Health Care Workers Owe It To Themselves and To Their Patients To Get The Flu Vaccine:  A Sensible Approach For A Successful Flu Vaccination Program

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Introduction

Although the 2009-2010 influenza1 (“flu”) season is in full swing,2 it is not too late to get vaccinated against the flu. Two categories of flu viruses are currently circulating in the United States: (1) the seasonal flu viruses (“seasonal flu”)3 and (2) the novel Influenza A H1N1 virus (“2009 H1N1 flu”).4 Health care officials predict this season may be a more dangerous one because the H1N1 flu has the potential to cause more people to get sick, become hospitalized and potentially die.5 The Centers for Disease Control and Prevention (“CDC”) claims a vaccination in either shot or mist form is the best tool to prevent the spread of flu and flu-related complications and further recommends individuals receive both the seasonal flu and H1N1 flu shots.6 The Department of Health and Human Services (“HHS”) began rolling out its nationwide campaign for H1N1 vaccinations in mid-October 2009, and seasonal flu vaccination programs have been underway since August 2009.

Health care workers should not delay in getting their flu shots because they are on the front lines of fighting disease and protecting the public health.7 Yet, statistics from past flu seasons show that less than 50 percent of health care workers get vaccinated.8 If they have not already done so, hospitals and health care organizations should take the necessary steps to plan and implement an effective flu vaccination program to increase their numbers of vaccinated health care personnel.

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1 Influenza (the “flu”) is a contagious respiratory illness caused by various strains of influenza viruses and can spread from person-to-person, causing mild to severe illness and sometimes may lead to death. See U.S. Dep’t of Health & Human Servs., Seasonal Flu Basics, available through http://www.flu.gov.


3 The seasonal influenza viruses include Influenza A (H1) and (H3) and Influenza B strains. See id.

4 U.S. Dep’t of Health & Human Services, About the Flu, available through http://www.flu.gov. The 2009 H1N1 virus was originally referred to as the “swine flu” because initial laboratory test results showed that many of the genes in this virus were similar to the influenza viruses that generally occur in pigs (swine) in North America. However, further study has shown significant differences. See Centers for Disease Control and Prevention, Novel H1N1 Flu (Swine Flu) and You, available at http://www.cdc.gov/h1n1flu/qa.htm.

5 About the Flu, supra note 4.


7 Institute of Medicine, Respiratory Protection for Healthcare Workers in the Workplace Against Novel H1N1 Influenza A, Sept. 3, 2009, available through http://www.iom.edu.

Understanding the Seasonal Flu and H1N1 Flu and the Need for Vaccination

Flu seasons are unpredictable in many respects, including the timing of the beginning, duration and severity of the season, and this season will be no exception. The 2009 H1N1 virus is a new virus and one to which most people have not been exposed and have little or no immunity. This leads to the potential for causing more infections than with seasonal flu. Most people have natural immunity to the seasonal flu. Typical symptoms of seasonal flu include fever, cough, sore throat, runny or stuffy nose, headaches, body aches, chills and fatigue. The H1N1 flu, however, may cause additional and more severe symptoms, including vomiting, diarrhea, and other infections. Researchers believe the H1N1 virus has the ability to spread more readily than seasonal flu viruses, with the capability of infecting receptor cells deep in the lungs.

While outbreaks of seasonal flu generally occur from late fall through early spring and may affect 5 percent to 20 percent of the U.S. population, the H1N1 flu has already emerged this calendar year. Since April 2009, when the H1N1 flu was first diagnosed in the U.S., it has made a global sweep across 191 countries and territories, affecting approximately 300,000 people, and causing 3,917 deaths world-wide. This global transmission prompted the World Health Organization (WHO) in June 2009 to issue a “phase 6” pandemic alert, advising the world that the H1N1 virus is spreading through communities in various regions of the world at a moderately severe rate.

