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COVID-19 Vaccine and Employment Issues

By Helene Hechtkopf and Emily Hogan Long
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As the world eagerly awaits the widespread availability of the COVID-19 vaccines, employers everywhere are bracing for an onslaught of the next round of COVID-related issues. Can—and should—employers require employees to get the vaccine, to protect themselves and others in their workplaces? Can an employee refuse to return to work if his or her co-workers are not vaccinated? And if there are vaccine injuries, would an employer be liable for them if the employer required its employees to get the vaccine?

Can Employers Require That Their Employees Get Vaccinated?

Generally yes, an employer can require its employees to be vaccinated—with two major exceptions noted below. See, e.g., *Hustvet v. Allina Health Sys.*, 910 F.3d 399 (8th Cir. 2018) (upholding a health care system's requirement that its employees immunize against rubella as a condition of employment); *Mazares v. Dep't of Navy*, 302 F.3d 1382 (Fed. Cir. 2002) (upholding removal of civilian employees of the Navy for refusing order to get anthrax vaccine).

Some states actually mandate that those in certain jobs receive certain vaccines. In New York, for example, hospital, nursing home and home health care workers are legally required to be immune to measles and rubella. See 10 CRR-NY 405.3, 415.26, 763.13. Furthermore, the EEOC's guidance also allows employers to compel flu vaccinations. See [Pandemic Preparedness in the Workplace and the Americans with Disabilities Act](#), EEOC, March 21, 2020.

As mentioned above, however, there are two exceptions to an employer's ability to mandate that its employees be vaccinated: where an employee has a religious belief conflicting with vaccination or where the employee has a disability that prevents the employee from receiving a vaccine.

Religious Discrimination

Title VII of the Civil Rights Act of 1964 (as well as many state and local laws) prohibit an employer from discriminating against an employee on the basis of religion. To qualify under Title VII, the employee must show that they held "a bona fide religious belief conflicting with an employment requirement." They must also show that they informed the employer of this belief, and that they were disciplined for failure to comply with the conflicting employment requirement. The "bona fide religious belief" requirement is a strict one—for example, in *Brown v. Children's Hospital of Philadelphia*, the Third Circuit rejected a religious discrimination claim by an employee with a "holistic health lifestyle" and her own personal belief that the flu vaccine might do more harm than good as insufficient to make out a prima facie case under Title VII. The court stated that "it is not sufficient merely to hold a 'sincere opposition to vaccination'; rather, the individual must show that the 'opposition to vaccination is a religious belief.'" 794 Fed. App'x. 226 (3d Cir. 2020) (quoting *Fallon v. Mercy Catholic Med. Ctr. of Se. Pa.*, 877 F.3d 487, 490 (3d Cir. 2017)).

Similarly, in *Fallon*, the Third Circuit applied a three-factor test to determine whether a hospital employee's refusal was religious in nature: whether the belief "addressed]

fundamental and ultimate questions having to do with deep and imponderable matters," was "comprehensive in nature," and was "accompanied by 'certain formal and external signs.'" *Id.* at 491. The court found that the plaintiffs' vaccine skepticism, which he claimed was grounded in Buddhism, failed on all three factors, because he was simply worried about the health effects of the vaccine and wished to avoid it. *Id.* at 492.

Further, Title VII does not require an employer to accommodate an employee's religious belief—even a sincerely held belief—if doing so "would result in undue hardship to the employer." *Id.* Of course, no court has yet had to determine what would be an "undue hardship" to an employer in the age of COVID-19 vaccinations, but, as with flu vaccine policies, it will likely require an employer to balance its obligations toward its employees and clients with its ability to accommodate its employee's vaccine refusal. Under Title VII an undue hardship is defined as "more than de minimis" cost to the operation of the employer's business. *Robinson v. Children's Hospital Boston*, No. CV 14-10263-DJC, 2016 WL 1337255, at *8 (D. Mass. April 5, 2016).

For example, in *Robinson*, a Massachusetts federal court was faced with a conflict between a hospital's mandatory flu vaccination policy and an employee's bona fide religious belief that she could not take the vaccine. The hospital argued that granting a vaccine exemption for the plaintiff would be an undue hardship because "it would have increased the risk of transmitting influenza to its already vulnerable patient population," and the court agreed. *Id.* at *9. The court noted that "[h]ealth care employees are at high risk for influenza exposure and can be a source of the fatal disease because of their job," that "[n]umerous medical organizations support mandatory influenza vaccination for health care workers," and that "[t]he medical evidence ... demonstrates that the single most effective way to prevent the transmission of influenza is vaccination." *Id.* Given that the same factors apply with even more force to the COVID-19 vaccinations, given the higher mortality rate of the disease and the significantly increased protection of the vaccine, there seems to be little doubt that health care workers can be mandated to take the vaccine even in opposition to their sincerely held religious beliefs.

