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INSURANCE SERVICES

Leaders News Alert

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Human Resources

Can You Require Employees to Get Flu Vaccines?

THE WINTER months that are fast approaching will bring with them the usual flu season, during which the illness typically affects one in every five Americans.

One debate that's been growing is whether businesses should follow the lead of hospitals and other health care facilities that require their staff to get flu vaccines every year.

Most people can recover from the typical influenza with bed rest at home, but some 200,000 people are hit so severely each year that they require hospitalization, according to the Centers for Disease Control.

Also, in a typical year some 3,000

people in the US die from flu-related symptoms and, if it's a particularly bad strain, the number of deaths has been known to reach 49,000.

The bigger concern for you is the infection of others on your staff, as well as of customers and/or patients that may come in contact with your employees.

But if you are considering requiring employees to get vaccinated, you may be stepping into a legal minefield and need to tread carefully.

The New York City law firm of Baker & Hostetler LLP has the following recommendations for employers mulling mandatory vaccination:

- **Don't force it** – You should accommodate any employees who refuse to get vaccinated based on medical or religious grounds. You could be held liable if you force an employee to take a vaccination or face the specter of termination, especially if they tell you they are allergic and then get sick after the vaccine is administered.

Also, the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 may prohibit the enforcement of mandatory vaccination policies against employees who claim their disability or religious beliefs or practices prohibit them from receiving the flu shot.

To avoid running afoul of these laws, you should establish in writing a process for determining whether granting an exception is warranted (being afraid of needle-sticks doesn't count).

And to protect yourself, include in your policy a requirement that employees declining the shot sign a form that includes a section where they can include the reasons for refusing the vaccination. If an employee claims they

cannot take a vaccination due to health reasons, you may request that they produce a doctor's note to that effect.

To abide by the ADA, you can also require that you and the employee engage in an interactive process to determine if you are obligated to provide them with a reasonable accommodation of not requiring a flu shot due to their disability or perceived disability.

Reasonable accommodation could include wearing a mask, temporary re-assignment, or use of a color badge to identify whether an employee has not been immunized.

But whatever you do, don't retaliate or otherwise punish an employee who claims an ADA exemption.

- **Who should be vaccinated?** – Many employers only require employees who have regular access to patients or individuals with compromised immune systems to receive a flu shot. If a policy

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CONTACT US



**2520 Venture Oaks Way, Suite 310
Sacramento, CA 95833**

**Phone: 866.211.2123
Fax: 866.913.7036
www.leaderschoiceins.com**

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Workplace Safety

Employers Fail to Report Worker Hospitalizations to Cal/OSHA

A NEW STUDY based on Cal/OSHA targeted inspections has found “large-scale under-reporting” of hospitalization cases to the safety agency.

Cal/OSHA uses reports by employers of workplace injuries that result in hospitalization to initiate workplace inspections. Rand Corp., which conducted the study for the Commission on Health and Safety and Workers’ Compensation, found under-reporting mostly in Southern California, as well as in rural areas.

While the employers may not be reporting these injuries to Cal/OSHA as required by law (or suffer a penalty of up to \$5,000), the study did not indicate whether they are also not reporting the injuries to their workers’ comp carriers (which is also against the law).

Rand wrote in its report that the “failure to report appears to go undetected often. The Appeals Board is now more committed to levying the full [\$5,000] penalty, but even that threat is probably unlikely to have a major effect in the absence of better methods of detection.”

Rand made its conclusions based on the fact that employers in Southern California counties saw fewer accident-related inspections than their counterparts in the north of the state. While at first glance that would seem to indicate safer workplaces in the south, the ratio of accident investigations for fatal incidents per 1,000 workplaces was lower in Northern California.

“We are not treating this pattern as evidence that construction safety practices are better in the north or even that fatality rates are lower there,” the working paper says. “However, these figures do provide very strong evidence that the quality of reporting of hospitalization cases ... varies greatly among counties and is lower in Southern California.”

Rand found glaring discrepancies in reporting by employers to Cal/OSHA.

For example, while San Francisco had 10 non-fatal reportable cases to every fatality, a ratio that is “much closer to what most experts would expect,” in Kings County in the Central Valley, the ratio was one non-fatal reportable case to three fatalities.

The takeaway

The study results could spur more aggressive policing by Cal/OSHA.

