

Cos. Should Brace For Workers' Vaccine Safety Concerns

By **Robert Nichols and Rebecca Baker** (September 15, 2020, 1:24 PM EDT)

A Gallup Inc. survey released in August indicates that more than one in three Americans, specifically 35%, intend to decline any COVID-19 vaccine that ultimately is approved by the U.S. Food and Drug Administration — even if offered free of cost.[1]

That high percentage appears to be based upon the influence of a movement that opposes vaccinations, as well as concerns about the fact that the vaccine may have been fast-tracked for approval and will be brand new and, therefore, lack a long track record of safe use.

In fact, since that Gallup survey was conducted, worries for many about the safety of the vaccine have only increased based upon the fear that the vaccine approval process may be rushed for political reasons.[2]

A major concern with this large percentage of Americans who intend to forgo the vaccine is that the effectiveness rate of any vaccine is likely to be something materially below 100%, according to experts such as Dr. Anthony Fauci, the nation's top infectious diseases expert.[3]

For instance, according to the Centers for Disease Control and Prevention, the annual flu vaccine is typically somewhere between 40% and 60% effective.[4] Therefore, those individuals rejecting the COVID-19 vaccine will increase the risk even for those who get the vaccine — given the fact that no one will be completely protected.

All of this places employers, who are obligated to provide a workplace free from serious recognized hazards, in an especially difficult position. Undoubtedly many employees not only will want to have the vaccine, but also, to protect themselves more effectively, will want all of their co-workers to have the vaccine as well.

When employees ultimately realize that a significant number of their colleagues have no intention of receiving the vaccine, employers should brace themselves for workplace health and safety concerns and employee conflict.

This reality has led some businesses to ask whether they will be able to require employees receive the



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vaccine as a condition of employment.

Of course, neither the courts nor any federal agency, including the U.S. Equal Employment Opportunity Commission or Occupational Safety and Health Administration, have yet to address this question of whether an employer-imposed COVID-19 vaccine requirement will be advisable or even lawful.

The court decisions and agency guidance we have concerning other vaccinations, such as the flu shot, indicate that certainly some employers, such as health care employers and other organizations where employees work with medically vulnerable individuals, will be able to impose such a requirement — subject to certain exceptions under (1) the Americans with Disabilities Act for bona fide medical concerns with vaccination; and (2) Title VII of the Civil Rights Act for bona fide religious objections.

As for whether a non-health care employer will be able to impose an across-the-board vaccination requirement on their workforce, currently we have no clear answer from existing legal authority.

Imposing a vaccination requirement necessarily involves the employer making a medical inquiry to each of its employees. After all, the business needs to ask each worker whether the individual has had the pertinent vaccination.

Federal court decisions, such as the U.S. Court of Appeals for the Eighth Circuit's 2018 opinion in *Hustvet v. Allina Health System*, have effectively recognized that confirming compliance with the employer-required vaccination requirement necessarily involves making a medical inquiry to each employee as defined under the ADA.[5]

Under Title I of the ADA an employer may not "make [covered medical] inquiries of an employee ... unless such ... inquiry is shown to be job-related and consistent with business necessity." [6]

In the case of health care employers, such as hospitals, courts have concluded that vaccination requirements, such as rubella or flu vaccinations, imposed upon patient care workers are "job-related and consistent with business necessity." In the case of non-health care employers, however, there is no significant body of case authority to guide businesses with regard to the lawfulness of a mandatory COVID-19 vaccination policy. At this point, we simply do not know what the courts would do.

A key consideration for courts certainly would be any pertinent EEOC guidance. In its COVID-19-related guidance, the EEOC has acknowledged that the pandemic meets the ADA's direct threat standard that permits more extensive medical inquiries and controls in the workplace than the ADA typically allows.

A direct threat finding means that having someone with COVID-19 or symptoms of it in the workplace poses a significant risk of substantial harm to others in the workplace. This has given employers freedom to implement certain medical protocols and standards that might otherwise be unlawful absent the COVID-19 pandemic. Yet, whether this freedom will permit employer-mandated vaccine policies has not been answered by the EEOC.

Importantly, during the 2009 H1N1 flu outbreak, the EEOC issued pandemic preparedness guidance — which it updated on March 21 following the declaration of a COVID-19 pandemic — in which it considered whether an employer could impose a mandatory flu vaccine requirement.[7] Specifically, the EEOC posed the following Q&A:

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?

