

## Employer Vaccine Practices May Spur Bias, Consumer Claims

By **Jen Rubin** (December 8, 2020, 1:20 PM EST)

The deployment of a safe, effective vaccine for COVID-19 is eagerly anticipated to combat the pandemic. It may be a mistake, however, for employers to assume the vaccine will create a COVID-19-safe working environment that allows employees to return to the office without fear of infection.

Indeed, it remains to be seen if the vaccine is accepted once available, and even then, only time will tell its effectiveness — not just for immunity against infection, but for lasting immunity that also lowers the incidence of transmission. Other obstacles also exist: Can employers legally require their employees to vaccinate and should they?



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It is clear no matter the obstacles that employers must understand that a vaccine is not the panacea for returning employees safely to the workplace; employers should therefore carefully consider the consequences of a mandatory vaccination program because that program will inevitably create a workforce of immuno-haves, or those who have received the vaccination.

Vaccine hesitancy remains a challenge, though recent reports indicate that suspicions appear to be waning. A recent Gallup Inc. poll[1] found that 58% of Americans are willing to undergo vaccination while a Nature Medicine[2] study put that number at 71% worldwide.

The Nature Medicine poll also found that 61% of those surveyed would follow their employer's suggestion that they submit to vaccination. These numbers are substantial enough to call into question whether vaccination will be widespread enough to achieve the herd immunity necessary to end the pandemic.

While these types of polls build vaccination confidence, vaccines alone are unlikely to deter the spread of COVID-19 unless they ensure long-term immunity and reliably limit disease transmission. Barring that certainty, many of the same measures necessary to curb the spread of COVID-19 prevaccine will likely remain in place post-vaccine: the use of facial coverings, social distancing, frequent and vigorous sanitation, and the limiting or avoidance altogether of enclosed and large group settings.

Employer-mandated vaccination programs therefore will likely not solve the immediate threat people pose by gathering in close-quarter offices and workplaces.

Employers face legal constraints too. While the U.S. Equal Employment Opportunity Commission has yet to update to its 2009 pandemic preparedness<sup>[3]</sup> guidance to address the COVID-19 vaccine, we do know that prior guidance makes it challenging for employers to mandate vaccination in non-health care settings and other special situations where an employee objects to vaccination based on sincerely held religious objections or if they have a disability.

There is potential for other legal exposure too. A hidden danger that a widely available COVID-19 vaccination poses is the perceived benefit for employers — particularly intensively consumer-facing ones — of promoting the alleged implicit safety and therefore intrinsic value of a fully inoculated workforce.

The impulse to extol the benefits of an inoculated workforce in fact may be the flip side of the anti-discrimination coin. While an employer may be obligated to reasonably accommodate an employee's refusal to take a vaccine based on religious or medical grounds, the law does not appear to ban a business from leveraging the perceived benefits of a vaccinated workforce.

It is relatively easy to imagine a circumstance where an employer would rather hire or retain a vaccinated individual, not only because the individual is less likely to become ill from COVID-19 — with the associated health care costs, lost work time and government-mandated benefits — but perhaps because of the public perception that a fully inoculated workforce creates a safer consumer environment. This could be especially true for employers with intensive customer-facing positions such as restaurants, gyms, retail locations, taxis, airlines, tourist attractions and entertainment venues.

Taking it a step further, marketing gurus may already have in the works advertising campaigns that pivot from a theme of uncertain times to a message promising a safe and healthy workforce to serve the consumer.

But employers should consider resisting the temptation to extol the benefits of an inoculated workforce, which values, and therefore categorizes, workers as immuno-haves or have-nots. Such claims may implicate unfair consumer practices — who, after all, can advertise the health of a workforce with complete confidence? This claim could also theoretically expose an employer to a discrimination claim framed as the legal equivalent of advertising to hire by gender, race or religious group. Here, the immuno-haves need only apply.

Given the high percentage of individuals from underrepresented communities<sup>[4]</sup> who are not only at greater risk for COVID-19, but who have also indicated a reluctance to take a vaccine, a mandatory vaccination program could be subject to an attack on a similar basis as the one the EEOC previously attempted to deploy<sup>[5]</sup> when it challenged mandatory background checks because they disproportionately impacted these communities.

So while Title VII or the Americans with Disabilities Act — or their state equivalents — may not expressly prohibit an employer from exclusively recruiting vaccinated workers or from advertising a COVID-19-safe workforce, employers could be susceptible to claims such a program could inequitably impact the right to equal employment opportunities, benefits and opportunities for advancement for immuno-have-nots.

Because the data and science cannot yet reliably confirm the effectiveness of the vaccine, including its impact on the potential spread of COVID-19, it seems imprudent to assume a mandatory vaccination program will accelerate the return of the workforce to the office — let alone certify the safety of an

immuno-haves workforce.

In the absence of clear guidance around potential legal constraints, employers instead should continue to focus on strategies for ensuring the safety of workers in the office and managing those working at home — employing the best methods to date against the virus: masks, social distancing, temperature checks, group avoidance, etc. Until the scientific and legal landscapes sharpen, employers should resist the temptation to extol or advertise the health of their workforce through mandatory vaccination programs.

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[1] <https://news.gallup.com/poll/325208/americans-willing-covid-vaccine.aspx>.

[2] <https://www.nature.com/articles/s41591-020-1124-9>.

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

[4] <https://www.covidcollaborative.us/content/vaccine-treatments/coronavirus-vaccine-hesitancy-in-black-and-latinx-communities>.

[5] <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions#VA2>.