So far, in the U.S. alone, the H1N1 flu has caused 10,082 hospitalizations and 936 deaths. The CDC estimates that more than one million people in the U.S have been affected by the H1N1 flu this year, and recent reports indicate an uptick in the number
of cases since the start of the 2009 school year. The good news is that the genetic makeup of the H1N1 virus is not changing and is showing no signs of mixing and mutating with other seasonal flu strains to create a stronger, “super bug” virus. The bad news is that H1N1 has become the world’s dominant strain of flu, and with its clear biological advantage over other strains of seasonal viruses, it out-competes the other strains, potentially may cause more severe illness. The other bad news is that experts cannot predict whether the H1N1 flu will become more deadly in the weeks and months to come.

Flu vaccination shots, which most health care officials say are the best line of defense for preventing the flu, are specifically designed to prevent flu viruses from spreading while anti-viral medications are designed to treat symptoms and provide some palliative comfort. This flu season, the CDC advises against relying on anti-viral medications to prevent the flu, and instead, recommends getting both flu shots to protect against the H1N1 flu and the seasonal flu. Given the fact that 99 percent of all subtypes of Influenza A viruses reported to the CDC are the H1N1 virus and the fact that the seasonal flu vaccine is not likely to protect against the H1N1 virus, both shots are necessary for adequate protection.

The H1N1 vaccine is new this season and recently received approval by the U.S. Food and Drug Administration (“FDA”). Early data from clinical trials suggests this newly-approved vaccine is safe and should provide immunity protection in healthy adults within 8-10 days after a single dose. Because the H1N1 flu has reached pandemic status, the U.S. has spent more than $1 billion to purchase and administer 195 million doses of the

21 Lauran Neergaard, Study: Swine Flu Easily Overtakes Other Strains, WTOP.COM, Sept. 1, 2009, available at http://www.wtop.com/?nid=220&sid=1752673. Researchers at the University of Maryland conducted a study, funded by the National Institutes of Health, on ferrets to determine whether the H1N1 virus would mutate with strains of other seasonal influenza viruses. Id.
22 Press Briefing Transcript, supra note 6.
24 Press Briefing Transcript, supra note 4.
26 2009-10 Influenza (Flu) Season, supra note 6.
27 FluView: 2008-2009 Influenza Season Week 37, supra note 2.
28 Recommendations of the CDC Advisory Committee on Immunization Practices (ACIP), supra note 24.
H1N1 vaccine, which HHS reported will be “enough vaccine for everyone.” The first lots of vaccine were shipped to national distribution centers in mid-October 2009, and from there, distributed to state health department officials. Additional doses will be shipped as produced. Each state is responsible for implementing a vaccine delivery plan, making vaccines available in a combination of settings, such as hospitals, vaccination clinics organized by health departments, physicians’ offices, schools, pharmacies and workplaces. In its effort to control the pandemic H1N1 flu, the U.S. government will be supplying the H1N1 flu vaccines, needles, and supplies at no charge. The U.S. government will not be doing the same for the seasonal flu vaccines.

Because the initial supplies of vaccines shipped in mid-October were insufficient to meet the demand, the CDC has recommended administering the vaccine first to persons in the following five target at-risk groups:

1. Pregnant women;
2. Persons aged 6 months – 24 years;
3. Health care and emergency medical services personnel;
4. Persons who live with or provide care for infants aged less than 6 months, including parents, siblings, and day care providers; and
5. Persons aged 25 – 64 who have medical conditions that put them at higher risk for flu-like complications.

Health care workers are on this priority list because of their risk of exposure to the flu both in the general community and the workplace. Because their risk of infection is increased due to their close proximity to infected patients and exposure to a constant flow of infected visitors and co-workers, health care personnel should be vaccinated for two important reasons: (1) to reduce the occupational risk of flu infection, and (2) to prevent the transmission of the flu virus to patients at risk of secondary complications and death.

