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Employer Required COVID-19 Vaccine Programs: Should They Be Instituted?

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So you're sitting there cursing me about such a silly question? In part, some of you are likely saying "What COVID vaccines? I don't qualify to receive it yet!" Others are saying "There is no way that I will allow anyone to stick that needle of junk in my arm!" Pardon the pun, but there are many on both sides of the issue that "feel your pain!" Many individuals cannot wait to get the vaccine into their veins, while others shun the thought. Fortunately, I am one of the current "lucky ones," as I have had both doses of the vaccine, but I digress. COVID vaccines are here and likely here to stay, in the foreseeable future. Thus, many employers are actively addressing just what their employee policy and standards should be about whether or not vaccinations of their workforces should be required as a mandatory condition for employee retention or even access to employment.



Regarding the question about whether employers can mandate vaccines during our current COVID-19 pandemic, you likely already have determined the answer based on the blog's title above. Yes, organizations can require such immunization requirements as well as other medical records validating the screening of certain viral conditions. One close-to-home example is the University of South Florida's Student Health Services' (**Policy 33-002**) requirement that students provide medical verification (immunization and screening) for Measles, Rubella, Hepatitis B, Meningitis, and Tuberculosis before registering for any of USF's on-campus courses. It is not uncommon for similar medical clearance

standards to be required in other occupational fields, as a condition for employment, such as in health-related occupations, entry into military service, or even for overseas travel in some foreign nations. Many countries, for example, require proof of a yellow fever shot for entry.

Nevertheless, while most human resource and labor law experts would indicate that employers likely have the authority to mandate immunization and medical screening, even for the COVID-19 vaccine, they would also advise that some exceptions may be granted—especially based on disability conditions and medical need or for religious accommodations—due to strongly felt and sincerely held religious, moral, or ethical objections to the vaccines' use. Note, however, that objections to the vaccines based on strongly held political beliefs would not qualify as a justified reason for avoiding immunization when an employer's COVID-19 vaccine program is in place.

Before a brief discussion of these two primary policy areas with demonstrated implications for COVID-19 immunization, it is important to advise that the discussion here only focuses on these two federal laws. To be fully informed and do one's due diligence for abiding by best human resource practices, it is also important to do a thorough review of not only federal policies and judicial standards, but also state and local policies relevant to the application of such a mandated vaccine program. The federal legislation most often noted concerning exemptions to a mandated vaccination derives from the Americans with Disabilities Act (ADA), originally passed in 1990, and Title VII of the Civil Rights Act (CRA) of 1964. ADA provides protections based on

disability and medical needs, while CRA affords protections against religious discrimination. Both have some influence on the question of implementing a mandatory COVID-19 vaccine program.

So, how might the Americans with Disabilities Act serve as a mitigating factor in the institution of a mandated COVID-19 vaccine program? ADA requires employers to offer "reasonable accommodations" to employees who are qualified for employment, but who indicate an objection to taking the vaccine due to a medical condition. Justification of exclusion for taking the vaccine might occur for several medical conditions, such as a high potential for allergic reactions to the vaccine, when reactions might further compromise an individual's health—such as for individuals with risks for the rejection of organ transplants—or other medical conditions indicating that "the medicine is worse than the cure." The use of medical examinations to determine job fitness as a condition of employment face some restrictions under ADA. In such instances, the Equal Employment Opportunity Commission (EEOC) serves as the federal agency that oversees ADA compliance and disputes, but it does not view the administration of vaccines as a form of a medical inquiry, nor does it regard the administration of a vaccine as part of a medical exam.

If the employer implements a mandatory immunization program, it must also keep in mind that ADA requires "reasonable accommodations" to be offered to qualified individuals who have a disability (or perceived disability) that disqualifies them for further consideration. In cases where individuals are unwilling to accept the COVID-19 immunization, the employer may be required to make reasonable accommodations, provided these accommodations do not place an undue hardship on the organization. Some examples of reasonable accommodations might be: allowing the individual to work from home, allow in-office work during off-peak hours where direct person-to-person contact is less, or offering PPE to the individuals to afford them greater protection against the virus. The determination of whether or not reasonable accommodation should be offered depends on the essential job characteristic of each position. As an example, it would be difficult to offer some forms of reasonable accommodation—like off-site patient care—to an in-hospital critical care unit nurse tending to COVID-19 patients. So what might be allowable as a reasonable accommodation for one position may not be so for another. Thus, it is highly recommended that the Human Resource system ensure that all job descriptions are accurate, up to date, and identify essential job characteristics before any mandated vaccination initiative.



Beliefs associated with strongly held religious, moral, or ethical stances opposed to the use of the vaccine also afford individuals some protection against mandatory vaccination administration, based on Title VII of the Civil Rights Act, which protects against workplace discrimination based on one's religious beliefs. It should be noted that one does not have to belong to a religious denomination to qualify, just a sincerely held conviction that the use of the vaccine is against one's moral, ethical, or religious ethos. In a similar fashion to our ADA discussion above, under such circumstances, employers may be required to provide reasonable accommodations that limit the application of the vaccine's use and the program's intended outcome.

In conclusion, what is suggested in this brief blog is that, in most instances, while employers can administer mandatory vaccine programs and protocols, they should also be prepared for some glitches and roadblocks, at a minimum, based on existing federal legislation, especially in the areas of ADA and Title VII of the Civil Rights Act. Furthermore, while not discussed in this blog, there may be increased risks associated with rising workers' compensation claims from individuals experiencing reactions to the vaccine. Finally, there may also be the

necessity to bargain collectively with unions, depending on the nature of one's collective bargaining agreement, before instituting any new program. In such cases, working conditions and job requirements may be mandatory elements for bargaining based on the nature of one's collective bargaining agreement.

In contemplating the creation of a mandatory vaccine program, the often-used saying in carpentry may apply here, "Measure twice and cut once." Thinking carefully and deliberately before "cutting" your organization's vaccine program's protocol may be my most sage advice.