
Coates' Canons Blog: May a Public Employer Require Vaccination Against COVID-19?

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Every year many employers choose to require employees to undergo vaccination against seasonal influenza (flu). This year, however, a different decision will confront employers: whether to require employees to undergo vaccination against COVID-19.

The flu vaccine has been around for a long time and its side effects and efficacy are well understood. The COVID-19 vaccines—two already in use, others on the way—are new. Several of them use new methods. Government employers and employees want to know: may a public employer require employees to be vaccinated against COVID-19?

For the most part, the answer is “yes.”

Background

The Development and Approval of COVID-19 Vaccines

In the United States, vaccines must be approved by the Food and Drug Administration (FDA) before they can be marketed and distributed. This is normally a lengthy process. In extraordinary circumstances, a vaccine that has not yet been formally approved by FDA can be granted emergency use authorization (EUA), allowing an otherwise unapproved product to be used and distributed during a public health or other emergency. The FDA decides whether to issue an EUA for a vaccine based on data about safety and effectiveness from completed or ongoing clinical trials in volunteers. It evaluates whether the known and potential benefits outweigh the known and potential risks of the vaccine. Manufacturers of vaccines are required to continue their clinical trials in volunteers and to monitor the vaccine for safety and effectiveness after an EUA is granted. For an explanation of how an EUA differs from a regular FDA approval, see [here](#), [here](#) and [here](#).

The Advisory Committee on Immunization Practices (ACIP) of the federal Centers for Disease Control and Prevention (CDC) also performs a separate analysis of vaccine candidates and makes recommendations for their use. Among other things, ACIP makes recommendations about who should receive a particular vaccination, and identifies any medical contraindications to the vaccine. .

At the time of this writing, two COVID-19 vaccines have received EUAs from the FDA and have been recommended for use by ACIP. Clinical trials of additional vaccines are underway and it appears likely that more authorizations will be issued in the coming months.

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 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. Recently, in the context of the COVID-19 pandemic, a few lower courts have found that *Jacobson's* rationale cannot be used to justify particular restraints on free speech and freedom of worship. But when it comes to vaccines, *Jacobson* is still good law.

Does It Matter That the COVID-19 Vaccines Have Only an EUA and Not 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. There is nothing to suggest that this fact changes 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 who is going to take the vaccine must be told 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.

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. 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.

What Does the EEOC Say About Mandatory COVID-19 Vaccinations?

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*, they do 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 a vaccine generally, 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. This is an ADA requirement, but it is also a constitutional requirement under *Jacobson v. Massachusetts*, discussed above. 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.

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 will often 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).

For employees whose jobs cannot be performed remotely and whose presence at work could expose others to the virus, *an employer may prohibit that employee from continuing 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. But it is easier for an employer to meet the test for undue hardship under Title VII than under the ADA. Nonetheless, 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.

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 (NC OSH has an enforcement agreement with OSHA and generally adopts OSHA's standards and guidance). 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, will allow 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 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.. Perhaps the employee simply does not wish to be vaccinated, or thinks vaccinations bring on other illnesses, or does not trust the federal government or the CDC. In these circumstances, the employee does not have a legal basis for refusing. 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.

Another Consideration in Deciding Whether to Require COVID-19 Vaccination: Distribution of the Vaccine

COVID-19 vaccinations will not be immediately available to all takers. The North Carolina Department of Health and Human Services (NC DHHS) considered the recommendations of the CDC's Advisory Committee on Immunization Practices and the North Carolina Vaccine Advisory Committee and devised a vaccine distribution plan . The original plan has been revised a number of time in response to changing federal guidance (the "current NC Plan"). The current NC Plan, like earlier versions, calls for the vaccine to be distributed in phases based on a combination of high risk of severe illness from the virus and high risk of exposure to the virus. This means that employers who require their employees to receive the COVID-19 vaccination will not be able to have all their employees vaccinated at the same time. The current NC Plan is described on pages 4 – 5 of NC DHHS's March 8, 2021 vaccine update document.

The current NC Plan aligns closely with CDC's current recommendations about the priority different groups should be given. It is divided into five groups. **Persons who can be vaccinated as part of Group 1** are limited to health care workers and COVID responders at high risk for exposure based on work duties or who are vital to the initial COVID vaccine response. As of the date of this post has been revised, this includes those who care for COVID-19 patients, as well as those providing cleaning services in areas where COVID-19 patients are treated; EMTs and paramedics; health care workers performing intubations or CPR; those administering intranasal COVID-tests; and those administering the COVID-19 vaccine. Of the other types of health care workers with direct patient contact who may be eligible for vaccination as part of Group 1, those most relevant to public employers include those providing behavioral health services, community health workers, dentists and dental hygienists in public health clinics, environmental services and janitorial staff, home health workers, laboratory and phlebotomy staff, pharmacists, respiratory techs, front-office administrative staff of health clinics, as well as doctors, nurses, nursing aides and assistants who see non-COVID patients. Non-health care employees who volunteer to help with the vaccination effort are also eligible members of Group 1. See the NC DHHS Fact Sheet, Deeper Dive: Group 1.

