

Wednesday, March 20, 2013

Dear Honorable Members of the Public Health Committee, State of Connecticut:

Residents of Connecticut, INCLUDING HEALTHCARE WORKERS, should not be subject to state mandated injection of the flu vaccine into our bodies as a condition of our employment. The attached letter by expert attorney on vaccination law, Alan Philips, outlines studies which clearly call into question the idea that the flu vaccine is effective against the prevention of seasonal flu. Even the highest "authorities" are publishing statistics this year with low percentage rates of efficacy. And, if healthcare workers, both nurses and physicians, are objecting to the flu vaccine, and we are considered "the experts", why then does this continue?

The pharmaceutical interests in widespread use of the vaccine must be considered when reading studies. Every day pharmaceuticals are a topic of news with newly found harmful side effects and dangers to the public. Just last week the public was notified of the harmful side effects of Z-pack, once considered safe. The same with the over prescribing of all antibiotics, and the side effects of Demerol, certain birth control pills, Ambien and Tylenol. The list is long.

However, my objection is not one of efficacy and safety. My objection is one of complicating the basic right of US and CT citizens to practice religious freedom and be gainfully employed. Does the state of CT want to pass a law that first does not show clear results toward the safety end it seeks, and secondly one that does not honor federal law by not providing protection of religious freedom of citizens.

Does the state of Connecticut want and need to get in bed with Medicine and Pharmaceutical companies to maintain the Public Safety of our state residents? INDEED NOT. It is not necessary to make flu vaccination of health care workers a law. Even if one subscribes to the faith-based belief (because this is not a practice firmly proven by unbiased scientific research) that vaccinations are effective it is unjust to put mandatory flu vaccination into law.

This practice is not only questionable due to the inefficacy of the flu vaccine it is in direct violation of personal rights of employees. I am an RN and I am CLEAR that Medicine is being raised to the level of a Religion in CT and across the US. The language used by those who condemn employees who choose not to receive the flu vaccine sounds similar to religious fanatics who condemn others that do not have the same religious beliefs. Hospitals are places of Medical business and place their FAITH in the belief system of MEDICINE (even when not firmly rooted or supported by science). Hospitals are also places of Nursing business and our realm (among many other tasks) is those of good hygiene, patient advocacy, and honoring our patients cultural and spiritual beliefs while caring for their WHOLE PERSON. We nurses (and physicians) deserve the same rights as those we advocate for our patients. And more personally, I act in accordance with FAITH IN GOD regarding the immune system and welfare of my body.

This proposed law, ESPECIALLY WITHOUT INCLUDING ALLERGIC OR RELIGIOUS EXEMPTIONS, IS IN DIRECT VIOLATION OF MY RIGHT FOR RELIGIOUS FREEDOM. The State of CT offers protection by law to resident families by offering religious exemption to vaccinations for school entry. While some of our hospitals are private and can create policies that include or not include religious exemptions, ALL OF THEM RECEIVE FEDERAL FUNDING, and are thereby held to law of our federal government--the second amendment protection of religious freedom. While I am not sure that hospitals are legally required to offer religious exemptions, they are legally required to allow them if an employee requests it. Why then does the State of CT want to make law based on a practice-belief that does not allow for religious freedom--further complicating the right of US and CT resident-citizens to practice religious freedom?

I STRONGLY URGE YOU TO LET THIS BILL DIE IN COMMITTEE AND EVEN FURTHER TO SUPPORT FUTURE BILLS Prohibiting Employers from Requiring Mandatory Flu Shots.

Sincerely,

Christy D'Aquila, RN

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October 25, 2012

LEGAL OPINION LETTER

Christy D'Aquila
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Regarding: Religious Exemption to Immunizations in the Workplace

Dear Ms. D'Aquila:

I am writing to document your right under federal law to refuse immunizations in the workplace due to your sincerely held religious beliefs opposed to immunizations. After discussing your religious beliefs with you, and having reviewed your written statement of beliefs opposed to immunizations, I am convinced that your beliefs qualify for protection under federal law, without the support of a religious official, as detailed below.

My experience with healthcare workers nationally suggests that many hospital administrators are unfamiliar with the law in this area; e.g., they don't realize that their failure to accommodate you could result in a federal investigation and potential liability for them. So, I recommend that you provide a copy of this letter along with your statement of religious beliefs opposed to immunizations when requesting the exemption.

