COVID-19 VACCINE MANDATES IN PUBLIC-SECTOR EMPLOYMENT

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A new wave of COVID-19 cases is sweeping across the United States, propelled by new variant forms. In response to this reality, employers are increasingly opting to require that their employees get vaccinated. With these mandates come a myriad of open legal questions, especially as it relates to public-sector employers, unionized workforces, and states with collective bargaining. This article will address several of the most common questions raised.

(1) Can a public employer mandate that employees get vaccinated?

Answer: Yes.

Public employers can require their employees to get vaccinated against COVID-19. However, if a mandatory vaccine policy is implemented, the employer may be required to accommodate an employee's medical conditions under the Americans with Disabilities Act (ADA) or religious belief under Title VII of the Civil Rights Act of 1964.

Indiana University – a public university – implemented a policy requiring all students, faculty, and staff to be fully vaccinated before returning to campus for the fall semester of 2021. Faculty and staff who refuse vaccination face termination. Indiana University students attempted to enjoin the university from imposing such policy, however, the Northern District Court of Indiana denied the injunction stating that the "Fourteenth Amendment permits Indiana University to pursue a reasonable and due process of vaccination in the legitimate interest of public health for its students, faculty, and staff." The Seventh Circuit and United States Supreme Court upheld the trial court's decision denying the injunction, thus allowing the mandate.

Furthermore, the state of California and New York City gave state and municipal employees a choice of getting vaccinated or face weekly testing. New York City's policy will cover 350,000 public workers – including teachers and police officers. Similarly, the state of New York will require employees at state-owned hospitals and veterans' home to be vaccinated. Finally, the Biden Administration announced on July 29, 2021 that federal government employees will be asked to attest to their vaccination status. Anyone who does not attest or is not vaccinated will be required to wear a mask, test one to two times per week, socially distance, and be restricted on travelling for work.

(2) If the employee refuses to get vaccinated, can the public employer mandate that the employee be tested for COVID-19? How often? And who must incur the costs of such tests?

Answer: Yes, the employer can mandate that the employee be tested for COVID-19. It is the employer's decision to determine frequency and who incurs the cost of the tests.

Unvaccinated employees can be subjected to COVID-19 testing. Although the ADA generally prohibits medical examinations of employees, such examinations are permissible to determine whether an employee poses a direct threat to the workplace. In guidance issued on April 23, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) stated that the COVID-19 pandemic poses a direct threat to the workplace – opening the door for COVID-19 testing of employees to reduce the risk of infection. For example, the California Statewide Law Enforcement Association is giving employees the option of providing proof of vaccination or adhering to testing and mask requirements.

In terms of testing costs, employers have taken a range of approaches from the employer fully covering the costs, to placing such cost on the unvaccinated workers. In some instances, employers are having employees contribute to the costs of on-site testing, such as a co-pay. While employees also have the option to be tested at an outside provider which typically bills patients and their insurance.

(3) If the employer mandates that an employee gets vaccinated and the employee gets sick (or has an adverse reaction), will the employee have a cause of action against the employer, the physician, and/or medical entity that administers the vaccine?

Answer: An employee's recourse for an adverse reaction due to a mandated COVID-19 vaccine would most likely be covered by workers compensation.

Under most state laws, an adverse reaction to an employer mandated COVID-19 vaccine would likely be treated as an on-the-job injury and therefore covered by workers' compensation. Workers' compensation has been the employee's only recourse for other employer-required vaccinations, so it is likely that a COVID-19 vaccine would be treated the same.

An employee would ***not*** have a cause of action against the manufacturer or medical entity providing the vaccine pursuant to the Public Readiness and Emergency Preparedness Act (PREP Act). The PREP Act authorizes the Secretary of Health and Human Services to limit legal liability for "losses relating to the administration of medical countermeasure such as diagnostics, treatments, and vaccines." In a declaration effective February 4, 2020, the Secretary of Health and Human Services invoked the PREP Act thereby providing legal protection to companies making or distributing the vaccine. The only exception to PREP Act immunity is for death or serious physical injury caused by "willful misconduct." This protection lasts until 2024.

(4) What are the privacy rights of the employees relative to vaccination when an employer requires that they furnish proof of vaccination?

Answer: Documentation or other confirmation of vaccination provided by the employee is medical information and must be kept confidential.

An employer can ask the vaccination status of its employees in an effort to maintain a safe work environment. Indeed, employers have a legitimate business

reason to keep track of employees who have been vaccinated. Contrary to public perception, it is not a Health Insurance Portability and Accountability Act (HIPAA) violation for an employer to ask if an employee is vaccinated against COVID-19. HIPAA applies only to specific health-related entities, such as insurance providers, doctors, and hospitals. However, if an employer is going to make a copy of an employee's vaccination card , the employer must maintain such information as it maintains other medical information.

Guidance from the EEOC warns employers against requesting medical information during the process of verifying the vaccination to avoid triggering violations under the ADA or the Genetic Information Nondiscrimination Act (GINA). Under the ADA, an employer may not make a disability-related inquiry (i.e., ask questions that are likely to elicit information about an employee's disability) unless the questions are job-related and consistent with business necessity.

