

Navigating Employee Rights in Anticipation of a COVID-19 Vaccine

As the hope for a COVID-19 vaccination appears to be coming to fruition, labor organizations and their members are naturally concerned about whether they will be provided prioritized access to the vaccination, as well as their employers' lawful authority to mandate a COVID-19 vaccination as a condition of employment. While public employees other than public school and healthcare professionals generally are not subject to mandatory vaccinations, the COVID-19 pandemic has been anything but ordinary. Therefore, employee organizations must be prepared to address these matters with their employing agency.

In March 2020, the EEOC updated its *Pandemic Preparedness in the Workplace* guidance to state:

Employers and employees should follow guidance from the Centers for Disease Control and Prevention (CDC) as well as state/local public health authorities on how best to slow the spread of this disease and protect workers, customers, clients, and the general public. The ADA and the Rehabilitation Act do not interfere with employers following advice from the CDC and other public health authorities on appropriate steps to take relating to the workplace.

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

Notably, the CDC has issued guidance *recommending* vaccination during an influenza pandemic for the “critical workforce,” which is defined as “anyone whose occupation, skills, or license makes them essential to preserving the critical functions of a society or given jurisdiction.” (https://www.cdc.gov/flu/pandemic-resources/pdf/roadmap_panflu.pdf.) This would appear to include public safety personnel including peace officers, firefighters, and dispatchers, however, there are, as yet, no rules *mandating* vaccination for such essential workers.

Should employers seek to mandate that their employees receive a COVID-19 vaccination, in addition to collective bargaining interests that must be addressed through the statutory meet and confer process, as set forth below, there must be exceptions to any vaccination requirement.

The United States Supreme Court first confronted the subject of mandatory vaccinations in *Jacobson v. Massachusetts* (1905) 197 U.S. 11, where the Court ruled that it was within the police power of the State to mandate that all citizens receive the smallpox vaccine in order to protect the public health and safety, writing that an individual's liberty may, “under the pressure of great dangers,” be subject to restraint “enforced by reasonable regulations.” *Jacobson* also

held, however, that the vaccination mandate would not apply where vaccination would exacerbate a “particular condition of [one’s] health or body.”

The EEOC *Pandemic Preparedness in the Workplace* guidelines discuss both the Americans with Disabilities Act (“ADA”) and Title VII of the Civil Rights Act of 1964. The former prohibits discrimination based on disability (i.e., a physical or mental impairment that substantially limits a major life activity such as hearing, seeing, speaking, walking, breathing, performing manual tasks, caring for oneself, learning or working) and the latter, among other protections, prohibits discrimination on the basis of religion.

While the ADA generally requires an employer to grant an employee a reasonable accommodation if the employee is generally at greater risk of death or serious injury by taking a mandated vaccination, such accommodation may not be required if the employer can show that doing so would cause an undue hardship, defined as a “significant difficulty or expense.” Additionally, an employer is not required to provide an accommodation if the employee poses a “direct threat to the health and safety of others.” (i.e., “a significant risk to the health or safety of others that cannot be eliminated by a modification of policies, practices, or procedures or by the provision of auxiliary aids or services.”)

Similarly, Title VII requires an employer to offer a reasonable accommodation to an employee who refuses a vaccination due to a sincerely held religious belief, practice, or observance, but the employer is not required to incur undue hardship. (See *Weber v. Roadway Express, Inc.* (5th Cir.2000) 199 F.3d 270, 273.) Once the employer has offered such accommodation, the burden shifts to the employee to “cooperate in achieving accommodation of his or her religious beliefs, and must be flexible in achieving that end.” (*Bruff v. N. Miss. Health Servs.* (5th Cir.2001) 244 F.3d 495, 503.) In *Horvath v. City of Leander* (W.D. TX.) 2018 U.S. Dist. LEXIS 236718, a member of the Fire Department objected to the Department’s mandatory prophylactic flu and DTAP vaccines as violative of his religious beliefs. Conceding that Horvath had made a prima facie case for religious discrimination, the City offered him two accommodations: (1) reassignment to a different position, which offered the same pay and benefits and did not require a vaccine, and the City would cover the cost of training; or (2) remaining in his current position while wearing personal protective equipment, including a respirator, at all times while on duty, submitting to testing for possible diseases when his health condition justified, and keeping a log of his temperature. Horvath rejected both offers, and urged an alternative, which was deemed unacceptable. After Horvath was terminated, he claimed that the City fired him in retaliation for his letter seeking an alternative accommodation for his beliefs. The court rejected this position, finding that the City “proffered a legitimate, non-discriminatory reason for Horvath’s firing—his defiance of a direct order by failing to select an accommodation.”

It is important to note that “religious” beliefs are not equivalent to moral or ethical secular beliefs. Although certain anti-vaccination beliefs can be part of a broader religious faith – it is well documented that Christian Scientists and other religious organizations are opposed to

vaccination – these faith-based convictions are distinguishable from a personal belief. For example, in *Friedman v. Southern California Permanente Medical Group* (2002) 102 Cal.App. 4th 39, a prospective employee refused to take a mandatory mumps vaccine because it was grown in a chicken embryo and thus, he claimed, would violate his religious beliefs as a vegan. Among other things, the court found that veganism reflects a moral and secular, rather than religious, philosophy.

As COVID-19 and the accompanying emergency orders issued by state and local governments have become highly politicized, many have come to question the safety and efficacy of the anticipated vaccines which have been developed in an unprecedented period of time. Employees should be aware, however, that Title VII is unlikely to uphold such safety and efficacy concerns as a protected religious belief. (See e.g., *Fallon v. Mercy Catholic Med. Ctr.* (3d Cir.2017) 877 F.3d 487) Moreover, before any vaccine is distributed in the United States, it will have been reviewed by countless regulatory bodies, including the Food and Drug Administration, thus marginalizing an individual belief based upon speculation and conjecture.

Finally, an employer’s decision to mandate vaccination must comply with labor laws, including the Meyers-Milias-Brown Act, as the proposed implementation of an employer-mandated vaccination policy is a mandatory subject of bargaining. As the Ninth Circuit has held, while there is a clear public policy “favor[ing] effective infection controls in hospitals,” for example, “[t]here is also clearly established public policy requiring employers to bargain with their union-represented employees over conditions of employment, and this comes into high relief where...employment can be terminated for failure to satisfy a condition. This policy favoring bargaining is at least as well defined and explicit as the policies regarding infection control.” (*Va. Mason Hosp. v. Wash. State Nurses Ass’n* (9th Cir.2007) 511 F.3d 908, 916-17.)

When bargaining with respect to the implementation of any mandatory vaccination, employee organizations should ensure such vaccinations will occur on duty and at the employer’s sole expense. Employee organizations should also remind the employers of their liability in the event an employee experiences complications from the vaccine, help develop reasonable accommodations for those who are exempt from the mandatory vaccination policy (and even perhaps those who simply wish to adhere to alternative safeguards in lieu of receiving the vaccination), determine the applicability of any vaccination mandates to employees that have previously tested positive for COVID-19 (or have been tested to show the presence of COVID-19 antibodies), establish that the mandate is applied in a consistent manner to all similarly situated employees (including management), and ensure that employees are provided adequate notice of any proposed rules and access to the vaccine so that compliance with the mandate is not frustrated by external factors.