Ironically, despite their increased risk of exposure to the flu, health care workers have a tendency to avoid flu vaccinations. Researchers report that between 1985 and 2002, the flu vaccination rates for healthcare workers on a worldwide basis ranged between 2.1

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32 Id.
33 Id.
36 Recommendations of the CDC Advisory Committee on Immunization Practices (ACIP), supra note 24.
38 Id.
39 Id.
percent to 82 percent. In 2007, only 41.8 percent of healthcare workers were vaccinated during the flu season. Thus, hospitals and health care organizations are faced with the big challenge of convincing their health care personnel to roll-up their sleeves and get vaccinated.

Vaccination of Healthcare Workers is the Cornerstone to Flu Prevention

HHS officials believe that vaccination of healthcare workers is the cornerstone to flu prevention. Up to 25 percent of non-immunized health care workers suffer from the flu during the winter months, and infection rates may be higher if health care workers are asymptomatic. In one study conducted during the 1993-1994 flu season, 23 percent of 500 healthcare workers serologically tested positive for flu infection, but were asymptomatic and had no recollection of experiencing respiratory or flu-like symptoms. Because healthcare workers typically tend to have a high level of commitment to their patients, they will often continue to take care of patients despite being infected with the flu, whether knowing it or not.

The average incubation period for the flu is two days, and adults may be infectious beginning with the day before symptoms emerge through up to five days afterwards. One study shows that each person who is infected with the H1N1 flu puts 1.5 other individuals at risk over the three days before coughing, fever and other symptoms appear. Because of the nature of their occupation, health care workers are more likely to become infected with the flu and more likely to unknowingly pass on the infection than any other worker-group. Conceivably, it would take just one asymptomatic, infected worker to pass on the flu virus to a high-risk patient, and cause that patient to suffer significant complications and potentially death.

Some Believe Health Care Workers Have Professional and Ethical Obligations to Get Vaccinated

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40 Id.
41 CDC Features: It's Not Too late to Vaccinate, supra note 8.
47 F. Hoffman, et al., supra note 37.
49 F. Hoffman, et al., supra note 37.
The Canadian National Advisory Committee on Immunization (NACI) takes a staunch approach to enforcing flu vaccinations by imposing a duty on health care workers to be immunized against the flu on an annual basis.50 The NACI considers the flu shot to be an essential component of the standard of care for the protection of patients, and expressly states that, in the absence of contraindications, Canadian health care workers who refuse a flu shot impliedly fail their duty of care to patients. While U.S. government health care officials have not imposed such a duty on U.S. health care workers, certain private sector physicians have nevertheless opined that health care workers have professional and ethical obligations to get vaccinated for both the seasonal flu and H1N1 flu to protect patients.51

There is some concern that health care workers may not fully understand their role in transmitting infection in the hospital setting and the tragic consequences that could happen to the high risk, complicated patients for whom they are providing care. In a series of 32 studies conducted over seven years, researchers compiled statistics on the prevalent ideas, opinions, and beliefs held by healthcare workers who refused to be vaccinated.52 Researchers learned that such refusals to be vaccinated were generally prompted by one or more of the following attitudes and beliefs: (1) the fear of adverse side-effects of the vaccine, (2) the misconception that the vaccine can cause the flu, (3) the feeling of being healthy and never at risk for flu infection, (4) the doubt that the flu is a serious disease, (5) the belief the vaccine is ineffective, (6) the fear of needles or injections, and (7) the lack of convenient times and locations for receiving the vaccine.53

HHS wants to improve flu vaccination rates among healthcare personnel with a goal of reaching at least a 60 percent vaccination rate by 2010.54 Some hospitals and health care organizations are recommending seasonal flu and H1N1 flu vaccinations, while others are mandating these vaccinations. The CDC has not made plans for a mandatory vaccination program,55 but the New York State Health Department took the initial radical step of mandating that all hospital, home health and hospice workers get seasonal flu and H1N1 flu shots.56 That mandate was subsequently suspended when New York officials learned they would not be receiving the quantity of vaccine doses they had initially requested from the CDC.57

