
Coates' Canons Blog: COVID-19 and the Workplace Part 1: Vaccine Mandates, Vaccine Incentives and More

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In December 2020, I published a blog post titled *May a Public Employer Require Vaccination Against COVID-19?*. In that post I concluded that a public employer may require its employees to be vaccinated against COVID-19 as a condition of employment. That conclusion has not changed. But much has happened since then, including publication of the EEOC's guidance about vaccine incentives, the Occupational Safety and Health Administration's issuance of an Emergency Temporary Standard for employees working in health care, including emergency medical services, and the emergence of a new, more contagious and more dangerous COVID-19 variant, the Delta variant. Many employers are now re-evaluating whether to make vaccination mandatory or offer bonuses to their employees who get vaccinated. This blog post updates and replaces the December post.

PUBLIC EMPLOYERS MAY REQUIRE VACCINATION AGAINST COVID-19

Nothing prohibits a North Carolina public employer from requiring some or all of its employees to be vaccinated against particular illnesses, including COVID-19. So long as a vaccine has been authorized for use by the FDA, ***an employer may require all of its employees to be vaccinated as a condition of employment, subject only to medical exceptions required by the ADA and religious exceptions required by Title VII of the Civil Rights Act of 1964.***

Mandatory Vaccinations Do Not Violate the U.S. Constitution.

Governmental employers often face significant restrictions that private employers do not face, because governmental employers are directly subject to the requirements of the Constitution. A decision from more than a century ago, however, indicates that mandatory vaccinations in a public health emergency do not violate the Constitution. That decision came in the 1905 case of *Jacobson v Massachusetts*, 197 U.S. 11. The U.S. Supreme Court upheld a Massachusetts law that permitted municipalities to order smallpox vaccination of all residents. That law, the Court held, did not violate the Fourteenth Amendment to the U.S. Constitution. The Court found that during a public health emergency, the government's police power allows it to restrain a citizen's rights in order to promote the common good, so long as the restraints are not imposed in an "arbitrary, unreasonable manner," and do not "go so far beyond what was reasonably required for the safety of the public." The *Jacobson* court did say that courts would be obliged to find an exception to a mandatory vaccination regulation for a person who had a condition that could result in serious injury to health or death from the vaccine—in modern words, a person with a medical contraindication. In the decades since, the courts have applied *Jacobson's* broad endorsement of the government's right to take measures to protect public health to a wide variety of situations. And recently, the federal Seventh Circuit Court of Appeals affirmed that when it comes to vaccines, *Jacobson* is still good law.

In *Klaassen v. Trustees of Indiana University*, a group of students enrolled at Indiana University (a public university) sued to stop the university from requiring that all students be vaccinated against COVID-19 unless they had medical or religious reasons precluding vaccination. The students alleged that the university's policy violated their substantive due process rights under the Fourteenth Amendment. The federal Seventh Circuit Court of Appeals denied the students' motion for a preliminary injunction to stop the university from implementing the requirement, finding the students were unlikely to prevail on the merits of their case. The court found that under *Jacobson*, the students did not have a fundamental right not to be vaccinated. It also said that while the students have a right to bodily integrity, making vaccination a condition of enrollment at the university did not interfere with that right. The students asked the U.S. Supreme Court to hear their appeal, but Justice Amy Coney Barrett (the justice who to whom emergency appeals from Indiana are assigned) denied their request without comment, a signal that the majority of the Court did not think the appeal had merit. The same constitutional principles apply to government employers and employees as do to public universities and their students.

Does It Matter that the COVID-19 Vaccines Have Only an EUA Rather Than a Regular Approval?

The vaccinations available at the time of this writing are being administered under an Emergency Use Authorization (EUA) from the federal Food and Drug Administration (FDA). The manufacturers of both the Pfizer and Moderna vaccines have applied for full approval from the FDA, and it has been widely reported that the FDA will issue a full approval for the Pfizer vaccine before the end of September (for an example of the reporting, see here).

The fact that a vaccine has been issued under an EUA does not change the analysis that a government and therefore, a government employer, may require vaccination against COVID-19. The section of the federal Food, Drug and Cosmetic Act that governs the issuance of an EUA [21 U.S.C. § 360bbb-3(e)(A)(ii)(III)] says that any person administering a vaccine – that is, any healthcare provider—must tell the person being vaccinated that they have the option to accept or refuse the vaccine and the consequences, if any, of refusing. They must also be told of any alternatives to the vaccine that are available and of their benefits and risks.

