

SHEEHAN PHINNEY

**Can Employers Require Their
Employees to Get the COVID-19
Vaccine? Issues to Consider**

with

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Agenda

- Introduction
- Update on virus and vaccine distribution
- Can employers mandate the vaccine for employees? All employers? All employees?
- Is consent still required?
- What if an employee objects to the vaccine due to medical or religious reasons?
- Alternatives to consider
- Best practices
- Q&A

Introduction

- COVID-19 infections, hospitalizations and deaths have been on the rise – nationally and here in New Hampshire.
- Some states responded by rolling back relaxed standards and implementing new restrictions.
- At the same time we are now over one month into the distribution of COVID-19 vaccines.
- Recent surveys indicate that almost 50% of those polled are uncertain they will get the vaccine.
- Some employers have asked if they can require their employees to get the vaccine.

The Vaccine: Light at the End of the Tunnel

- On December 11th, Pfizer's COVID-19 vaccine was the first COVID vaccine to receive the FDA's Emergency Use Authorization (EUA).
- The day before an FDA Advisory Committee recommended the shot for widespread use for people ages 16 and older.
- Clinical trials show that this, and other COVID vaccines that should also soon be approved, are as much as 95% effective.
- On December 14th, the Pfizer vaccine was shipped coast-to-coast and vaccinations are now underway.
- On December 18th, Moderna's COVID-19 vaccine was approved by the FDA. And potentially two-three more in the pipeline.

The Vaccine in New Hampshire

Since there was not enough vaccine on day one, the NH Department of Health and Human Services had to prioritize the order of vaccine administration.

In NH, the roll out of the vaccine is underway and that is happening in four phases.

- **High-Risk Health Workers are in priority #1.**
According to DHHS, more than 60,000 healthcare workers, 15,000 residents of nursing homes and assisted living facilities and 13,000 first responders were among the first Granite Staters to receive the vaccine.

Four phases (five groupings) of NH vaccine distribution

Phase 1a: Because more than 80% of NH's deaths from COVID-19 have been related to long-term care settings, residents of those facilities will get the first shots, along with healthcare workers and first responders.

Phase 1b: The second group will include older adults in other group living settings, such as senior complexes, and people of all ages who have other conditions that put them at “significantly” high risk.

Phase 2: Vaccines will be offered to school teachers and staff, child-care workers, critical workers in other high-risk settings, people with conditions that put them at moderately higher risk, those in homeless shelters or group homes, prisoners and prison staff, and all other seniors.

Phase 3: This group includes young adults, children and workers in occupations “important to the functioning of society and at increased risk of exposure” who were not included in the earlier phases.

Phase 4: The final group is everyone else.

Is Everyone on Board?

- Roughly 6 in 10 Americans say they would agree to be vaccinated.
- In other words, nearly half of Americans are uncertain or have said they will refuse the vaccine. That resistance is dropping but it is still significant.
- It is estimated that 21 million healthcare workers and 3 million residents of long-term care facilities could be vaccinated by end of January 2021.
- And as many as 100 million Americans could be vaccinated by March 2021.
- In order to reach herd immunity, 70%-80% of Americans would need to be vaccinated.
- That could be by June 2021, but that may not be until late summer or early fall 2021.

Can the Federal Government Mandate Vaccine?

- There is no precedent for a federal government mandate of a vaccine.
- OSHA's 2014 Pandemic Guide simply mentions offering or encouraging vaccination to reduce the risk of infection in the workplace.
- EEOC has consistently taken the position (e.g. flu, H1N1, SARS, etc.) that a vaccine may be necessary in some jobs, but even then there must be opt outs for medical reasons and to accommodate religious beliefs.

Can the State Government Mandate Vaccine?

- Under New Hampshire law, healthcare workers in hospitals, adult day care, residential care, and long-term care facilities can be required to receive a flu shot and present immunization records (e.g. MMR and Hep C).
See RSA 151:9-b, IV.
- However, exceptions and accommodations still apply (i.e., medical and religious reasons).

So, Can Employers Mandate Vaccine?

- On December 11th, FDA issued Emergency Use Authorization (EUA) for Pfizer vaccine. An EUA is a temporary approval, but not full vaccine licensure.
- FDA required to ensure that recipients of a vaccine under an EUA are informed, “that they have the option to accept or refuse the vaccine.”

So, Can Employers Mandate Vaccine?

- On December 16th, EEOC issued updated guidance that confirmed some employers (e.g. hospitals, nursing homes, assisted living facilities and home healthcare agencies) can indeed require employees to get the vaccine.
- *However*, even those employers who may be able to make the vaccine mandatory should proceed with caution.

Legal Issues Related to Possible Vaccine Mandate by Employers

- The mandate should be “**job related**” and “**consistent with business necessity**”.
- Determine if employee refusal or failure to get vaccine represents a “**direct threat**” to him/herself, co-workers and others in the workplace.
- In other words not all employees, even in healthcare settings or schools, may be automatically required to get the vaccine.
- If the employee’s refusal is based on medical or religious reasons, **reasonable accommodations** should be considered.
- Also employers in the process need to be careful not to elicit information about the employee’s impairments or current health status if not relevant to an accommodation discussion.

Legal Issues Related to Possible Vaccine Mandate by Employers (continued)

- Employers need to provide notice (or ensure 3rd party working with employer to provide vaccine) of known benefits and risks/side effects of vaccine. (This should come with the vaccine.)
- Employees who refuse the vaccine may be relieved from duty, transferred, or required to work remotely but employers cannot retaliate against employee for refusing vaccine.
- Employees should consent to receiving vaccine.
- In union environments, mandating vaccination would be the subject of collective bargaining.
- Vaccination records and related inquiries and accommodations should be treated as confidential records.