Therefore, there are limits on what an employer can ask or how they may react once aware of an employee's vaccination status. Asking questions about *why* an employee is not vaccinated could reveal medical or religious information which are protected by federal laws. However, if an employer has a policy requiring that all employees get vaccinated, then any employee seeking an exemption or

accommodation under such policy will be obligated to disclose either a medical disability or religious exemption for their case.

(5) What are the privacy rights of the employees relative to COVID-19 tests when an employer requires that they furnish proof of the COVID-19 test?

Answer: The results of an employee's COVID-19 test is medical information and must be kept confidential.

The EEOC's guidance allows for employers to test employees for COVID-19 as well as ask employees if they are experiencing symptoms of the virus, such as fever, chills, cough, shortness of breath, or sore throat. The EEOC indicated that "employers are to maintain all such information about an employee's illness or absence thereof as a confidential medical record in compliance with the ADA."

The ADA requires that an employer keep all medical information about employees confidential, even if that information is not about a disability. The results of a COVID-19 test or information that an employee has symptoms of COVID-19 is medical information and therefore, must be kept confidential.

(6) Is workers' compensation implicated if a public employee contracts COVID-19 and it is believed that it is not job-related? Will that individual be eligible for workers' compensation or paid sick leave?

Answer: An employee may only be eligible for workers' compensation if the employee contracts COVID-19 on the job or it is job-related.

Though every state has its own workers' compensation system, generally workers' compensation does not cover communicable diseases like COVID-19 because of the varying ways individuals can be exposed to COVID-19. Thus, it is

difficult to directly tie contracting COVID-19 to the workplace. For an employee to be eligible for worker's compensation will depend on the nature of the job, the circumstances of the case, and the rules in that state. For example, according to the Ohio Bureau Workers Compensation, an Ohio COVID-19 workers' compensation claim "depends on how you contract COVID-19 and the nature of your occupation." Jobs with a higher risk of exposure, like first responders, are more likely to have an eligible COVID-19 workers' compensation claim.

Clearly, first responders face a particular danger of being exposed to COVID-19 because of the nature of their job. As such, several states took actions to extend workers' compensation coverage to include first responders and health care workers impacted by COVID-19. Some states amended their policy so that COVID-19 infections in certain workers are *presumed* to be work-related and covered under workers' compensation. This presumption places the burden on the employer and insurer to prove that the infection was not work-related, thus making it easier for those workers to file successful claims. For example, Minnesota enacted legislation that creates a presumption that an employee contracted COVID-19 out of and in the course of employment for first responders and healthcare providers – including peace officers.

(7) In a unionized workforce, must the employer bargain before mandating employees get COVID-19 vaccines?

Answer: An employer's decision to mandate COVID-19 vaccines will likely be subject to mandatory bargaining.

In a unionized environment, employers are presented with other legal obligations – primarily in the bargaining context – when considering whether to implement a mandatory vaccine mandate. The employer's legal obligations depend upon the collective bargaining agreement. The agreement might have provisions reserving to management the right to promulgate health and safety rules. Such provisions might allow the employer to make unilateral decisions.

An employer's decision to require employees be vaccinated as a condition of their employment will likely require bargaining with the union. "[L]abor law presumes that a matter which affects the terms and conditions of employment will be a subject of mandatory bargaining." *Newspaper Guild v. NLRB*, 636 F.2d 550, 561 (D.C. Cir. 1980). Typically, a new workplace rule affects a term or condition of employment is if an employee's breach of the rule can lead to discipline or the loss of an opportunity. However, what that bargaining looks like, in terms of COVID-19 mandated vaccination policies, is new territory and currently being litigated.

For example, The International Brotherhood of Teamsters, Local 743 filed a federal lawsuit in Chicago against a union health fund – the TeamCare fund – challenging the fund's mandate that its workers get vaccinated or face termination. In the complaint, Teamsters allege the fund's vaccination policy required bargaining

and that the fund failed to adequately negotiate over the requirement with the union. The court denied the temporary restraining order, sending the parties to grievance arbitration instead. The court further declined to expedite the arbitration proceedings.

In a similar case, the Tucson Police Officers Association filed a lawsuit against the City of Tucson after the City mandated that all employees must be vaccinated. The union argues that the City breached its obligations under the parties' collective bargaining agreement by mandating the vaccines without bargaining in good faith over the change in working conditions. The matter is pending in Arizona state court.

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While it may be likely that the employer's decision to mandate COVID-19 vaccines must be bargained for, it is also likely that such bargaining will only cover the impact or "effects" of the vaccine mandate. For example, the timing of the implementation of the mandate, where and when the vaccination will be performed, and any consequences of an employee's refusal to submit to vaccination—up to and including termination. Thus far, the courts are not providing employees with any immediate relief from these mandated policies. Indeed, to date, we have not seen

any decision—by a judge or arbitrator—overturning a public employer's mandatory vaccine policy.