LEGAL ANALYSIS

I. Vaccine Mandates: Policy or Law?

Most mandatory employee vaccines in the U.S. are required by the employer, and not state law. A few states have statutory medical exemptions for healthcare workers. Two states offer religious and medical exemptions for employees (Maryland and Maine); one offers medical, religious and philosophical exemptions (Maine).¹ Regardless, the federal law cited below applies. Even where a state requires vaccines for healthcare workers and offers no exemption, federal law supersedes the state law mandate.

II. Title VII of the Federal Civil Rights Act of 1964 and Religious Accommodation.

Title VII makes it "unlawful . . . for an employer . . . to . . . discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

¹ Centers for Disease Control and Prevention, Vaccines & Immunizations, State Immunization Laws for Healthcare Workers and Patients, <http://www2a.cdc.gov/nip/StateVaccApp/statevaccsApp/default.asp>

individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. Employers are required to accommodate their employees' religious beliefs and practices, unless the employer "demonstrates that he is unable to reasonably accommodate an employee's . . . religious observance or practice without undue hardship on the conduct of the employer's business." 42 U.S.C. 2000e(j). In addition, it is unlawful for employers "controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his . . . religion . . . in admission to, or employment in, any program established to provide apprenticeship or other training." 42 U.S.C. § 2000e-2(d). So, the right to refuse vaccines in the workplace extends to college students doing clinical rotations in local healthcare facilities as well.

As many hospitals have Title VII or other similar policies in place allowing employees to refuse immunizations for religious reasons, there can be no doubt that hospitals can accommodate employees' religious objections to immunizations, generally. More specific support comes from several sources, including:

A. As to flu vaccines specifically, a 2010 review of the flu vaccine literature by the Cochrane Collaboration, an independent, international consortium of medical researchers, issued a WARNING stating that "reliable evidence on influenza vaccines is thin but there is evidence of widespread manipulation of conclusions..." The review also found that "vaccine use did not affect . . . working days lost" and "had no effect on hospital admissions or complication rates."²

B. The widely accepted herd immunity theory tells us that so long as most in a population are immune, all are protected.

C. According to the CDC, 5% - 15% of vaccinated persons do not develop immunity,³ while according to JAMA, student exemption rates run around 1% - 2.5%.⁴ So, there are far more non-immune vaccinated persons than exempt persons. Furthermore, the CDC tells us that non-vaccinated persons may develop natural immunity, and without necessarily developing symptoms.⁵ So even where immuno-compromised patients are concerned, there is no medical justification for excluding the occasional exempt employee from working with even these patients, unless the hospital is testing *all* relevant employees, vaccinated or not, to determine their immune status. Bottom line: Vaccination status is not a reliable indicator of immune status.

² Vaccines for preventing influenza in healthy adults, <http://www2.cochrane.org/reviews/en/ab001269.html>

³ Centers for Disease Control and Prevention, Vaccines and Immunizations, Misconception #2. The majority of people who get disease have been vaccinated, <http://www.cdc.gov/vaccines/vac-gen/6mishome.htm>

⁴ Non-medical Exemptions to School Immunization Requirements, The Journal of the American Medical Association, <http://jama.ama-assn.org/content/296/14/1757.full>

⁵ Centers for Disease Control and Prevention, Vaccines and Immunizations, Glossary, "Asymptomatic infection: The presence of an infection without symptoms. Also known as inapparent or subclinical infection." <http://www.cdc.gov/vaccines/about/terms/glossary.htm>

D. The AMA and the CDC endorsed non-mandatory flu vaccine policies during the 2009-2010 swine flu pandemic.^{6,7} Clearly, these agencies contemplated at least some non-vaccinated employees, even during a declared pandemic.

E. A recent study revealed that flu vaccines are 60% effective. However, the 60% figure was the “relative” risk reduction (rounded up); the “actual” risk reduction was a trivial 1.5%.⁸ Accordingly, flu vaccines are of questionable benefit.

F. A recent study revealed that vitamin D supplements protect against the flu better than flu shots.⁹

Given the above, it is clear that hospitals can, and therefore must, reasonably accommodate their employees’ religious objections to vaccines.

