

General Research re: Refusal of Employer-Required COVID-19 Vaccinations

Below is with respect to public employees in New York State working in correctional facilities refusing an employer's requirement to take a vaccine for COVID-19. There is an OSHA opinion on point with respect to mandatory influenza vaccinations.

In general, employers can require employees take vaccinations, with some limitations for those employees entitled to an exemption from mandatory vaccination under Americans With Disabilities Act ("ADA") and Title VII of the Civil Rights Act of 1964 ("Title VII"), and analogous New York State laws, based on the employee's disability or sincerely held religious belief, practice, or observance.

Under federal and state law, employers have a duty to provide safe and healthful workplaces. Employees must comply with legitimate safety requirements and precautions, and those who refuse may be subject to discipline. The U.S. Occupational Safety and Health Administration ("OSHA") has specifically taken the position that employers can require employees to take influenza vaccines, with the limited exception of employees "who refuse[] 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 a serious reaction to the vaccine)." *OSHA's position on mandatory flu shots for employees* (<https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09>) ("although OSHA does not specifically require employees to take the vaccines, an employer may do so.")

Consistent with OSHA's analysis, on March 19, 2020, the Equal Employment Opportunity Commission ("EEOC") issued COVID-19 guidance entitled, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, wherein the EEOC explained that, although no COVID-19 vaccine currently exists, an employer generally *can* compel employees to take the influenza vaccine, but employees could be entitled to an exemption from mandatory vaccination under the ADA or Title VII. (<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>). The EEOC explained the relevant exemptions as follows:

"An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under [Title VII], once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ('more than de minimis cost' to the operation of the employer's business, which is a lower standard than under the ADA)."

There are several recent cases from other Circuits addressing reasonable accommodations under the ADA and Title VII with respect to refusals to vaccinate and illustrating the unlikelihood that any exemption to mandatory vaccination requirements would apply:

First, in *Horvath v. City of Leander*, 946 F.3d 787 (5th Cir. 2020), a firefighter (and ordained Baptist minister) objected to his employer's requirement that employees receive a vaccination for TDAP (tetanus, diphtheria, pertussis). The employer offered two options: (1) assignment away from first responder duties with additional training; or (2) remaining in his position while wearing a respirator at all times, keeping a log of his temperature, and submitting to medical testing. *Id.* The employee declined both accommodations, and the employer terminated him. The Fifth Circuit upheld the termination. *Id.*

Second, in *Hustvet v. Allina Health Sys.*, 910 F.3d 399 (8th Cir. 2018) the Eight Circuit upheld the termination of an employee who objected to her employer's requirement that she be vaccinated for measles and mumps, finding that the employee's medical condition was "garden-variety allergies" for which there was not statutory duty to accommodate.

Third, in *Robinson v. Children's Hospital Boston*, No. 14-10263-DJC (D. Mass.) (April 5, 2016), the District of Massachusetts agreed that accommodating an intake worker at Children's Hospital Boston with a religious objection to the influenza vaccine would have been an undue hardship, "because it would have increased the risk of transmitting influenza to [the hospitals] already vulnerable population." The Court continued to explain that the employee "worked in a patient-care area...worked closely with patients, regularly sitting near or touching them as she worked on their admission to the Hospital," and "[h]ad the Hospital permitted her to forgo the vaccine but keep her patient-care job, the Hospital could have put the health of vulnerable patients at risk...[or] forced the Hospital to arrange its work flow around uncertain factors." *Id.* Consequently, accommodating the employee's desire to be vaccine-free imposed more than a *de minimis* cost and the employer had no duty to accommodate. *Id.*

Considering employees working in correctional facilities have jobs involving significant in-person contact and interaction, it is unlikely that any exemption or accommodation would be required, especially during the COVID-19 pandemic and continued public health emergency, including mandatory stay-at-home orders, travel restrictions, and quarantine requirements.

Moreover, the U.S. Supreme Court has long-upheld the constitutionality of state criminal laws that require vaccinations during public health emergencies. *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905); *see also*, *Phillips v City of New York*, 775 F.3d 538, 543 (2d Cir. 2015) (mandatory vaccination as condition for school constitutional) ("Because the State could bar...children from school altogether, *a fortiori*, the State's more limited exclusion during an outbreak of vaccine-preventable disease is clearly constitutional"), cert denied, 136 S Ct 104 (2015); *F.F. ex.rel Y.F. v. State*, 65 Misc. 3d 616 (Sup. Ct. Albany Cty 2019) (upholding mandatory vaccination laws during measles outbreak in Brooklyn, New York). A mandatory vaccination against COVID-19 would likely be justified by the government's need to promote public health and safety.

In short, a public employer may require that employees receive any future COVID-19 vaccine, with some limited exemptions based on federal and New York State anti-discrimination laws. It is unlikely that a public employee would be entitled to such exemption, and, in any event, it is also unlikely that a reasonable accommodation could be designed for such an employee working

in a correctional facility. Any employee refusing a vaccination requirement, could face disciplinary charges.