The Office of Legal Counsel of the United States Department of Justice (DOJ) has opined that while the emergency use authorization statute requires that certain information be provided to anyone who is to be vaccinated under an EUA, it does not prohibit employers or businesses from requiring vaccinations.

In other words, no employer, health care provider or pharmacist can take another person by physical force and vaccinate them. The person must be willing to receive the vaccine and the person administering the vaccine must inform them of the risks and benefits, including the medical consequences of refusing. But that doesn't prohibit an employer from requiring vaccination against COVID-19 as a condition of employment. It doesn't prevent discipline or even discharge as a consequence of refusing to be vaccinated against COVID-19.

The EEOC Says Employers May Require Vaccination against COVID-19 So Long as Reasonable Accommodation is Made for Employees with Disabilities or Religious Objections

Most employers, public and private, are subject to the Americans With Disabilities Act and to Title VII of the Civil Rights Act of 1964. Those statutes, in their prohibitions against discrimination, may affect an employer's ability to require that a particular employee submit to a COVID-19 vaccination.

The federal Equal Employment Opportunity Commission (EEOC) administers the ADA and Title VII. It recently updated its online guidance *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* to add a new section (Section K) about vaccination. This is an excellent and comprehensive discussion of how employee vaccination requirements interact with anti-discrimination laws. It should be consulted by employers looking for a detailed discussion. In brief, here's what the EEOC has to say about mandatory employee vaccination against COVID-19:

- First, while the ADA and Title VII continue to apply during the COVID-19 pandemic, they do not interfere with or prevent employers from following the guidelines and suggestions made by the Centers for Disease Control and Prevention (CDC) and state and local public health authorities about steps employers should take regarding the spread of this disease. The EEOC has updated its comprehensive publication *Pandemic Preparedness in the Workplace and the Americans With Disabilities Act* to include discussion of COVID-19.
- A vaccination is not a medical examination. Thus, it is not subject to the ADA's regulation of medical examinations

of employees.

- According to the CDC, health care providers should ask certain questions before administering a vaccine to ensure that there is no medical reason that would prevent the person from receiving the vaccination. *But pre-vaccination medical screening questions are likely to elicit information about a disability and therefore could fall under the ADA's regulation of medical examinations of employees.* As the next two bullet points show, how the vaccination is administered may determine how the ADA applies to the pre-vaccination screening.
 - In the first situation, the pre-vaccination questions are simply not subject to the ADA's regulation of medical inquiries. When an employee is vaccinated by an independent entity that is not acting on the employer's behalf, such as the employee's personal physician, an independent medical clinic, a retail pharmacist, or a local health department that is not sharing information with the employer, pre-vaccination screening questions are **not** disability-related inquiries restricted by the ADA. *This would be true even where the employer has required the employee to receive a COVID-19 vaccine.*
 - In the other situation, however, pre-vaccination medical questions **are** subject to the ADA's medical-inquiry regulations, but are unlikely to violate them. When the pre-vaccination questions *are asked by the employer or by a third-party contractor brought in to administer vaccinations on the employer's behalf*, the questions fall under the ADA. For such questions to be lawful, the employer must show that these inquiries are "job-related and consistent with business necessity." In the case of vaccination against COVID-19, to show that the pre-vaccination screening is job-related and consistent with business necessity, an employer would have to have a reasonable belief that employees who did not answer the questions and, therefore, did not receive a vaccination, would pose a direct threat to the health or safety of themselves or others. **The EEOC has expressly recognized that COVID-19 satisfies the direct threat standard.** See *Pandemic Preparedness in the Workplace*, under Part II (Relevant ADA Requirements and Standards), Section B (Direct Threat). So, even when the employer is administering the vaccination itself (or directing its administration) and asking pre-vaccination questions, there is no violation of the ADA.
- **An employer may require proof that an employee has received a COVID-19 vaccination.** This is not a disability-related inquiry because there are many reasons why an employee may not have been vaccinated, which may or may not be disability-related.
- The ADA requires employers to keep any employee medical information obtained in the course of the vaccination program confidential.
- Under the ADA, an employer must accommodate an employee who has a medical condition that makes it inadvisable for that employee to receive a COVID-19 vaccine unless accommodating the employees poses an undue hardship on the employer.
- Under Title VII, an employer must accommodate an employee whose sincerely held religious beliefs are incompatible with COVID-19 vaccination.