Rand recommended that Cal/OSHA:

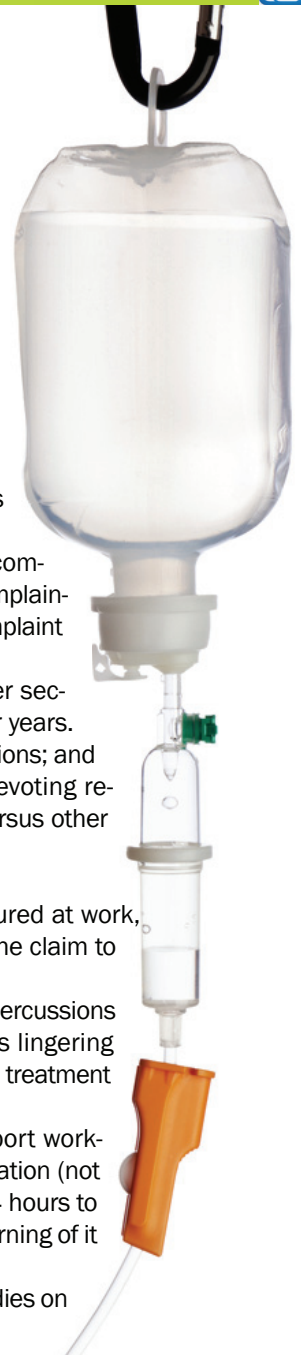
- Better examine hospital bills submitted to workers’ comp insurers to detect employers that may not be reporting workplace injuries resulting in hospitalization.
- Maintain data on informal complaints and better serve potential complainants in counties with lower formal complaint rates;
- Identify workplaces in riskier sectors that have not been inspected for years. Include them in programmed inspections; and
- Evaluate the “impact” of devoting resources to accident investigations versus other inspection types.

Remember: If an employee is injured at work, you are required to not only submit the claim to your insurer.

Not doing so can have serious repercussions for you, particularly if the worker has lingering symptoms that require further medical treatment and time off from work.

Likewise, you are required to report workplace injuries that result in hospitalization (not outpatient services) for more than 24 hours to Cal/OSHA within eight hours after learning of it and in no more than 24 hours.

The same applies if an employee dies on the job. ❖



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Staff Can Cite Medical Necessity, Religion for Refusal

is challenged, an employer must be prepared to present its reasonable business interest. Careful consideration of the scope of a mandatory policy prior to implementation can avoid legal issues down the road.

- **Consequences for refusing vaccination** – You should also determine in advance what type of corrective action you will take against employees who refuse to take the flu shot without claiming medical necessity, religious belief or disability. You could include measures such as temporary reassignment during the flu season. Just make sure that you apply the rules consistently throughout your ranks.

- **Employment contract kibosh** – Should you have staff working on contract, if you didn’t include the mandatory flu vaccine measure in the contract (or in a collective bargaining agreement), you may be prohibited from requiring vaccination.

As you can see, you need to think through all of the legal implications of implementing a mandatory vaccination policy.

However, if you do implement one, consistently applying the rule across your staff is most important – that, and staying within the guidelines of anti-discrimination and civil rights laws.

ACA Fallout

Millions Receiving Policy Cancellation Notices

AS A RESULT of Affordable Care Act rules governing health plans, millions of Americans are receiving cancellation notices from insurers that have covered them for years.

News reports have found that many people have been dismayed to find out that their old health plans are not up to a minimum standard requiring that they offer a certain level of benefits. Worse yet, when they are going shopping for new coverage, they are finding that they are paying substantially more than they were under the plans they wanted to keep but cannot, according to an article in *Kaiser Health News*.

While the new policies typically provide better coverage, costs will vary from region to region within individual states depending on population densities and how many health plans participate. In many smaller areas, only one insurer has stepped up.

The law requires all policies to cover 10 “essential” benefits, such as prescription drugs, mental health treatment and maternity care. Also, insurers cannot reject people with medical problems or charge them higher premiums. Policies must also cap annual out-of-pocket expenses at \$6,350 starting in 2015..

Just how many people currently have been on health plans

since at least March 2010, when President Obama signed the enabling ACA legislation into law? Nineteen million. How many are expected to lose their coverage and are already receiving notices? Sixteen million, according to health policy expert Bob Laszewski. He writes:

“The U.S. individual health insurance market currently totals about 19 million people. Because the Obama administration’s regulations on grandfathering existing plans were so stringent, about 85% of those, 16 million, are not grandfathered and must comply with Obamacare at their next renewal. The rules are very complex. For example, if you had an individual plan in March of 2010 when the law was passed and you only increased the deductible from \$1,000 to \$1,500 in the years since, your plan has lost its grandfather status and it will no longer be available to you when it would have renewed in 2014.

“These 16 million people are now receiving letters from their carriers saying they are losing their current coverage and must re-enroll in order to avoid a break in coverage and comply with the new health law’s benefit mandates. Most of these will be seeing some pretty big rate increases.”

What has really stung those that have received cancellation notices is that Obama had promised during numerous speeches that the ACA would not take away their coverage and that they could keep their plans if they liked them. Apparently not.

Kaiser Health News said that it had called insurers in several states and that many said they’d sent out cancellation notices.

