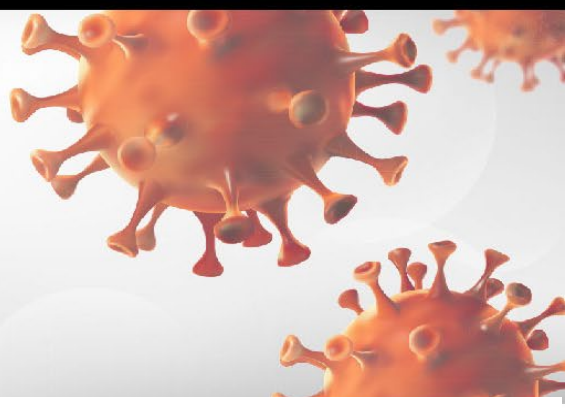
Employer-Mandated Vaccination of the Health Care Workforce to Mitigate the COVID-19 Pandemic



By: Jeffrey Daitz, Esq. & Jacqueline Voronov, Esq., Hall Booth Smith, P.C.
Patrick Mullen, Johnson Kendall Johnson (JKJ)

The COVID-19 pandemic has spawned unprecedented public health challenges and spurred a global race to develop and distribute one or more viable vaccines. While the arrival of a vaccine may be months away, a critical question already looms: can employers, particularly those in health care settings, require employees to take the vaccine when it does become available? If employers do mandate the vaccine, would insurance carriers provide coverage if sued by the employee or the employee experiences negative side-effects from the vaccine?

In the health care industry, mandatory vaccination programs for employees are common, but not uniform across the industry. Requiring vaccination for workers in clinical settings is a long-accepted, widely used standard practice when health care workers can be vectors of infection, particularly airborne pathogens. For example, some states already mandate influenza vaccination for workers in long-term care facilities, and several have requirements for acute care facilities. Many states, however, do not have legislation requiring vaccination of health care workers. Therefore, the responsibility falls upon hospitals and other health care facilities to develop and enforce their own policies.

Recent polls suggest that the U.S. is far from embracing the highly anticipated COVID-19 vaccine. Vaccine hesitancy has historically been a hurdle, with only 45% of adults having received the flu vaccine during the 2018-19 flu season, according to the CDC.[i] Skepticism surrounding an unproven and, as yet, undeveloped vaccine poses another. A May survey found that less than two-thirds of U.S. adults were "very" or "somewhat" interested in getting a COVID-19 vaccine.[ii]

It would be easy to assume that in a health care setting there is a high level of understanding and acceptance of vaccines. The reality is that health care employees live in the same communities and are exposed to the same social media, arguments and influences that drive vaccine cynicism in the rest of the population. But the stakes are far higher among health care workers. Public health officials frame the issue of vaccine mandates for health care workers as one of resident safety. Studies have shown higher death rates in health care settings with a smaller percentage of vaccinated employees

This tension between employees who distrust vaccines and employers who want to encourage or require vaccination has led many to explore the legal ramifications of compulsory vaccine policies.[iii] While the benefits of a fully immune workforce seem clear, what is less obvious are the legitimate objections that employees may raise to mandatory COVID-19 vaccinations, the legal basis for those objections, and the potential legal consequences for health care employers that *fail* to require their employees to be vaccinated.

State-Mandated Vaccinations in Health Care Settings

Laws mandating the vaccination of health care workers are typically intended to protect residents who may be uniquely vulnerable to vaccine-preventable diseases.[iv] Health care facilities across the country are increasingly requiring their workers to be vaccinated for certain vaccine-preventable diseases to reduce the spread of infectious diseases. Many facilities are establishing these requirements under mandates set forth by state statutes or regulations. Depending on the state, these policies may also provide for certain exemptions, such as religious, medical, or philosophical reasons for refusing vaccines. Although various regulations have faced legal challenges, no statute has ever been struck down by the courts.[v]

Unfortunately, the states' laws are far from uniform and vary with respect to which vaccines are required, which health care personnel must be vaccinated, and what exemptions, if any, are available. Some state laws are limited to particular categories of employees and some only require health care facilities to implement a vaccination policy—which may include education and opportunities for employees to receive the vaccine, but not mandate vaccination.[vi] Currently, 17 states require long term care workers to receive influenza vaccinations, with or without exemptions.[vii] (CA, CO, GA, IL, ME, MD, MA, NH, NV, NY, OH, OK, OR, RI, SC, TN, UT)

The primary advantage of a state-imposed vaccination mandate is that employers will not have to worry about Title VII or ADA liability. So long as the state laws hold up against any legal challenges, an employer should not be liable for complying with the law.