Medical Exemptions from a Mandatory Vaccination Requirement

An employee may have a disability that prevents him or her from taking any vaccine, or a particular vaccine such as a COVID-19 vaccine (because, for example, they are allergic to an ingredient used in the making of the vaccine). The employer must make a reasonable accommodation for that employee. Such an accommodation may result in the employee being exempt from the vaccination requirement and it may not.

As with all requests for accommodation because of a disability, an employer is entitled to documentation from the employee's health care provider about the nature of the medical condition and how the condition makes it unsafe for the employee to receive any or all of the COVID-19 vaccines. ***An employee who refuses to provide the information requested, attested to by their physician, is not entitled to an accommodation and may be held to the vaccination requirement.***

Employers must, as with all situations of reasonable accommodation, engage in an interactive process with employees whose medical condition makes them unable to take the vaccine to try to find a suitable accommodation. The EEOC has said that it generally considers exemption from a vaccine requirement to be a reasonable accommodation in such cases. But as with all ADA accommodations, an employer is not required to accommodate an employee's disability where to do so would cause an undue hardship. What is an undue hardship in the COVID-19 context? As with all matters involving the

ADA, every situation must be evaluated on its own merits, even in the context of COVID-19. Here, one of the most important considerations will be whether the individual employee will pose a direct threat if they remain in the workplace without being vaccinated. In other words, will this employee expose co-workers or the public to the COVID-19 virus? Given the nature of local government employment, the answer to this question may frequently be “yes.”

In some cases, however, an employer will be able to accommodate an employee who cannot be vaccinated by allowing the employee to work remotely for the duration of the pandemic emergency. But not all work can be done remotely. Some jobs involve working out in the community. Others involve providing direct, in-person service to the public from the local government employer's offices. Some jobs require in-person collaboration with others. See 29 CFR § 1630.2(p). Nevertheless, it may be possible to accommodate a person who cannot be vaccinated by having them wear a well-fitting face mask (for useful guidance about face-mask fit, see [here](#)). This would be a particularly effective means of accommodation in those workplaces where everyone is required to wear a mask. Employers may also reassign these employees to different duties that reduce their contact with other employees and with the public.

If an unvaccinated employee's work cannot be performed remotely, and if the employee's presence at work would create a significant risk of exposing others to the virus should the employee become infected, the employer may prohibit the employee from coming to work. As noted above, the EEOC has said that COVID-19 may be considered a direct threat to others in the workplace or to members of the public who interact with the employer's workforce. In such a situation, an employer may exclude that person from the workplace. The employer might put the employee on an indefinite, unpaid leave (or allow the employee to use any accrued paid leave or accrued comp time). But it is possible that the employer will find that the only alternative is termination of employment.

Religious Exemptions from a Mandatory Vaccination Requirement

An employee may have a sincerely held religious belief, practice, or observance that forbids taking a COVID-19 vaccination. Once an employer gets notice of this situation, the employer must, as under the ADA, provide a reasonable accommodation unless it would pose an undue hardship. It is easier for an employer to meet the test for undue hardship under Title VII than under the ADA, but an employer will likely want to apply the same analysis to an employee's request for a religious accommodation from a COVID-19 vaccination requirement as it does for requests for an ADA accommodation, with some slight modifications.

A person doesn't have to belong to a particular religion or religious sect that objects to vaccination – the requirement is only that the person have a sincerely-held religious belief. Thus, an employer cannot require proof of membership in a particular religious community or verification by a clergy member or other religious leader. But an employee's belief that they cannot be vaccinated must be tied to their beliefs about theology, the role of human beings in the universe and the meaning of life. A non-religious personal belief that vaccines cause illness, or that the COVID vaccine has not been subjected to rigorous enough testing, is not sufficient to entitle an employee to an exemption from a vaccine mandate.

Many organizations require an employee to fill out a form that asks them to explain how vaccination is incompatible with their religious beliefs. That can help distinguish between those whose objection really is religiously based from those who simply don't want to be vaccinated. In evaluating the sincerity of the employee's request, you may consider whether it is compatible with their previous behavior. You could ask, for example, whether they have previously been vaccinated against seasonal flu (but note that the problem here is that a person's religious beliefs could change over time).