50 See Nat’l Advisory Comm. on Immunization (NACI), Stmt. on Influenza Vaccination for the 2008-2009 Season, 34 CAN. COMMUN. DIS. REP. 1, 16 (2008).
52 F. Hoffman, et al., supra note 37.
53 Id.
54 Health Care Personnel Initiative to Improve Influenza Vaccination and Toolkit, supra note 43.
55 Susan Abram, supra note 42.
56 Lindsey Tanner and Valerie Bauman, supra note 51.
Other state health departments have not issued a mandate for either the seasonal or H1N1 flu, but a handful of large hospitals and health care systems have already implemented mandatory vaccinations measures for the seasonal flu. By way of example, Virginia Mason Medical Center in Seattle, Loyola University Medical Center near Chicago, Charleston Area Medical Center in West Virginia,58 The Methodist Hospital in Houston, and Hospital Corporation of America (“HCA”) based out of Nashville 59 have implemented mandatory vaccination programs for the seasonal flu, and some of these institutions may possibly do the same for the H1N1 flu. However, although some of these organizations are stating the flu shots are mandatory, they are giving those employees who decline the flu shot, whether for religious or medical reasons, the option to wear an approved mask at all times, or otherwise face possible termination.60 One particular hospital, The Methodist Hospital in Houston, states that it does not intend to terminate any objecting employees, but it is taking one extra step to encourage compliance by asking any employee who refuses the shot, absent a medical or religious reason, to talk with a counselor.61

Employment Law Considerations

Whether a hospital or health care system chooses to implement a “recommended” or “mandatory” vaccination program, consideration should be given to certain federal and state labor and employment laws and the implications imposed by the same, including but not limited to, the Occupational Safety and Health Act (“OSHA”), The Americans with Disability Act of 1990 (“ADA”), the National Labor Relations Act (“NLRA”), and state workers compensation programs. OSHA, which is enforced by the Occupational Safety and Health Administration, applies to most private-sector employers and contains a “General Duty Clause,” which requires employers to create a safe work environment free of recognized hazards likely to cause death or serious injury.62 OSHA has issued guidelines on what employers can do to protect their employees from the H1N1 flu and expressly states that encouraging healthcare employees to get flu vaccinations is one method of creating a safe work environment.63

The ADA,64 which is enforced by the federal Equal Employment Opportunity Commission (“EEOC”) imposes a variety of duties on employers as may be applicable to preparing the workplace for protection and infection control strategies against the H1N1 flu. Generally, the ADA protects employees from disability discrimination and applies to

58 Lindsey Tanner and Valerie Bauman, supra note 51.
59 L.M. Sixel, supra note 51.
60 Id.; Lindsey Tanner and Valerie Bauman, supra note 51 (citing HCA Chief Medical Officer as saying that HCA will consider those employees who refuse to wear a mask as a resignation). At Virginia Mason Medical Center, a handful of objecting employees were fired during the 2005-2006 flu season. Id.
61 L.M. Sixel, supra note 51.
government and private sector employers having 15 or more employees. Among other things, the ADA regulates when and how employers may require a medical examination or request disability-related information from employees, regardless of whether the employee has a disability.\footnote{U.S. Equal Employ. Opp. Comm., ADA-Compliant Employer Preparedness for the H1N1 Flu Virus, May 4, 2009), available at http://www.eeoc.gov/facts/h1n1_flu.html.} This seemingly could affect when and how employers may request health information from employees for purposes of determining whether employees are exempt from vaccination due to medical reasons, or whether an employee’s disability may preclude use of infection control face masks, latex gloves or other protective equipment, and whether accommodation would be reasonably necessary. The ADA also places limits on the scope of which employer personnel may be privy to an employee’s confidential medical information.