Employer-Mandated Vaccinations for Health Care Workers

The case for mandatory immunization of health care workers is compelling. Studies have shown that health care workers who have direct contact with residents are the primary source of infectious disease outbreaks in health care facilities.[viii] Unvaccinated workers can introduce infection or propagate an outbreak in any facility or congregate community setting. The solution then, in the view of most public health officials, is to have all health care workers vaccinated.

JKJ JOHNSON KENDALL JOHNSON

H|B|S HALL BOOTH SMITH, P.C. ATTORNEYS AT LAW

In 1981, the Advisory Committee on Immunization Practices ("ACIP") of the CDC first recommended that all health care personnel receive the annual influenza vaccine.[ix] The goal was for 90% of health care personnel to have received the vaccine.[x] Three decades later, influenza vaccination rates for health care workers have failed to reach this threshold.

According to the latest Morbidity and Mortality Report published by the CDC, the overall vaccination coverage rate for health care personnel in the United States was 78.4%.[xi] Coverage rates noticeably varied based on health care setting. The highest coverage was observed by those employed by hospitals (91.9%) and the lowest by those working in long-term care settings (67.4%).[xii]

But even though the risks to residents appear clear, health care facilities have difficulty achieving high voluntary vaccination rates among their employees year over year. The only approach that has generated near-total compliance is mandatory vaccination consisting of an ultimatum to health care workers that they either receive a vaccine or lose their job.

Employers have significant legal flexibility in adopting mandatory employee vaccination policies. Yet while employers have the legal right to adopt these policies, it is not mandated by all health care organizations. This is partly due to the strength of the anti-vax movement and fears that employees would find mandatory vaccination policies an unacceptable intrusion on their personal liberties.

Legal Objections to Workplace Vaccinations

In general, employers *can* require vaccination as a term and condition of employment. This is due to most states recognizing the doctrine of employment-at-will, under which employers can terminate a worker for any reason as long as a prohibited motivation, such as race or disability status, is not involved.

As for employers in the health care field, specifically, courts have repeatedly upheld an employer's right to require that employees receive vaccinations if they work directly with residents or if they handle materials that could spread infection. The CDC recommends that these health care workers receive vaccinations for hepatitis B, flu, measles, mumps, rubella, chickenpox, tetanus, diphtheria, pertussis, and meningococcal diseases.

Mandating vaccines, even in the health care field, is not without legal risks of which employers should be aware. The U.S. Equal Employment Opportunity Commission ("EEOC") takes the position that health care employers must consider exemptions for those employees who cannot receive vaccines for reasons related to disability, pregnancy, or religion. Employers should analyze each request for exemption on a case-by-case basis.

In March 2020, the EEOC issued COVID-19 guidance specifically addressing the issue of whether employers covered by the Americans With Disabilities Act ("ADA") and Title VII of the Civil Rights Act of 1964 ("Title VII") can compel *all* employees to take the influenza vaccine (noting that there is not yet a COVID-19 vaccine).[xiii]

In responding to this question, the EEOC explained that an employee could be entitled to an exemption from a mandatory vaccination under the ADA based on a disability that prevents the employee from taking the vaccine, which would be a reasonable accommodation that the employer would be required to grant *unless* it would result in undue hardship to the employer. Under the ADA, "undue hardship" is defined as "significant difficulty or expense" incurred by the employer in providing an accommodation.

Additionally, Title VII provides that once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from taking the vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship to the employer as defined by Title VII, a lower standard than under the ADA. Under Title VII, employers do not need to grant religious accommodation requests that result in more than a *de minimis* cost to the operation of the employer's business, a lower standard than under the ADA. However, analogous state laws may impose stricter standards.

