



Consideration and Guidance for COVID Vaccines

*By Margo Ely, Executive Director
December 18, 2020*

As IRMA members anticipate the availability of vaccines to combat COVID-19, we provide this information and guidance. There are currently 2 vaccinations that will receive emergency authorization from the FDA. This is the first time the FDA has provided emergency authorization of a vaccine. While there are many cases addressing an employer's ability to mandate vaccinations, none have addressed the question in the context of a vaccination authorized under emergency use authorization. Some officials have suggested that employers do not have the authority to mandate such a vaccination, but no statutory reference has been found supporting these statements. Nonetheless, we recommend that IRMA members strongly encourage the vaccine, but not mandate it, at this time. The EEOC issued guidance on vaccinations on December 16, 2020, which is clear that employers can require employees to report whether they have taken, or declined, the vaccine. In the meantime, we are waiting for the IDPH and OSHA to issue guidance. This memorandum outlines statutory and regulatory provisions as well as caselaw related to an employer's legal ability to mandate vaccinations. Finally, this memorandum provides guidance to IRMA Fire Departments that will assist in administering vaccinations.

IDPH Law and Regulations

Pursuant to the Illinois Department of Public Health Powers and Duties Law, the Illinois Department of Public Health may require any facility licensed by the Department to implement vaccination programs. 20 ILCS 2310-650. The regulations that implement this law require health care employees working in health care settings to receive "seasonal, novel and pandemic influenza vaccines" unless the vaccine is unavailable. These employees can decline the vaccine for 3 reasons: the vaccine is medically contraindicated; the vaccination is against the employee's religious belief; the employee has already been vaccinated. It further provides "General philosophical or moral reluctance to influenza vaccinations does not provide a basis for an exemption." 77 Illinois Public Health, section 956.30. EMS Systems are included within the definition of health care setting and, as such, applies to Fire Departments. So, even though state officials have indicated they will not mandate the COVID vaccine, these provisions appear to mandate it for IRMA paramedics and EMTs.

There is another statutory provision that requires employees of childcare facilities receive vaccinations, but does not state "pandemic influenza vaccines." 225 ILCS 10/4.6. Rather it specifies Tdap and MMR. Some IRMA members do operate childcare facilities and should be aware of this statutory provision.

Caselaw regarding Employer Vaccine Mandates

There is a wealth of caselaw addressing the authority of employers to mandate vaccines for employees. The overwhelming majority of cases evolve from health care settings, indicating that employees that provide direct or indirect patient care present a risk of infection and the importance of the employer's interest in assuring safe workplaces. With COVID-19 and the risk of spread by essential employees beyond the healthcare industry, it is likely additional employers will consider

mandates. Any injury or illness after a mandatory vaccination would likely be compensable as a worker's compensation claim if the vaccine is mandated. If the vaccine is voluntary, and an employee refuses the vaccine, a subsequent infection that is work related would likely be compensable despite the employee's refusal. In other words, based on the current law, a refusal to be vaccinated is not a basis for the denial of a worker's compensation claim.

The cases involve employees who were terminated after refusing a vaccine that was mandated by the employer. The claims are brought as either discrimination based on disability or discrimination based on religious beliefs. The law is clear that any mandate must include exemptions for disability and religious beliefs.

Vaccine Mandates and the Americans with Disabilities Act

Pursuant to the Americans with Disabilities Act, any vaccine mandate must be job-related and consistent with business necessity. As such, there has to be a specific and reasonable basis to believe that requiring a COVID-19 vaccine is necessary to keep the workplace safe from significant risks and/or to permit employees to be able to perform their jobs. The cases consistently uphold the importance of vaccinations in healthcare settings. I expect that COVID-19 will expand this analysis to additional workplaces based on the infectious spread it brings. In addition, the EEOC proclaimed early on that COVID-19 poses a direct threat to the health and safety of others in the workplace. For these reasons, I believe that COVID vaccine mandates will be upheld if challenged. However, any such mandate must allow for an exemption for disability.