III. Equal Employment Opportunity Commission (EEOC) Agency and Regulations.

The Equal Employment Opportunity Commission (EEOC) is the federal agency “responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person’s . . . religion...” or “because a person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.” EEOC regulations state: “After an employee or prospective employee notifies the employer . . . of his or her need for a religious accommodation, the employer . . . has an obligation to reasonably accommodate the individual’s religious practices.” 29 CFR § 1605.2 (c)(1). The EEOC agency itself said, during the recent 2009-2010 swine flu pandemic, that “*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...*”¹⁰ [emphasis added] The EEOC’s position was echoed at the Department of Health and Human Service’s flu.gov website: “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*

⁶ AMA meeting: No flu shot mandate for doctors; hand sanitizer pushed, <http://www.ama-assn.org/amednews/2009/11/23/prsd1123.htm>

⁷ Vaccine News and Commentary from the University of Pennsylvania Centers for Bioethics, <http://blog.vaccineethics.org/2010/06/cdc-declines-to-endorse-mandatory-flu.html>, citing 75 Fed. Reg. 35497 (June 10, 2010)

⁸ Flu Shots, Fosamax and Pharmaceutical Fakery: The Common Use of Misleading Statistics in the Medical Literature, Gary G. Kohls, M.D., Dec. 3, 2011, <http://www.thepeoplesvoice.org/TPV3/Voices.php/2011/12/03/flu-shots-fosamax-and-pharmaceutical-fak?tempskin=basic>

⁹ Vitamin D Proves Better Than Flu Vaccine, health freedom alliance, March 16, 2010, <http://healthfreedom.org/2010/03/16/vitamin-d-proves-better-then-flu-vaccine/>

¹⁰ The U.S. Equal Employment Opportunity Commission, PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT, III. B. 13., http://www.eeoc.gov/facts/pandemic_flu.html, citing Equal Employment Opportunity Comm’n, EEOC Compliance Manual Section 12: Religious Discrimination 56-65 (2008), <http://www.eeoc.gov/policy/docs/religion.pdf>

cost” to the operation of the employer’s business...)¹¹ As these statements were posted during a pandemic, it is clear that hospitals must accommodate their employees’ religious-based objections to routine immunizations, generally.

IV. Qualifying Religious Beliefs.

The Office of Legal Counsel of the U.S. Equal Opportunity Employment Commission provided information to me personally in a letter dated March 5, 2012,¹² in response to a formal Request I made to the EEOC Chairman pursuant to 29 C.F.R. § 1601.91 on February 7, 2012. In that Request, I sought clarification on a list of questions concerning healthcare workers’ right to refuse mandatory vaccines in the workplace. With regard to what beliefs qualify for protection under Title VII, the Office of Legal Counsel explained:

The EEOC has addressed this question extensively in its *Guidelines on Discrimination Because of Religion*, 29 C.F.R. Part 1605,¹³ and the *Compliance Manual, Section 12: Religious Discrimination* (2008).¹⁴ The Commission and courts have consistently found that Title VII defines religion very broadly to include not only traditional, organized religions, but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others. Furthermore, an employee’s belief or practice can be “religious” under Title VII even if the employee is affiliated with a religious group that does not espouse or recognize that individual’s belief or practice, or if few – or no – other people adhere to it. *See, e.g., Commission Guidelines*, 29 C.F.R. § 1605.1 (“The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.”); *Compliance Manual* at 6-12; *Welsh v. United States*, 298 U.S. 333, 343 (1970) (petitioner’s beliefs were religious in nature although the church to which he belonged did not teach those beliefs); *accord Africa v. Commonwealth of Pa.*, 662 F.2d 1025, 1032-33 (3d Cir. 1981); *Bushouse v. Local Union 2209, United Auto., Aerospace & Agric. Implement Workers of Am.*, 164 F. Supp. 2d 1066, 1076 n.15 (N.D. Ind. 2001) (“Title VII’s intention is to provide protection and accommodation for a broad spectrum of religious practices and beliefs, not merely those beliefs based upon organized or recognized teachings of a particular sect.”).

¹¹ *May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?*, FLU.GOV, <http://answers.flu.gov/questions/4766>

¹² EEOC Informal Discussion Letter, http://www.eeoc.gov/eeoc/foia/letters/2012/religious_accommodation.html

¹³ <http://www.gpo.gov/fdsys/pkg/CFR-2011-title29-vol4/xml/CFR-2011-title29-vol4-part1605.xml>

¹⁴ <http://www.eeoc.gov/policy/docs/religion.html>

The Office of Legal Counsel referenced further the *Compliance Manual's* explanation that Title VII protections extend even to those who profess no religious beliefs. Protected religious beliefs include theistic beliefs—those that include a belief in God—but also non-theistic “moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views,” “ultimate” ideas about “life, purpose, and death.”

