

Can Employers Require Vaccines for Those Who Have Gotten COVID-19?

By Allen Smith, J.D.

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Federal law allows employers to mandate COVID-19 vaccines for employees who've been infected with COVID-19 and those who haven't, legal experts say.

"Although COVID-19 vaccination continues to be a polarizing issue in the United States as a whole, private employers who wish to require employees to be vaccinated for COVID-19 can do so with little legal risk, provided they comply with accommodation (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/if-workers-refuse-a-covid-19-vaccination.aspx), confidentiality and any other legal obligations," said Christopher Durham, an attorney with Duane Morris in Philadelphia.

Currently, there aren't valid legal arguments forbidding private employers from requiring vaccinations against COVID-19, except that legally required accommodations must be provided, he added. The vaccine mandates can include employees who have been infected with and recovered from COVID-19, Durham said.

Kevin Troutman, an attorney with Fisher Phillips in Houston, explained, "Employers have the legal right to require employees to be vaccinated, but each employer must decide whether a requirement—rather than encouragement—is the right choice for them. The more people who are vaccinated, the sooner life and work can return to normal."

But employers should monitor state and local developments, cautioned Jo Bennett, an attorney with Schnader in Philadelphia. Equal Employment Opportunity Commission (EEOC) guidance (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/takeaways-from-eec-latest-guidance-on-covid-19-vaccines.aspx) and the Houston Methodist Hospital decision (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/Judge-Dismisses-Hospital-Workers-Lawsuit-Over-Mandatory-Vaccinations.aspx) in favor of mandatory vaccinations did not address state and local law, she said.

Donna Glover, an attorney with Baker Donelson in Baltimore, said the court held in the Houston Methodist Hospital decision that the federal Food, Drug and Cosmetic Act (FDCA) does not grant an employee subject to an employer's vaccine mandate the right to sue that business, despite the vaccines having received only emergency use authorization. She said once full Food and Drug Administration approval is conferred on the vaccines, "we may see less frivolous litigation."

In addition, the U.S. Justice Department stated in a July 6 opinion that the FDCA doesn't bar public or private entities from imposing vaccination requirements, even when the only vaccines available are those authorized under emergency use.

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COVID-19 Vaccination Resources

(www.shrm.org/hr-today/news/hr-news/Pages/COVID-19-Vaccination-Resources.aspx)

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CDC's Stance

The Centers for Disease Control and Prevention (CDC) states that people should be vaccinated regardless of whether they have already had COVID-19.

"That is because it's not certain how long someone is protected from getting sick again after recovering from COVID-19," said Emily Harbison, an attorney with Baker McKenzie in Houston. So if an employer has a mandatory vaccine policy, it should require vaccines for all employees and not create an exception for those who have already had COVID-19, she said.

Nonetheless, Troutman said, people who were treated with monoclonal antibodies or convalescent plasma should wait 90 days to get a vaccination.

"According to the CDC, studies have shown that vaccination provides a strong boost in protection in people who have recovered from COVID-19," Harbison said. "It may be that if employees are challenging the policy and asking for an exception because they have previously had COVID, the company should provide information to educate employees and raise awareness about the benefits of vaccination even to those who have already had COVID."

[Want to hear from experts from the CDC and more? Join us at the SHRM Annual Conference & Expo 2021 (<https://annual.shrm.org/>), taking place Sept. 9-12 in Las Vegas and virtually.]

Mandate's Purpose

For employers in safety-sensitive industries, such as hospitals, a vaccine mandate can serve to communicate the employer's mission, Bennett noted.

"As the judge in the recent Houston Methodist Hospital case succinctly stated, the hospital is in the business of saving lives without infecting patients with the virus," she said. "An employer that mandates vaccines, regardless of whether it is in a safety-sensitive industry, may intend to demonstrate that it cares for all of its employees and wants to ensure a safe workplace."

Reasonable Accommodation Process

"Based on the current EEOC and CDC guidance, employers can require vaccinations as long as certain legal steps are taken, and based on the CDC's guidance, this should include individuals who already had COVID-19," said Andrew Maunz, an attorney with Jackson Lewis in Pittsburgh.

Objections based on a previous COVID-19 infection would have to be made through the reasonable accommodation request process, he noted, and the employer should then follow its normal accommodation procedures to determine if the following applies:

- The employee has a disability under the Americans with Disabilities Act (ADA) that conflicts with the employment policy. While COVID-19 that lasted a short time and didn't substantially limit a major life activity would not be an ADA disability, a "COVID-19 long-hauler" (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-ada-fmla-covid-19-long-hauler.aspx) may have an ADA disability that must be reasonably accommodated.
- A reasonable accommodation can be provided without an undue hardship on the employer.

Difficulty Identifying Who Has Been Infected

In some cases, it would be difficult to know whether an employee had COVID-19, particularly if that person's infection occurred before testing was available and was identified solely based on the presence of antibodies or self-reported symptoms, said Martha Boyd, an attorney with Baker Donelson in Nashville, Tenn. "Accordingly, we advise employers who require employees to be vaccinated not to distinguish between those who were previously infected and those who were not with regard to the vaccination protocol," she said.

From an employee relations perspective, letting employees who have previously been infected opt out of a COVID-19 vaccine mandate seems like a recipe for employee conflict, Boyd said. "Proving that an employee was previously infected may be difficult in many instances, and the level of immunity may depend to some extent on the severity of the prior infection and the time since the prior infection," she noted.

An employer that lets an employee bypass a vaccine mandate by claiming prior infection may be in the uncomfortable position of having to determine on a case-by-case basis whether the employee's account of the previous illness substantiates the worker's claim, Boyd said.

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