Group 2 includes anyone 65 years of age and older. There is no requirement that a person have conditions that make them more at risk for complications from COVID-19. The reason for giving people 65 and older high priority for vaccination without regard to occupation or living situation is that they are statistically at high risk of being hospitalized with or dying from COVID-19. Public employers will likely have very few employees who are in Group 2.

Group 3 is comprised of frontline essential workers. Frontline essential workers are those who *must work on-site* at the employer's premises (or out in the community) and who work in one of eight essential sectors, which for local government purposes include Government and Community Services, Public Safety, Transportation, Health Care and Public Health (to the extent not covered by Group 1) and Education. (In its Deeper Dive Fact Sheet for Group 3, NC DHHS identifies frontline essential sectors and workers as those working in one of eight listed sectors from among the sixteen sectors designated as essential by the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Security Agency (CISA). **See** how these sectors are described on pages 7 – 23 of the *CISA Guidance on the Essential Critical Infrastructure Workforce, Version 4.*) Public employee essential workers who are eligible to be vaccinated in Group 3 potentially include:

- all public safety workers & support staff, including law enforcement, fire, EMS and emergency management personnel;
- all 911 telecommunicators;
- all human services workers & support staff;
- county engineers who perform safety inspections;
- transit workers and dispatchers, including maintenance and repair workers;
- public works staff supporting the operation of roads and bridges and engaging in vehicle repair and maintenance for the local government employer;

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- IT staff supporting emergency management, 911, public safety and other critical government operations and maintaining cyber security for local health department operations;
 - occupational safety specialists;
 - registers of deeds and employees;
 - purchasing and procurement employees involved in the COVID-19 relief effort;
 - jail and corrections staff; and
 - those working in the court system.

Public employers must remember, however, that mere employment in one of these sectors does not automatically make an employee eligible for vaccination in Group 3. To be eligible for vaccination in Group 3, a public employee in one of the fields listed above **must be required to work on-site**. Employees working remotely are not part of Group 3.

Note also that there are an additional eight essential infrastructure areas identified by CISA that are not included in Group 3. The many local government employees working in these fields fall into Group 4. Group 4 essential workers include finance department personnel; purchasing and procurement personnel; general public works personnel, including those involved in solid waste and recycling; those who work in traffic signal maintenance; general IT staff; water and wastewater operators; personnel at other local government-run utilities; and parks and recreation employees.

Groups 1, 2 and 3 are active and eligible for vaccination as of the date this post has been revised.

Group 4 expands the pool of those eligible for vaccination to include all adults at high risk of exposure and at increased risk of severe illness from COVID-19. Group 4 includes anyone 16-64 years old with high-risk medical conditions such as cancer, chronic kidney disease, COPD, being immunosuppressed from an organ transplant, obesity, serious heart condition, sickle cell disease and type 2 diabetes, among others. NC DHHS also includes in Group 4 essential workers who work in fields other than those identified in Group 3. These would include employees working in the CISA-designated essential critical infrastructure areas of information technology, water, financial, energy, and communications.

Those members of Group 4 who are at increased risk of severe illness from COVID-19 are now eligible for vaccination . Essential workers in Group 4 will be eligible for vaccination beginning on March 31, 2021.

Group 5 covers everyone else. Group 5 will be eligible on April 7, 2021. This means that as of that date, every adult over age 16 in North Carolina can get their shot.

Conclusion

Recent surveys indicate that perhaps 40% of the population is unlikely to take a COVID-19 vaccine. Employers may, therefore, face significant resistance to a COVID-19 vaccine requirement. Nonetheless, mandatory vaccination is lawful, with the limitations discussed above.

Public employers should ask their local health departments for material and assistance in educating their workforces about the safety and efficacy of the different COVID vaccines to overcome any hesitation that may be based on misinformation. The North Carolina Department of Health and Human Services has prepared material that health departments and employers may use to encourage people to get vaccinated. You can find them here.

Links

- www.fda.gov/vaccines-blood-biologics/vaccines/emergency-use-authorization-vaccines-explained
- www.fda.gov/consumers/consumer-updates/understanding-regulatory-terminology-potential-preventions-and-treatments-covid-19
- www.jhsph.edu/covid-19/articles/what-is-emergency-use-authorization.html
- supreme.justia.com/cases/federal/us/197/11/#tab-opinion-1921099
- www.law.cornell.edu/uscode/text/21/360bbb-3
- www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=



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- www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act
 - www.law.cornell.edu/cfr/text/29/1630.2
 - www.sog.unc.edu/publications/books/are-you-prepared-legal-issues-facing-north-carolina-public-employers-disasters-and-other-emergencies
 - www.osha.gov/laws-regs/standardinterpretations/2009-11-09
 - covid19.ncdhhs.gov/vaccines/deeper-dive-group-1
 - covid19.ncdhhs.gov/vaccines/deeper-dive-group-3
 - www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce
 - fivethirtyeight.com/features/many-black-americans-republicans-women-arent-sure-about-taking-a-covid-19-vaccine/
 - covid19.ncdhhs.gov/vaccines/