An accommodation for those who have sincerely held religious beliefs that preclude vaccination does not have to be allowing them to do their jobs unvaccinated. An employer may reassign them to different duties that reduce their contact with other employees and with the public for as long as necessary, may require them to wear a mask or, duties permitting, require them to work remotely.

For a more detailed discussion of exemption from vaccination as a reasonable accommodation of a religious belief under Title VII, see my publication, *Are You Prepared? Legal Issues Facing North Carolina Public Employers in Disasters and Other Emergencies*.

What Does OSHA Say About Mandatory COVID-19 Vaccinations?

To date, neither the federal Occupational Safety and Health Administration (OSHA) nor the Occupational Safety and

Health Division of the North Carolina Department of Labor (NC OSH) have issued any formal or informal guidance or opinions that specifically address COVID-19 vaccination mandates (NC OSH has an enforcement agreement with OSHA and generally adopts OSHA's standards and guidance). OSHA's recently release COVID-19 Emergency Temporary Standard for healthcare employees (adopted in full by NC OSH) encourages employers to facilitate vaccination but does not require that they adopt a vaccination requirement.

OSHA has addressed the question of whether an employer may require vaccination against seasonal flu, however. In a 2009 opinion letter posted on the OSHA website, the acting assistant secretary of labor said,

. . . {A}lthough OSHA does not specifically require employees to take the vaccines, an employer may do so. In that case, 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.

So it seems reasonable to conclude that OSHA, like the EEOC, allows employers to require COVID-19 vaccination provided that it makes an exception in the case of those employees for whom this vaccine is contraindicated for medical reasons.

What If an Employee Refuses To Be Vaccinated But Has No Medical or Religious Excuse?

Employees who refuse to take a mandatory vaccination without medical documentation and without pointing to a sincerely held religious belief may be disciplined or terminated from employment. Refusal to be vaccinated is a form of failure to abide by the terms and conditions of employment and of insubordination. Employers must, of course, follow any procedures set forth in their personnel policies in administering any discipline or in terminating employment.

Proof of Vaccination

To enforce a vaccine mandate, employers need to know who has actually received the vaccine. ***Employers may require employees to tell them whether they are vaccinated.*** Under Equal Employment Opportunity Commission guidelines, employers may ask for this information but must keep it confidential as medical information. See <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> under Section K "Vaccination" at Q & A K4.

Employers may require whatever form of proof of vaccination it chooses. The federal government is relying on self-attestation from its employees. Other employers are requiring employees to show a copy of their CDC vaccination card. Everyone who has been vaccinated received a white card with the CDC seal in the upper right-hand corner at the time of vaccination. On the card the vaccine provider records the type of vaccine (Pfizer, Moderna or Johnson & Johnson), the lot number and the date and place of vaccination. Many employers are asking employees to show them a hard copy of the card or to upload a copy of the card to an employer occupational health and safety website. An employer could also accept a document from a healthcare provider, pharmacy or state COVID-19 vaccine registry that provides similar information.

Must a Public Employer Provide Paid Time Off for Employees to Get Vaccinated?

As a general matter, paid time off for vaccination is not required even if an employer is requiring vaccination. Employers may require that employees get vaccinated while they are off-duty. But an employer that has extended emergency paid sick leave (EPSL) or emergency family and medical leave (EFMLA) to take advantage of employment tax credits is subject to different rules. And employers who have employees who provide health care services must follow OSHA's Emergency Temporary Standard (ETS) for those employees. Under the ETS, emergency medical services personnel are considered healthcare workers. So most local governments will need to take the ETS into account for their first responders. Let's consider EPSL and EFMLA first, then turn to the ETS.

If a local government has extended Families First Coronavirus Response Act (FFCRA) leave in accordance with the American Rescue Plan Act (ARPA), it will have either extended EPSL or EFMLA or both. I've written about the FFCRA extensions here. Employers who have extended either EPSL or EFMLA must provide paid time off for employees to get vaccinated against COVID-19 and to recover from any side effects of the vaccination. Under the ARPA, there is no upper

or lower limit on the amount of wages that an employer is responsible for paying when an employee is using EPSL or EFMLA. By implication, an employer should pay for vaccine-related EPSL or EFMLA at the employee's usual rate.

Employers must also take into account OSHA's Emergency Temporary Standard for COVID-19, which the NC OHS has adopted in full. Although the ETS applies only to healthcare employees, the definition of healthcare provider **includes emergency responders**. That includes emergency medical services, as well as law enforcement and fire service employees if they provide any emergency treatment on scene while waiting for EMS to arrive. To determine which of your emergency responders may be subject to the ETS, use the tool developed by NCDOL [here](#).