In order to state a case of wrongful discharge under the ADA, a plaintiff must establish: 1) she is a qualified individual with a disability; 2) she was fulfilling her employer's legitimate expectations at the time of termination; 3) the circumstances of her termination raise a reasonable inference of unlawful discrimination. The employee must present medical evidence as to a condition that results in risk from vaccine.

The ADA requires an employer to afford an employee a reasonable accommodation for a known disability unless doing so would impose an undue hardship on the employer. 42 USC 12112(b)(5)(A). Discrimination includes not making reasonable accommodations. The first inquiry is whether the employee's condition is a disability, which is a condition that substantially impairs a major life activity. This analysis is fact intensive and requires an individual analysis. An impairment that is episodic or in remission can qualify as a disability, but it must substantially limit a major life activity, which is defined as "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working." 42 USC 12102(2)(A). Impairments that last only for a short period of time are typically not covered, although they may be covered if they are sufficiently severe. 29 CFR Section 1630.2(j)(1)(ix).

The majority of cases involving vaccine mandates and the ADA involve allergic, or adverse, reactions to vaccines. There is a split in the federal circuits regarding whether sensitivity to vaccinations constitutes a covered disability. The 8th Circuit ruled for the employer in a case where the employee's reaction was moderate and did not require hospitalization. Husvet v. Allina Health Sys., 910 F.3d 399 (8th Cir. 2018). The 3rd Circuit, on the other hand, found that a nurse with severe anxiety and eosinophilic esophagitis stated a claim against a mandatory policy requiring her to receive the TDAP vaccine. Ruggiero v. Mount Nittany Medical Center, 736 Fed.Appx.35 (*3rd Cir. 2018); *See also*, Chmura v. Monongalia Health System, 2019 WL 3767469

(N.D. West Virginia 2019) (nurse failed to prove that her latex allergy required an exemption from a mandatory flu vaccine since a latex free vaccine was available); Norman v. NYU Langone Health System, 2020 WL 5819504 (S.D. New York 2020) (Senior project manager for hospital whose reactions to flu vaccines caused shortness of breath was not sufficient to constitute a disability).

If an employee notifies the employer of a disability and requests an exemption from a vaccine mandate, the employer must engage in an interactive process with the employee to determine if it can provide a reasonable accommodation such as wearing a mask, social distancing and other specific precautions, remote work or alternative work schedule. If the requested accommodation would be an undue hardship, or if the employee could pose a direct threat to the health and safety of others, then an exemption may not be reasonable.

Vaccine Mandates and Religious Discrimination

Both the First Amendment and Title VII of the Civil Rights Act provide public employees with protection from religious discrimination at work. Employees with sincerely held religious objections to vaccines may seek an accommodation from a vaccine mandate. These cases first focus on the issue of whether the employee has a “sincerely held religious belief.” “A religion need not be based on a belief in the existence of a supreme being...nor must it be a mainstream faith.” Kaufman v. McCaughtry, 419 F.3d 678 (7th Cir. 2005). The Supreme Court has provided a standard for determining whether a belief is religious: “Does the claimed belief occupy the same place in the life of the objector as an orthodox belief in God holds in the life of one clearly qualified for exemption?” United States v. Seeger, 380 U.S.163 (1965); *See also*, Adeyeye v. Heartland Sweeteners, LLC, 721 F.3d 444 (7th Cir 2013) (“whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.”); Fallon v. Mercy Catholic Medical Center of Southeastern Pennsylvania, 877 F.3d 487 (3rd Cir. 2017) (employee’s belief that flu vaccine may do more harm than good is a medical belief, not a religious one). As such, whether an employee has a sincerely held religious belief is fact intensive and considered on a case-by-case basis.

If an employee holds a sincerely held religious belief in opposition to vaccines, the next inquiry is whether the employer can offer a reasonable accommodation. An accommodation that imposes an undue hardship on the employer is not reasonable. An accommodation constitutes an undue hardship “if it would impose more than a de minimus cost on the employer.” Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977). Undue hardship can exist if the proposed accommodation would “either cause or increase safety risks or the risk of legal liability for the employer. EEOC v. Oak-Rite Mfg. Corp., 2001 WL 1168156 (S.D.Ind 2001); *See also*, Robinson v. Children’s Hospital Boston, 2016 WL 1337255 (D. Mass 2016) (“Health care employees are at high risk for influenza exposure and can be source of the fatal disease because of their job. The medical evidence in this record demonstrates that the single most effective way to prevent the transmission of influenza is vaccination.”) The cases make clear that the analysis of whether the proposed accommodation constitutes an undue burden takes into consideration the particular job and the workplace at issue.