A more interesting question will be whether employees in other sectors can be required to be vaccinated despite a bona fide religious opposition. The answer to that

question will likely depend on the particular facts of each scenario. An employer should look at each case separately and raise questions like: What are the employee's job duties—do they come in contact with many people each day? Do they come into contact with individuals who are at higher risk of contracting or having a negative outcome from COVID-19? Are there steps the individual could take short of the vaccine to prevent that person from becoming infected with COVID-19 or spreading it to others, such as wearing a mask?

Disability Discrimination

The Americans With Disabilities Act (and potentially state and local laws) will determine how an employer must address employees who refuse a vaccination for medical reasons.

A preliminary question that employers will have to address will be whether the employee does in fact have a medical condition that prevents him or her from receiving the vaccine. So far the Food and Drug Administration has put out some guidance on who should not receive the vaccine. For example, those with severe anaphylactic allergies to any of the ingredients of the vaccine should not receive the Pfizer vaccine.

The employer would have to engage in an interactive process to determine if there was a reasonable accommodation that could be provided to the employee that would not inflict an undue hardship (including significant difficulty or expense) on the employer. In *Mainella v. Golub Corporation*, a pharmacist alleged discrimination under the ADA where her autoimmune disease made it unsafe for her to risk a needle stick while providing vaccinations, and her request to not immunize customers was denied. The court held that "this suggested 'accommodation'—that she not be required to perform vaccinations—would amount to the elimination of an essential job function and, thus, [was] not a 'reasonable' accommodation. No. 115CV1082FJSDJS, 2018 WL 1587049, at *6 (N.D.N.Y. March 28, 2018).

Employers may be faced with questions in the gray zone though: Should pregnant or breastfeeding employees be required to receive the vaccine? What about employees with severe anxiety relating to vaccines? What type of doctor's note is sufficient to exempt an employee from vaccination? See *Head v. Adams Farm Living*, 242 N.C. App. 546, 588 (2015) (non-specific vaccine exemption

note from a chiropractor not sufficient to meet employer's medical exemption policy).

As with religious accommodation, employers will have to address each situation on a case-by-case basis, weighing the need for the employee to get the vaccine against the alternatives available to the employer. For example, an employee who claims a medical exemption to the COVID-19 vaccine due to a previous allergic reaction to an ingredient in the Pfizer vaccine could perhaps be required to get a different COVID-19 vaccine that does not contain the problem ingredient, when that vaccine becomes available. See *Norman v. NYU Langone Health System*, 2020 WL 5819504 (S.D.N.Y. 2020) (finding no discrimination where plaintiff alleged she had an allergy to the flu vaccine based on two prior reactions but was required to receive a flu vaccine developed without egg proteins).

Can Employees Refuse To Return to Work If Their Coworkers Are Not Vaccinated?

On the other side of the coin will be employees who are nervous about returning to work before their co-workers are vaccinated. Although the General Duty Clause of the OSH Act of 1970, 29 USC 654(a)(1), requires employers to furnish to each worker "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm," OSHA has already confirmed that employers can generally require employees to come in to work during the COVID-19 pandemic. OSHA Standard 1977.12(b)(2) states that the condition must be "of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels" before an employee can refuse to work. Given that there is no reason why a workplace would be *more* hazardous once the vaccine becomes available, and OSHA's position that employees can be required to come into work now, there is no reason to believe that employees would be allowed to refuse to work solely because their coworkers are not vaccinated.

Will Employers Who Require the Vaccine Be Required To Pay for Vaccine-Related Injuries?

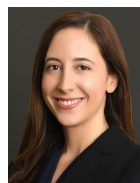
Any such injury would likely be covered by states' workers compensation regimes. See, e.g., *Atkinson v City of New York*, No. 37, 96 N.Y.2d 809 (N.Y., March 27, 2001).

Further, employers who choose to administer the vaccine may be immune from suit pursuant to the Public Readiness and Emergency Preparedness (PREP) Act. Under the PREP Act, "covered persons" are protected from liability "against any claim of loss caused by, arising out of, relating to, or resulting from, the manufacture, distribution, administration, or use of certain medical countermeasures (Covered Countermeasures), except for claims involving 'willful misconduct.'" 85 FR 79190, 91. Covered Persons who are afforded liability include "'manufacturers,' 'distributors,' 'program planners,' and 'qualified persons,' as those terms are defined in the PREP Act; their officials, agents, and employees; and the United States." The latest guidance on the PREP Act states that a "program planner" includes organizations that supervise or administer a program for dispensing or distributing pandemic products, which includes vaccines. See *Advisory Opinion 20-04*, DHHS Oct. 23, 2020.



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