Under the ETS, employers do not have to provide additional paid time off for vaccination for employees covered by the rule. Employees may be required to use any accrued sick or vacation leave. But if an employee does not have any accrued leave, then the employer must provide additional paid time off specifically for use for vaccination. The ETS allows for a cap on the amount of time taken for vaccination. It considers up to four hours for the actual administration of the vaccine to be reasonable (unless it is being offered on-site, in which case less time would be reasonable) and up to 16 hours for side effects from the vaccination.

Allowing Employees to Get Vaccinated During Work Hours

Employers that allow or encourage employees to get vaccinated during work hours must compensate those employees. Remember that the Fair Labor Standards Act (FLSA) has no provisions requiring or governing accrued paid leave. Where time is compensable, as vaccination during work hours would be, the FLSA only requires that an employee be paid at his or her regular hourly rate. If accrued paid leave is used to cover that time – that is, if that payment results in time being deducted from the employee's accrued leave bank – the FLSA is satisfied. The time, however, because compensable, would count toward overtime. If an employee did not have any accrued leave that could be applied to the time spent getting a vaccination, and the employer allowed vaccination during working hours, an employee without accrued paid leave would have to be compensated. If vaccination is required, an employer cannot allow employees to be vaccinated during working hours on leave without pay status.

A PUBLIC EMPLOYER MAY ALSO OFFER VACCINE INCENTIVES OR BONUSES

Before requiring all employees to be vaccinated, some employers prefer to offer incentives to employees to take the vaccine. As a general matter, incentives are lawful, but there are different standards an employer must meet depending on the circumstances. Under the ADA, employers can offer incentives to employees to engage in certain types of health-related activities (such as exercising, taking a class, bringing down blood pressure) so long as the incentive is not so great as to make engaging in the activity coercive rather than voluntary. Gift cards in modest amounts (such as \$25) have generally not been considered to be coercive. Some North Carolina local government employers have been talking about incentives of much greater dollar amounts, such as a \$300 or even \$500 cash payment to get vaccinated. Others are offering additional days of paid sick or vacation leave. Whether or not that would be considered coercive depends in part on how the offer is phrased and on who will be doing the vaccinating.

In its online [at question K.16](#), the EEOC says that ***asking an employee to provide proof of vaccination is not a disability-related medical inquiry*** and, therefore, that an ***incentive offered to employees to show proof of vaccination is not subject to the requirement that the amount of the incentive not be coercive***. Accordingly, an incentive of a \$500 or even a \$1,000 bonus to those employees providing proof of vaccination against COVID-19 is allowable under the ADA. An employer could also, therefore, limit merit pay increases to those who provide proof of vaccination.

But the EEOC takes a different approach to incentives tied to an employee's participation in a vaccine clinic offered by the employer or the employer's agent (typically, an outside healthcare company that an employer pays to come to the workplace to vaccinate employees). In this situation, the EEOC says the employer will necessarily be asking questions about medical history as part of the pre-vaccination screening and the process would be subject to the ADA and the Genetic Information Nondiscrimination Act (GINA), and their requirements that no incentive be so large as to be coercive. (See question K.17 of the EEOC guidance). Unfortunately, the EEOC has not provided any guidance about how large an incentive is coercive. Perhaps that is because different types of incentives and incentives of different values will seem voluntary or coercive to different employees.

The bottom line is that when employers direct employees to go out and get vaccinated by a provider of the employee's own choosing, and employers are not themselves providing or hiring someone to provide vaccination, they may offer a bonus or some other type of incentive in whatever amount or value they choose. Incentives will not be considered coercive unless the employer itself or someone hired by the employer is administering the vaccine. But employers should make sure they phrase the offer as a reward or an incentive for showing proof of vaccination.

What about Employees Exempted from Vaccination for Medical or Religious Reasons? Must an Employer Offer the Bonus or Incentive to Them As Well?

The EEOC has not addressed the question of whether employers offering vaccination incentives must give the incentive to those employees who cannot get vaccinated because of a health condition or a sincerely-held religious belief. If the incentive were tied to an employer's health insurance plan – where, for example, an employee received a discount in the amount of their premium contribution – alternative methods of earning the discount would have to be provided to those with medical or religious exemptions. The ADA's and Title VII's principles of nondiscrimination would seem to imply that similarly, employers could not simply disregard those who cannot earn an incentive payment through no fault of their own, because of a disability or a religious belief. But that remains an open question.