Legal Issues Related to Vaccination

EEOC says vaccinations are not “medical examinations” under the Americans with Disabilities Act (“the ADA”) but the vaccination must still be:

- Job-related
- Consistent with “business necessity” or justified by a “direct threat”
- No broader or more intrusive than necessary

Reasonable Accommodations **Should be Considered**

When applicable (e.g. employee refuses the vaccine), employers must consider reasonable accommodation requirements under Title VII of the Civil Rights Act and under the ADA.

Religious Exemption

Title VII obligation to reasonably accommodate an employee's sincerely held religious belief:

- Sincerely held *religious* belief is necessary
- Sincerely held *non-religious* opposition to vaccine is insufficient
- Employee must tell employer that sincerely held religious belief conflicts with job requirement (i.e. the vaccine requirement)

Religious Exemption

Employer is obligated under Title VII to reasonably accommodate an employee's sincerely held religious belief unless doing so would result in undue hardship to the employer.

- Undue hardship for religious accommodation purposes is more than a minimal burden on the operation of the business
- Easier standard for the employer to meet than under the ADA

Disability/Medical Exemption

- Employee requests reasonable accommodation to avoid vaccine based on “disability”
- Disability: recognized physical or mental impairment
- Employer’s duty to engage in interactive process with employee about possible reasonable accommodations
- Not a reasonable accommodation if “undue hardship” or no vaccination represents direct threat to unvaccinated in workplace

Other Workplace Considerations

***Union Issues* – Is the employer obligated to negotiate about the Policy itself or the impact of the Policy? Concepts to consider:**

- Obligation to bargain about terms and conditions of employment
- Management rights clause in existing CBA
- Union relations

Notice and Consent Required

Is consent still required if eligible employee volunteers to receive vaccine?

- Yes, the FDA's EUA related to the Pfizer vaccine includes notice and consent provisions (i.e. distribution of drug fact sheet)
- This notice and consent should include:
 - Known benefits and risks
 - Option to refuse
 - Possible consequences in case of opt out

Other Healthcare Issues to Consider

- Health care facilities often require staff to get flu, Hepatitis B, MMR, Varicella, and Tdap vaccines for safety of hospital patients.
- Because healthcare personnel work in an environment where contact with patients or infective material is routine, HCP are at risk for exposure to vaccine-preventable diseases and possible transmission to patients, their families, and other HCP.
- Vaccination programs are therefore an essential component of infection prevention and control.

Other Healthcare Issues to Consider

- **BUT** only one-third of a panel of 13,000 nurses said they would voluntarily take a vaccine; another third said they wouldn't take a vaccine; and the rest said they were unsure - *October survey by American Nurses Association*
- According to American Hospital Association, hospitals unlikely to mandate vaccine until full FDA approval, which will not likely occur until March or later.
- Many physicians and nurses waiting to see side effects of vaccines approved under EUAs.

Other Healthcare Issues to Consider

- HIPAA: Generally not applicable to employers; COVID-19 vaccine does not change the analysis.

However, employers should not look at their group health insurance claims to determine if employees are vaccinated. (That could violate HIPAA privacy rule.)

GINA: Title II not implicated when employer administers vaccine or requires employees to prove they have received it because it does not (a) involve use of genetic information to make employment decisions; or (b) involve the acquisition or disclosure of genetic information as that term is defined by statute.

So what does it mean if the unvaccinated employee represents a “Direct Threat”?

- EEOC “Direct Threat” Analysis:
 - Conduct an “individualized assessment” of four factors in determining whether a direct threat exists: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) and the imminence of the potential harm.

Other Issues to Consider

- EEOC “Direct Threat” Analysis:
 - If employer determines that an unvaccinated worker poses a direct threat, the EEOC says that employer cannot then exclude that employee from the workplace unless “there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so that the unvaccinated employee does not pose a direct threat.”

Other Issues to Consider

- Consider CDC and OSHA guidelines as well as infection control policies and guidelines when making decision as to whether reasonable accommodation is possible based on circumstances of person's job.

If direct threat cannot be reduced to acceptable level, employer can prevent employee from entering workplace and, may, be able to terminate employee.

So if not mandated can employers provide incentives for employees to get the vaccine?

The short answer is yes, but there may be challenges from those who received a religious or medical exemption.

Can you ask employees if they have been vaccinated?

Yes, EEOC says that isn't an improper disability-related inquiry but the inquiry shouldn't attempt to elicit more information than necessary.

Alternatives to the Vaccine

- Whether vaccine is mandatory or not employers should consider alternatives to vaccination. Those should include:
 - Moving employee to a new job or different work space
 - Remote work, at least for a while (e.g. 6 months)
 - Insisting on new or enhanced PPE and safety practices
 - Furlough/leave
- Termination should be the last option and used only when the unvaccinated employee represents a “direct threat” to others in the workplace and there are no reasonable accommodations possible.

Consistency Recommended

Employers should be consistent in their application of their COVID vaccine policies, their opt out practices, recordkeeping and treatment of employees who opt out or refuse the vaccine for other reasons.

Best Practices

- Stay up-to-date with CDC and DHHS guidance
- Create or update COVID-19 policy for your workplace to include vaccination requirements, if applicable
- Be sure notice and consent guidelines are followed
- Continue to follow recommended workplace safety policies
- If vaccination required or encouraged be careful to avoid improper and irrelevant inquiries
- Engage employees in interactive accommodation process
- Maintain confidential medical records
- Be as flexible as possible
- Stay safe – brighter days are ahead

Questions?



THANK YOU.

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