No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, 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 cost" to the operation of the employer's business, which is a lower standard than under the ADA).(36)

Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it. *As of the date this document is being issued, there is no vaccine available for COVID-19.[8]

This guidance fails to answer the general question as to whether non-health care employers can meet the business necessity test for imposing a vaccination requirement on its employees generally. However, the guidance does make it clear that all employers will need to consider making an exception (1) under the ADA if an employee raises a potential health concern with the vaccine, or (2) under Title VII if the employee raises a religious objection to the vaccine.

It is notable that at the end of this Q&A concerning a flu vaccine, the EEOC noted that there is currently no COVID-19 vaccine available, suggesting that it is withholding judgment concerning such a vaccine. It is also significant that the EEOC seems to recommend that employers merely encourage employees to have a vaccination.

Also potentially relevant, during the 2009 H1N1 flu outbreak, OSHA took the position that, with respect to employer-mandated vaccine policies,

an employee who refuses vaccination because of a reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death (such as serious reaction to the vaccine) may be protected under Section 11(c) of the Occupational Safety and Health Act of 1970 pertaining to whistle blower rights.[9]

The takeaway for employers should be that, particularly if they are in a non-health care industry, they should carefully consider the potential legal impediments to imposing an across-the-board COVID-19 vaccination requirement. Additionally, employers should watch carefully for further guidance from the EEOC and OSHA.

Further, employers should consider the practical implications of implementing a vaccine policy: How might the vaccine be made available to employees; who will pay for the vaccine; what is the process for employees to confirm they have been inoculated; and — if mandating the vaccine — what are the consequences for an employee who refuses to take the vaccine absent any legally protected reason to do so? Whatever an employer decides, it should ensure its policy is clearly articulated to employees.

As we await a COVID-19 vaccine, there are other legal considerations for employers to contemplate about any potential mandatory vaccination requirement.

For instance, does the employer have any employees represented by a union? It is likely that any

imposition of a COVID-19 vaccination requirement, could be a mandatory subject of bargaining with the union — depending upon the particular collective bargaining agreement and bargaining history at issue.

Further, businesses need to recognize that they may operate in a state that has restrictions on vaccination requirements. Notably, employers also need to recognize that the opposite may prove true — that is, governmental entities, whether they be state or federal, may seek to impose a vaccination requirement.

Some states already have various immunization requirements for health care workers.[10] The Advisory Committee on Immunization Practices, or ACIP, is a committee within the CDC comprised of medical and public health experts who develop recommendations on the use of vaccines in the U.S. Many state and local governments rely on these recommendations in implementing vaccine mandates, such as those for public schools.

As ACIP provides annual recommendations for the use of influenza vaccines for the prevention and control of influenza, we would expect the committee to make recommendations with respect to any COVID-19 vaccine.[11] Depending on the guidance, it is possible that states may mandate the COVID-19 vaccine for certain categories of employees, such as those it designates as essential workers. We would anticipate that any government-imposed COVID-19 vaccine rule would lead to complicated and prolonged litigation.

Additionally, employers should consider the potential for workers' compensation claims over adverse reactions to a vaccine. An employer should, at least, inquire with their workers' compensation insurance providers as to how those claims would be handled under the states in which the employer operates.

Finally, businesses may want to consider approaches short of an across-the-board vaccination requirement. For instance, an employer might consider a policy that requires an employee to either receive the vaccine or continue to wear a face mask as an alternative.[12]

Sometimes hospitals have taken that approach with patient care employees who, based upon religious or medical concerns, have refused to take the flu vaccine. Notably, even this more modest approach, may lead to legal concerns and litigation.

What is clear is that now is the time for businesses to begin to consider these questions, giving thought to what approach may be a best fit for their work environments.

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[1] <https://news.gallup.com/poll/317018/one-three-americans-not-covid-vaccine.aspx>.

[2] <https://www.cbsnews.com/news/voters-covid-19-vaccine-opinion-poll/>.

[3] <https://www.brown.edu/news/2020-08-07/fauci-sph>.

[4] <https://www.cdc.gov/flu/vaccines-work/vaccineeffect.htm>.

[5] 910 F.3d 399, 407-409 (8th Cir. 2018).

[6] 42 USCS § 12112(d)(4).

[7] <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>.

[8] *Id.*

[9] <https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09>.

[10] <https://www2a.cdc.gov/vaccines/statevaccsApp/AdministrationbyVaccine.asp?Vaccinetmp=Influenza>.

[11] <https://www.cdc.gov/vaccines/acip/recommendations.html>.

[12] See *Can Health Care Facilities Require Their Employees to Receive the Influenza Vaccine?*, 40 Ohio N.U.L. Rev. 277, 300(2013).