There is also an exception to the employment-at-will doctrine for collective bargaining agreements that prohibit imposing mandatory vaccinations without first bargaining with the union. In 2006, the Washington State Nurses Association sued Virginia Mason Hospital in Seattle, which sought to require nurses to receive seasonal flu vaccine. The union claimed that a collective bargaining agreement prohibited new workplace rules without its consent. An arbitrator upheld the union's right to veto the vaccine requirement, and the decision was affirmed in court.[xiv]

Concerns about union opposition and potential liability under Title VII and the ADA may explain why mandates are so rare. In light of these exemptions and the risk of discrimination claims, the EEOC has advised that it is best practice to simply *encourage* employees to take the influenza vaccine rather than to mandate it. Although we can presume that the EEOC will issue similar guidance when a COVID-19 vaccine is approved, the threat imposed by COVID-19 to the health and safety of others may make employers more inclined to require vaccination. Moreover, this threat and the necessary safety measures required of employers with unvaccinated employees may render exemptions to the COVID-19 vaccine more burdensome.

Employers contemplating any policy mandating a COVID-19 vaccine should be prepared to carefully consider the threat posed to the health and safety of their employees and the risk of future claims.

Do Employers Have A Legal Duty to Mandate Vaccination?

Most arguments in support of or in opposition to vaccination policies do not address whether health care or other employers may face liability if they do not require employees to be vaccinated. This question is critically important because many lawyers and government agencies advise employers to encourage but not mandate employee vaccination, and the only risk identified is the risk of being sued for imposing a mandate in violation of anti-discrimination statutes. The unstated premise is that there is no liability if the employer chooses not to require vaccination. However, health care employers should not be lulled into a false sense of security.

Employers whose employees are likely to transmit diseases to other employees or residents may face liability if they fail to require their employees to be vaccinated. For example, an employee might be able to successfully argue that an employer's failure to mandate vaccination was negligent or violated a statutory duty, such as the "general duty clause" of the Occupational Safety and Health Act (OSHA) of 1970, under which an employer must "furnish to each of his employees 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 to his employees." Thus, it is conceivable that OSHA could be interpreted to require a fully vaccinated workplace in the midst of a pandemic.

With respect to some illnesses, it would be fairly easy for OSHA to find that an employer knew that the risk of illness is a known hazard. For example, OSHA has published guidance that states employers that "[w]orkers who perform certain types of health care tasks for patients who may have the flu are at a higher risk of exposure to the seasonal flu virus and need additional precautions to protect them from workplace infection." [xv] The first recommendation is that employers promote vaccination and make vaccines readily accessible to employees. "Vaccination is the most important way to prevent the spread of the flu." [xvi] Healthcare and emergency medical services personnel are a priority group for receiving the flu vaccine." [xvii] This suggestive guidance implies that an employer that fails to at least encourage and enable at-risk employees to be vaccinated may violate OSHA's general duty clause. However, no court has held that OSHA affirmatively obligates an employer to require employees to get vaccinated.

What If Something Goes Wrong with The Vaccine? Would My Insurance Respond?

The two main exposures related to the requirement or encouragement of a vaccine by the employer are (1) employment-related lawsuits or (2) bodily injury/sickness to the employee. Employment actions and subsequent claims would fall under Employment Practices Liability (EPLI) insurance. Bodily injury/sickness as a result of a vaccine could fall within Workers' Compensation (WC) insurance.

If an employer mandates the vaccine as a condition of employment and an employee experiences negative side-effects, this would give rise to a workers' compensation claim. However, if getting the vaccine is merely optional, the result is not as clear. The workers' compensation insurance carrier would examine how strongly it was promoted by the employer, whether it was administered and/or paid by the employer, and whether it relevant to the job or beneficial to the employer.

A 20 year-old nurse's aide at Lehigh Valley Hospital was paralyzed as a result of a flu shot and received an $11.6 million settlement. In that specific case, the hospital did not require the vaccine, but if they had, it would be a very costly workers' compensation claim. [xviii]

The settlement was actually paid by a national vaccine injury program called the *Countermeasures Injury Compensation Program (CICP), which is* a governmental supported program to cover injuries from a governmental approved countermeasure to a public health threat (vaccination, medication, devices, etc). COVID-19 would fall into this program. However, it is a payor of "last resort," meaning health insurance and workers' compensation would be primary.