In Horvath v. City of Leander, a firefighter who was also an ordained minister objected to a flu vaccination as a religious belief. Horvath v. City of Leander, 946 F.3d 787 (5th Cir. 2020). The department approved his requested exemption, but required that he engage in increased isolation, cleaning and PPE to prevent spread of influenza virus to coworkers or patients. The Department also offered to reassign him to another position where he would not provide patient

care. He declined both accommodations and filed a lawsuit after he was terminated. The 5th Circuit ruled in favor of the employer finding that the accommodations offered were sufficient. In addition, the Court found that the mandate was reasonable since it was based on recommendations for health care workers by the CDC, the State Health Department and County officials that required vaccination of EMS and first responders would protect public health and safety.

In summary, vaccine mandates in health care settings are routinely upheld and exemption requests for religious beliefs are closely scrutinized. Moving forward, in light of the direct threat created by COVID-19 in many workplaces, it is likely that we will see mandates in the future once the vaccines are licensed.

EEOC Guidance issued December 16, 2020

In its guidance issued on December 16, 2020, the EEOC indicates that employers can require employees to report whether they have accepted or declined a COVID vaccination. <http://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>. However, pre-screening vaccination questions may implicate the ADA's provision on disability-related inquiries. Such questions must be job-related and consistent with business necessity and because the EEOC has determined that COVID-19 is a direct threat, such questions are likely considered job-related and consistent with business necessity – especially for employees who are present in the workplace as opposed to working remotely. For those employers who are not mandating the vaccine, but rather it is voluntary and encouraged, the employee's decision to answer these questions must also be voluntary. The guidance provides that employers can require proof of the vaccination. Such documentation should be maintained in a confidential manner, as other medical information is maintained.

IRMA members should strongly encourage vaccinations, for now

At this time, with the vaccinations planned roll out, it is our recommendation that IRMA members strongly encourage employees to get vaccinated. In doing so, it is appropriate and permitted for employers to require employees to report whether they have received the vaccination. The ADA allows employers to do so when it is job related and consistent with business necessity. Since the EEOC has determined that COVID-19 is a "direct threat," an employer's need to know what employees have been vaccinated is reasonable. Here is a [CDC document](#) that IRMA members can require be completed by employees who choose to not be vaccinated. For the time being, all employees should continue to be required to wear masks and appropriate PPE, social distance and disinfect, regardless of whether they get the vaccine or not, according to the CDC. <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html#Safety>.

Once the vaccines are licensed, we may consider recommending a mandate since we will have more information related to its effectiveness, side effects and availability. In addition, we will have guidance from the EEOC, the IDPH and the CDC. IRMA members that would impose mandates should provide exemptions for disability and religious beliefs and give individual consideration of each such request.

Guidance for Fire Departments Involved in Vaccine Administration

We are aware that many IRMA Fire Departments will participate in vaccine administration through their EMS systems. We have some concern that this activity could increase liability exposure if

those persons who receive the vaccine become ill. There is a federal law that appears to provide immunity for this activity. 42 U.S.C. Section 247d-6d. There are also various provisions in state law that provide affirmative defenses for any claims that may arise if a person who receives a vaccine becomes ill and files suit. Nonetheless, we recommend that Departments attempt to get an agreement with their EMS hospital requiring that the hospital pay the paramedics/EMTs who assist with vaccine administration for their time and that the agreement include a provision requiring the hospital to defend and indemnify the municipality and its employees for any claims that arise from the administration of vaccines. We are available to review these agreements. In addition, we recommend that Departments require “patients” to sign a waiver of all claims as an additional protection from potential liability. [Sample Vaccine Participant Waiver form](#).

Additional resources related to COVID-19 are available on the IRMA [website](#). As always, we are available for additional questions.