum retention periods, which are the shortest period of time a record must be held. As indicated above, there are numerous of laws requiring retention of certain records and the following chart is only intended to be used as a general guide and overview to some of the more common records maintained by most business. Employers are encouraged to obtain the advice of counsel regarding specific laws' time periods applicable to their circumstances.

Item	Examples	Retention Period
Pre-Employment Information - applicants not hired	Application, Drug Screen, Reference checks, Interview Notes	4 years
Pre-Employment Information - applicant hired. ** Note: pre-employment physical records should be kept separately.*	Application, Drug Screen, Reference Checks, Interview Notes	4 years after termination
I-9 Forms	Form plus photocopy of identification document(s)	1 year after termination / minimum of 3 years
Payroll information	Weekly wages, pay rate, place of employment	7 years
Benefit records	Insurance enrollment forms	6 years
Health and Safety records	Workers' compensation claim information; OSHA records	5 years, 7 years if employee returns to work; 30 years if hazardous exposure
OSHA Forms 300, 301, 301A	Logs and posting of incidents/summary of injuries	5 years from year of posting
FMLA records	Medical information to support leave; to be kept separate from personnel records	Required to keep 3 years from the date the leave ended, but should be kept the same length as general employee records
General employee personnel records	Performance evaluations, disciplinary documentation	4 years after termination (minimum; 7-10 years is generally better practice)
COBRA Notice / HIPAA Certificate of Group Coverage		6 years after termination
Payroll	Pay journal, supporting documentation	7 years
Employment Taxes	Returns, quarterly reports, supporting documentation	4 years required; 15 years recommended
Other Taxes		Permanent (recommended)
Unemployment Insurance	Generally, payroll information	7 years
Employee Benefit Plans		6 years+