For some employers, simply giving the incentive to employees with medical or religious exemptions without requiring them to do anything seems counterintuitive. It isn't, after all, doing anything to further the goal of making the workplace safer. A conservative approach – one that would not run the risk of a disability or religious discrimination claim – would be to require exempted employees to engage in some other COVID-19 related safety activity before qualifying for the incentive. If employees are required to be vaccinated outside of working hours, then exempted employees could be required to engage in the alternate activity outside of working hours. Such activities might include completing a training on safety practices or, perhaps, helping with community outreach related to vaccination.

CONFIDENTIALITY AND COVID-19 VACCINATION

For employers, the confidentiality rules that apply to COVID-19 vaccination are those set out in the ADA. As noted earlier, the EEOC has said that asking for proof of vaccination against COVID-19 is not a violation of the ADA. But under the ADA, any information about COVID-19, including information about vaccination, test results, and symptoms of COVID-19 is confidential medical information that department heads and supervisors are not entitled to know. COVID-19 information must be kept separate from the rest of the personnel file in a separate medical file. A central administrative office or employee (such as the human resources department or the person charged with human resources responsibility) should handle the tracking and recordkeeping associated with a vaccine requirement.

Employers may want to ensure that employees who are exempted from the vaccination requirement wear masks and may want to allow department heads and supervisors to know who is and is not vaccinated so that they can ensure that masks are being worn. As noted above, the EEOC considers vaccination records to be confidential medical information that cannot be shared with a supervisor or anyone else. However, ADA regulations allow employers to put stickers or little notes on ID badges and the like that indicate what employees can and cannot do as a result of their vaccination status. Employers may, therefore, affix some kind of sticker to employee badges indicating whether or not they must wear masks (as opposed to whether or not they are vaccinated). Where employers have a mask mandate in place, that may not be necessary.

Note that HIPAA does not apply to employers seeking information about employee vaccination status. HIPAA applies only to **health care providers** and prohibits **them** from releasing medical information without authorization from the patient. It does not prohibit employers from asking medical questions (the ADA governs that) and does not prohibit employers from requiring proof of vaccination.

TESTING IN LIEU OF VACCINATION

Some North Carolina public employers have adopted a hybrid vaccination plan where employees must either provide proof of vaccination or undergo regular testing for COVID-19. Under a policy of this kind, employers may either conduct on-site testing themselves or require employees to get tested outside of working hours. In either case, employers may require employees to provide proof of their test results.

There are two primary forms of COVID-19 tests. One is a diagnostic test that shows whether someone has active COVID-19 infection. The other is an antibody test that shows whether a person has antibodies of the type produced by COVID-19 infection in their immune system. Antibodies form while a person is infected and can remain in a person's system for a length of time after infection. The presence of antibodies does not guarantee that a person does not have current COVID-19 infection. Employers should therefore require proof of a diagnostic test.

Diagnostic tests themselves come in two forms. One is the molecular or PCR test. This is considered the most accurate form of diagnostic testing and is done by inserting a swab deep into the nose or nasal cavity. The downside to PCR testing is that the results can take from several hours to several days for a lab to produce. The other kind of diagnostic test is an antigen test, also known as a rapid test. An antigen test is less accurate than a PCR test in that it is more likely to show a false negative. Antigen tests are most useful when an employee is showing symptoms of COVID-19. The benefit of an antigen test is that it returns results in as few as 15 minutes. Both antigen and PCR tests rarely show false positives. A positive test result almost always means that an employee is infected with COVID-19. Employers may require employees to return results from either antigen or PCR testing depending on the employer's preference. To read more about the different kinds of COVID-19 tests, see [here](#) and [here](#).

Paying for COVID Testing That is in Lieu of Vaccination

While some health insurance plans may pay for employees' regular testing, the most recent collective guidance from the Centers for Medicare & Medicaid Services (CMS), together with the Department of Labor and the Department of the Treasury, make clear that health insurers may, but are not required to cover testing for employment purposes (see [here](#) at Q.2). If an employer's health insurance plan will not cover regular testing that is required when an employee is vaccinated, the question becomes whether the employer must pay for the test or whether it may let the unvaccinated employee bear the cost.