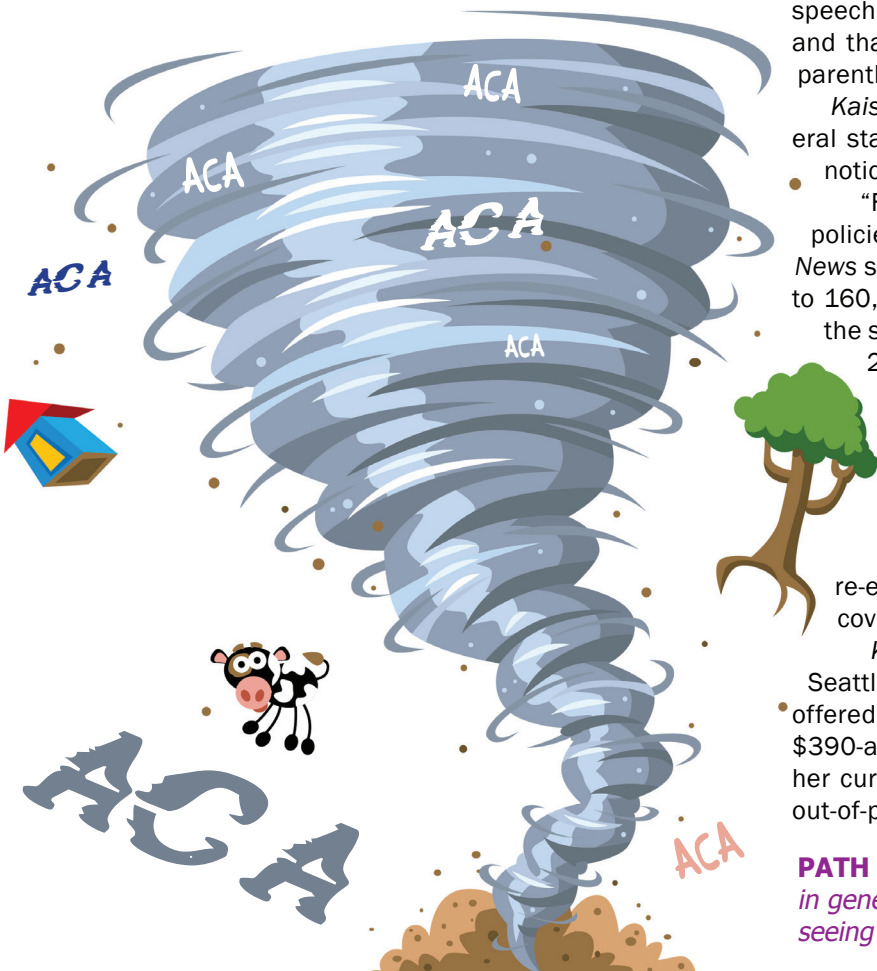
“Florida Blue, for example, is terminating about 300,000 policies, about 80% of its individual policies,” *Kaiser Health News* said. “Kaiser Permanente in California has sent notices to 160,000 people – about half of its individual business in the state. Insurer Highmark in Pittsburgh is dropping about 20% of its individual market customers, while Independence Blue Cross, the major insurer in Philadelphia, is dropping about 45%.”

It also noted that Blue Shield of California sent some 119,000 cancellation notices out – equivalent to about 60% of its individual business.

Insurers say they are encouraging existing clients to re-enroll in their new plans, which usually provide better coverage, but may cost more and have higher deductibles.

Kaiser Health News found a 56-year-old woman in Seattle who is currently being non-renewed and has been offered a plan that is \$79 more a month than her current \$390-a-month plan, with a deductible that is \$5,000 (double her current deductible). The new plan does limit her annual out-of-pocket expenses to \$6,250, including the deductible. ❖

PATH OF DESTRUCTION: *Already the bane of businesses in general, now the ACA is upsetting individuals who are seeing their old policies non-renewed.*





Risk Management

Forgiving Employee Theft May Void Coverage

IF YOU FORGIVE an employee who has stolen from your company and then that person steals again, you may be voiding any potential insurance recoveries.

That's according to speakers at a panel of risk management professionals at a recent insurance seminar. The problem of not being able to recover any losses through your fidelity coverage would typically stem from not reporting to your insurer the original instance of theft.

You may also void coverage if you suspect theft and do not conduct an internal investigation.

If the insurer, upon investigation, finds out that you forgave the employee and kept them on after the first instance of theft, it would likely argue that failure to report would void the coverage, according to the speakers – Andrew Kautz, national claims manager for Central



2520 Venture Oaks Way, Suite 310
Sacramento, CA 95833

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Risk & Insurance Management Services Ltd. based in Vancouver, Canada; and Ross McGowan, a partner at Borden Ladner Gervais L.L.P., also in Vancouver.

They pointed out that employees that steal, will typically not steal just once.

If they get away with it the first time, they will likely steal more the next time around.

Prior dishonest acts generally terminate coverage if the insured knew about them.

An insurer's subsequent investigation after a theft report would focus mostly on coverage issues and whether the employee was responsible for other theft at the company.

Under the terms of their fidelity policies, employers have a duty to give timely notice to the insurer in writing after first discovering the loss.

The same would likely not hold true in the case of employee negligence that caused a loss and the employee tried to cover it up to keep their job. In such cases, the original loss may not be covered, but the subsequent losses (actual theft) might be covered.

You may also void coverage if you suspect fraud or theft, but do not investigate. ❖

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