Still further clarification comes from federal legal precedent defining First Amendment boundaries for state vaccine religious exemption laws, which includes the following cases:

1. *Sherr and Levy vs. Northport East-Northport Union Free School District*, 672 F. Supp. 81, 98 (E.D.N.Y., 1987), which held that the exemption should be offered to all who “sincerely hold religious beliefs. . .”
2. *Farina v. The Board of Education*, 116 F. Supp.2d 503, 507 (S.D.N.Y. 2000) (citing *Sherr and Levy vs. Northport East-Northport Union Free School District*, 672 F. Supp. 81, 91 (E.D.N.Y., 1987)), which held that “[t]he beliefs need not be consistent with the dogma of any organized religion, whether or not the plaintiffs belong to any recognized religious organization;”
3. *Mason v. General Brown Cent. School Dist.*, 851 F.2d 47 (2nd Cir. 1988), which held that “[i]t is sufficient if the belief ‘occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.’” (quoting *United States v. Seeger*, 380 U.S. 163, 166, 85 S.Ct. 850, 854);
4. *Lewis v. Sobel*, 710 F. Supp. 506 (S.D.N.Y. 1989), which held that the defendant had “violated [the plaintiff’s] First Amendment right to free exercise of religion by denying the exemption,” *id.* at 507, and “awarded [money] damages . . . [for the] violation of their First Amendment right to free exercise of their religion.” *Id.* at 517;
5. *Lewis v. Sobel*, 710 F. Supp. at 515 (quoting *Allanson v. Clinton Cent. School Dist.*, No. 84-174, slip. op. at 15 (N.D.N.Y. May 7, 1984)), holding that the court “need only determine that a sincere religious belief underlies [the applicant’s] present claims” (i.e., past vaccines or previously different religious beliefs do not automatically prevent the exercise of a present exemption); and
6. *Berg v. Glen Cove City School Dist.*, 853 F. Supp. 651, 654 (E.D.N.Y. 1994) (quoting *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 2689, 49 L.Ed.2d 547 (1976)), which held that “[t]he loss of First Amendment Freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”

In sum, the scope of federally protected religious beliefs is quite broad.

V. Employer Scrutiny of Employees’ Religious Beliefs.

The section below, also taken directly from the EEOC Office of Legal Counsel’s February 2012 letter, provides clear insight on the very limited extent to which employers may scrutinize employees’ religious beliefs:

The *Compliance Manual* explains in pertinent part:

Because the definition of religion is broad and protects beliefs and practices with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely-held religious belief. If, however, an employee requests religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief or practice, the employer would be justified in seeking additional supporting information.

* * *

When an employer requests additional information, employees should provide information that addresses the employer's reasonable doubts. That information need not, however, take any specific form. For example, written materials or the employee's own first-hand explanation may be sufficient to alleviate the employer's doubts about the sincerity or religious nature of the employee's professed belief such that third-party verification is unnecessary. Further, since idiosyncratic beliefs can be sincerely held and religious, even when third-party verification is needed, it does not have to come from a church official or member, but rather could be provided by others who are aware of the employee's religious practice or belief.

An employee who fails to cooperate with an employer's reasonable request for verification of the sincerity or religious nature of a professed belief risks losing any subsequent claim that the employer improperly denied an accommodation. By the same token, employers who unreasonably request unnecessary or excessive corroborating evidence risk being held liable for denying a reasonable accommodation request, and having their actions challenged as retaliatory or as part of a pattern of harassment.

A hospital's scrutiny of an employee's religious beliefs is a delicate matter that potentially raises serious Constitutional questions. It is not realistic to assume that individual hospitals—let alone hospitals throughout the U.S. collectively—are capable of scrutinizing in depth all employees' religious beliefs under the same and proper criteria, and that such scrutiny could be applied consistently to all applicants. Therefore, employer scrutiny could not reasonably extend beyond a superficial examination before risking Constitutional violations of an employee's First Amendment "free exercise" and "establishment" clause rights and/or the employee's "equal protection" 14th Amendment rights. Accordingly, employers should generally accept religious exemption requests unless there is a clear, objective problem with the employee's stated beliefs. Employee religious belief statements should not be rejected because a hospital administrator disagrees with, doesn't like, or doesn't understand the employee's religious beliefs.