The least risky course for an employer would be to pay for testing that it is requiring in lieu of vaccination. In its *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the ADA*, the EEOC says that an employer must pay for all medical exam related costs when an employer requires the examination because the employer reasonably believes the employee poses a "direct threat." Elsewhere, the EEOC has said that COVID poses a direct threat. The logical conclusion is that the ADA would require that an employer cover the costs of COVID testing if it is doing so to keep COVID-19, a direct threat to the health and safety of other employees, out of the workplace.

An employer should probably also pay the costs of pre-employment COVID-19 testing for different reasons. North Carolina General Statutes § 14-357.1 makes it a criminal offense for an employer to require an employee to pay for a pre-employment medical exam. The law provides for a fine of \$100 for each violation. Note that the statute's definition of employer does not mention state or local government but also does not exclude them from what is otherwise a fairly broad definition.

SOME ADDITIONAL QUESTIONS AND ANSWERS ABOUT VACCINATION

Q1. Must a Vaccination Mandate Be Adopted by the Governing Board?

There is nothing in the General Statutes or in case law that speaks directly to this specific situation. In the author's opinion, unless the governing board has taken this power away from the city or county manager, managers have the authority to require employees to be vaccinated as part of their responsibility to provide a safe workplace for their employees. Such a requirement would be in line with recommendations from the Governor and NC Secretary of Health and Human Services, the federal Centers for Disease Control (CDC), federal OSHA and NC OHS. If the governing board disagrees, it can vote to override the manager's decision. The wise manager will probably want to make an informed decision about the governing board's general feeling about vaccination.

Q2. Can a local government employer require vaccination of one department or group of employees but not another?

Certainly, a private employer can require one group of employees to be vaccinated, but not another. A public employer can also make similar distinctions but should be aware that an employee subject to the vaccine requirement could bring a lawsuit claiming that the local government violated the Equal Protection Clause of the 14th Amendment by treating one group of employees differently than another. To defend against such a claim, the local government employer would have to show a rational basis for making vaccination mandatory for one group of employees but not for another. Chances are that the employer will not have made such a decision without a reason. Perhaps the group being required to get vaccinated has more exposure to people likely to be infected with COVID-19 (first responders, for example). Perhaps the reasoning is more practical in that the employer is exempting a department from the vaccine requirement because it thinks it will lose too many employees in crucial or hard-to-fill positions. The reason need only be rational.

Q3. Can a local government require volunteers, interns and staffing agency employees to be vaccinated?

A local government may require volunteers and interns to be vaccinated. No one has a right to be a volunteer or an intern. Local governments may impose whatever conditions they choose on volunteers or interns including a requirement that they be vaccinated against COVID-19.

Local governments frequently supervise workers who are placed with the city or county through a staffing agency, which remains the primary employer. In those situations, the local government cannot give those workers a direct order to receive a vaccine. But it can tell the staffing agency that as of an effective date, the workers it places with the city or county must show proof of vaccination to the local government, and that anyone who is not vaccinated or is not willing to show proof should be reassigned to another employer and replaced with someone who meets the local government's requirements.

Q3. May a county enforce a vaccination mandate against employees of the office of the sheriff, employees of the register of deeds, and employees of county health and social services departments that are subject to the State Human Resources Act?

Theoretically the county's personnel policies and requirements that do not apply to hiring, discipline and discharge apply to employees of the sheriff and the register of deeds and to county health and social services departments. Nevertheless, if the sheriff, the register of deeds, the county health director or county social services director choose not to enforce a county-imposed vaccination requirement, there is not much the county can do. The General Statutes give each of these department heads the exclusive right to hire, fire and discipline their employees. If any of these department heads will not discipline or discharge their employees for not getting vaccinated, one recourse the board of county commissioners has is to cut the budget for those departments until their employees become vaccinated.

Q4. If an employee is dismissed for failure to adhere to a vaccine mandate, will they be eligible for unemployment?

It is unlikely that an employee who is dismissed for failure to comply with a vaccination requirement will qualify for unemployment compensation. Failure to satisfy the terms and conditions of employment, including failure to comply with workplace policies, are a form of insubordination and personal misconduct that typically disqualifies an employee from receiving unemployment compensation.

Links

- supreme.justia.com/cases/federal/us/197/11/#tab-opinion-1921099
- www.nytimes.com/2021/08/03/us/politics/pfizer-vaccine-approval.html
- www.law.cornell.edu/uscode/text/21/360bbb-3
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