The NLRA\footnote{29 U.S.C. §§ 151-169 (2000, Supp. IV).} governs the relationship between unions, employees, and most private-sector employers and is enforced by the National Labor Relations Board (“NLRB”). This Act comes into play for those hospitals and healthcare organizations that employ unionized nurses and other healthcare workers. Unions undoubtedly will intercede in any mandatory vaccination program involving its member workers. In fact, local labor unions in New York reacted angrily when they were not consulted on the mandatory vaccination law for healthcare workers.\footnote{Donald G. McNeil, Jr., and Karen Zraick, New York Health care Workers Resist Flu Vaccine Rule, N.Y. TIMES, Sept. 21, 2009, http://www.nytimes.com/2009/09/21/nyregion/21vaccine.html.} While most unions do not oppose vaccination, they do oppose mandating a program in which employees could be fired for non-compliance.\footnote{Id.}

State workers’ compensation laws may be implicated if employees develop illnesses or medical conditions caused by or related to the vaccination under a program mandated or administered by their employers. The workers’ compensation laws may vary from state to state.

Regardless of whether hospitals and health care organizations pursue “recommended” or “mandatory” vaccination campaigns, the ultimate goal should be to strive for 100 percent voluntary participation. No one wants to be forced to be vaccinated – the best scenario would be to allow healthcare workers to voluntarily make that choice.

Successful Health Care Worker Vaccination Programs Entail Adequate Notice, Pertinent Education, and Free Accessible Vaccinations

Given the myriad of attitudes, beliefs, and misperceptions about flu vaccinations held by health care personnel, the pivotal question becomes: How should an organization plan and implement a successful H1N1 vaccination campaign? Statistics from four previous U.S. vaccination programs, each touting a greater than 60 percent vaccination rate, seem to suggest the following three components are key for a successful program:

\footnote{Id.}
Providing adequate notice of the vaccination program,

Providing pertinent education about the flu and vaccination,

Administering free, accessible vaccinations at convenient times.  

Adequate Notice: Health care workers need adequate notice of the H1N1 vaccination program. This means effectively communicating information about the vaccination program through various media outlets, such as individual invitations to participate via enclosure with pay slip, e-mail messages, intranet postings, memoranda, and posters in well-traveled areas. The notice should be timely and provide a schedule of convenient times (all shifts) and locations so healthcare workers can make their plans accordingly.

Pertinent Education: The educational component of the campaign is by far the most important and should be designed to timely address and respond to health care workers’ fears, misperceptions, misunderstandings, opinions and beliefs about the H1N1 flu and vaccination, to include information on the role of the healthcare worker in the transmission of the flu, the benefits of vaccination – to protect the worker and patient, the side effects and risks of vaccination, and the health care worker’s professional and ethical obligations to the patient. An effective education program may be accomplished through staff in-services, conferences, written pamphlets, and educational films, with targeted audiences at both group and individual levels. Perhaps the most efficient way to identify workers’ concerns in a timely manner would be to seek a written commitment from each worker that he or she is willing to get the shot. Any worker not willing to make the commitment, other than for religious or medical reasons, should be asked to give a written reason why he or she is not willing to participate. The education program should then be geared to target those non-committed employees to facilitate their understanding of the importance of the shot and provide the necessary education to address and reconcile their fears, misperceptions, and doubts, as feasible.

Free, Accessible Vaccinations: The actual vaccination program should be administered free of charge at convenient and readily accessible locations, utilizing mobile carts and “walk-in” clinics, as feasible, and at reasonable times of the day.

Conclusion

Because health care workers are on the front lines of fighting the seasonal flu and H1N1 flu, they should consider the need to roll up their sleeves and get vaccinated, not only to protect themselves from exposure to the flu, but also to prevent the spread of the flu to the same patients for whom they are providing care and treatment. Hospitals and health care organizations should consider the importance of designing an effective, free flu vaccination program for its health care workers that provides timely notice and pertinent and responsive education about the flu and vaccine, and one that will be readily accessible at convenient locations. The decision to get vaccinated should be an informed, educated one. Healthcare workers owe it to themselves and to their patients to get vaccinated.

69 F. Hoffman, et al., supra note 37.