VI. Title VII Applies to Both Public and Private Employers.

Title VII was passed pursuant to the U.S. Constitution's Commerce Clause,¹⁵ and so applies to both private and public employers. Accordingly, Title VII statutes must be applied consistent with proper Constitutional boundaries to public and private employers. Additionally, federal courts have construed broadly the principle that private entities with ties to government may be considered "state actors" for purposes of application of the Constitution directly to those private entities. This may provide a separate and additional legal basis for the proposition that private hospitals must honor their employees' Constitutional rights, if they accept Medicaid and Medicare or have other substantial ties to government. So, a hospital cannot escape its obligations under Title VII due to being a private employer.

VII. Hospital Mask Policies for Exemption Employees.

Hospital employers often require non-immunized employees to wear masks. While this makes little practical sense given the far larger number of non-immune, vaccinated employees who are *not* required to wear masks, such policies may be legally acceptable unless employed excessively for a coercive or punitive purpose. But as long as the policy does not exceed CDC or other widely accepted authoritative guidelines, it is probably legally appropriate. For example, in the June 22, 2010 Federal Register, the CDC proposed that healthcare professionals wear masks when the professional has a "fever and respiratory symptoms" and "when symptoms such as cough and sneezing are still present . . . during patient-care activities," and "when entering the room of a patient with suspected or confirmed influenza." The federal register information also explained that "a facemask, by design, does not filter or block very small particles in the air that may be transmitted by coughs, sneezes or certain medical procedures," but that they "may be effective in blocking splashes and large-particle droplets," thereby acknowledging their limitations. So, a hospital employer could reasonably require an ill employee (vaccinated or not) to stay home from work until symptoms abate, or to wear a mask according to these recommendations, but an overreaching mask policy may constitute a Title VII violation and subject the employer to potential liability accordingly.

VIII. Disparate Impact on Non-Vaccinated Employees is Discriminatory.

When employers treat vaccinated and non-vaccinated employees differently, and where the non-vaccinated employees' non-vaccinated status is due to religious objections to vaccines, the employer's actions may constitute unlawful discrimination. This could include, but would not necessarily be limited to, requiring non-vaccinated employees to wear color-coded badges or ribbons, treating influenza sick days differently, excessive mask policies as noted above, or any other disparate treatment not required by business necessity. Those practices in particular designed to reveal to fellow workers and patients the non-vaccinated employees' non-vaccinated status are improper on a more disturbing level as well. Such practices call to mind the Nazis anti-Semitic requirement that all Jews wear a yellow badge, intended to be a "badge of shame," to mark them as Jews in public.

¹⁵ U.S. CONST. art. I, § 8, cl.3.

It is disturbing that an employer would ever consider a vaccine “badge of shame” policy, let alone actually implement such a policy in violation of federal law.

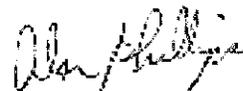
IX. Remedies.

If your employer discriminates against you by denying your right to refuse vaccines for religious reasons or by imposing an excessive mask for coercive and/or punitive reasons, your legal remedy would be to file a “charge” with the EEOC alleging religious discrimination. (There is no fee to file a charge.) If your charge describes a discriminatory act on the part of your employer, the EEOC may investigate. If an EEOC investigation reveals a discriminatory act on the part of your employer, they have a range of possible actions that include attempting to negotiate a settlement or even suing your employer on your behalf if they deem that necessary and appropriate. If the EEOC’s involvement fails to resolve the matter, you would then have the option of suing your employer directly and asking a court to award you appropriate damages that could potentially include, but may not necessarily be limited to, reimbursement for lost wages and money damages for violation of your First Amendment rights.

In closing, there is clear legal authority in federal statutes, regulations, regulatory agencies and legal precedent to support your right to refuse hospital-required immunizations based solely on your sincerely held religious objections to immunizations and notice of the same to your employer. You also have the right to refuse wearing a mask beyond reasonable, authoritative recommendations such as those from the CDC cited above.

Relevant sections of Title VII of the federal Civil Rights Act of 1964 are provided below for your review. In the meantime, please feel free to contact me if you should have questions about any of the above.

Sincerely,



Alan G. Phillips
State Bar No. 30436

Title VII of the Federal Civil Rights Act of 1964

42 U.S.C. 2000e. Definitions

(j) The term "religion" includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.

42 USC § 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

(d) Training programs

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.