[i] Centers for Disease Control and Prevention, *General Population Vaccination Coverage*, September 26, 2019, Available at https://cdc.gov/flu/fluvaxview/coverage-1819estimates.htm

[ii] Joseph Ax & Julie Steenhuysen, *Exclusive: A Quarter Of Americans Are Hesitant About A Coronavirus Vaccine*, May 21, 2020, Available at https://www.reuters.com/article/us-health-coronavirus-vaccine-poll-exclu/exclusive-a-quarter-of-americans-are-hesitant-about-a-coronavirus-vaccine-reuters-ipsos-poll-idUSKBN22X19G

[iii] Rene F. Najera & Dorit R. Reiss, *First Do No Harm: Protecting Patients Through Immunizing Health Care Workers*, 26 HEALTH MATRIX 363, 368 (2016) (exploring "the legal issues surrounding the influenza vaccine requirement for health care workers").

[iv] Michele L. Pearson, Carolyn B. Bridges & Scott A. Harper, Ctrs. for Disease Control & Prevention, *Influenza Vaccination of Health-Care Personnel* (Feb. 24, 2006), http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5502a1.htm

[v] Najera & Reiss, *supra* note 3, at 377–78.

[vi] *See* MD. CODE REGS. 10.07.02.01, 10.07.02.21-1 (2017) (requiring comprehensive care facilities and extended care facilities to "request that the employee receive immunization for varicella"); MD. CODE REGS. 10.07.02.21-1(B)(5), 10.07.02.21-1(B)(8) (2017) (requiring facilities to "screen all new employees for immunity to common childhood infections such as mumps, rubella, measles, and chicken pox (varicella), through the use of pre-employment questionnaires and, if appropriate, serologic testing for presence of antibodies of these diseases."). By comparison, Maine's law is not especially rigorous. *See* 10-144 ME CODE R. § 264-2(C) (2010) (requiring that hospitals "adopt and implement a policy that recommends and offers annual immunization against seasonal influenza to all personnel who provide direct care to residents of the facility.").

[vii] CTRS. FOR DISEASE CONTROL & PREVENTION, MENU OF STATE HOSPITAL INFLUENZA VACCINATION LAWS (2015), http://www.cdc.gov/phlp/docs/menushfluvacclaws.pdf [https://perma.cc/YEJ3-DA93]. Some states allow philosophical (California, Illinois, Maine, Maryland, Massachusetts, Nebraska, Oklahoma, Oregon, Rhode Island, and Tennessee) or religious (Illinois, Maine, Massachusetts, New Hampshire) exemptions. Id. Others only allow medical exemptions (Colorado). Id.

[viii] Stewart AM, Rosenbaum, S. *Vaccinating the Health-Care Workforce: State Laws vs. Institutional Requirements. Law and the Public's Health.* July-August 2010; 125: 615-618.; Poland GA, Tosh P, Jacobson RM. Requiring influenza vaccination for health care workers: seven truths we must accept. Vaccine. 2005; 23(17-18):2251-2255.

[ix] Alexandra M. Stewart & Marisa A. Cox, *State Law and Influenza Vaccination of Health Care Personnel*, 31 VACCINE 827, 830 (2013) ("State-based vaccination requirements are the more efficient method to increase vaccine uptake among all HCP when compared to employer-based requirements.").

[x] Am. Acad. of Family Physicians, *AAFP Supports Mandatory Flu Vaccinations for Health Care Personnel*, AAFP (June 13, 2011), http://www.aafp.org/news/health-of-thepublic/20110613mandatoryfluvacc.html

[xi] Black CL, Yue X, Ball SW, et al. *Influenza Vaccination Coverage Among Health Care Personnel — United States, 2017–18 Influenza Season.* MMWR Morb Mortal Wkly Rep 2018;67:1050–1054. DOI: http://dx.doi.org/10.15585/mmwr.mm6738a2

[xii] Id.

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

[xiv] Virginia Mason Hospital *v* Washington State Nurses Association, 511 F.3d 908 (9th Cir. 2007).

[xv] U.S. Dep't of Labor, Occupational Safety & Health Admin., *Interim Guidance for Protecting Workers from Occupational Exposure to Zika Virus*, https://www.osha.gov/zika/index.html

[xvi] Id.

[xvii] Id.

[xviii] Peter Hall, *Leigh County woman paralyzed after flu shot wins $11.6 million for treatment, The Morning Call*, June 10, 2014, https://www.mcall.com/news/mc-xpm-2-14-06-10-mc-lehigh-valley-vaccine-injurt-settlement-20140610-story.html