



COVID-19 Vaccine Mandates for First Responders— Employee Rights and Management Considerations

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Across the nation, government employers are issuing COVID-19 vaccine mandates. These mandates range from requiring either a weekly negative COVID test or a vaccine, to a zero tolerance vaccine mandate as a condition of continued employment. Further complicating matters is the fact that different local governments seem to be accepting medical and religious exemptions to these policies in dramatically different ways.

The issues presented by these vaccine mandates are novel as a result of two distinct factors:

First, COVID-19 is not a public health threat identical to the likes of smallpox. Case law siding with a government interest to require inoculations from these and similar diseases is not identical to the present questions we face. The rate of hospitalization and death—particularly among the young—are so distinct when comparing COVID-19 to past outbreaks of smallpox and other outbreaks addressed in past cases, that the questions are qualitatively different. These details matter when it comes to questions of government interference with individual liberty.

Second, the fact that the medical treatments necessary to inoculate an employee from COVID-19 is uncertain and potentially unending also presents a unique set of questions. Requiring a smallpox vaccine is a one-time proposition. **Measures to combat COVID-19 may prove to be an ongoing, and even unending, proposition which arguably moves mandate outside the realm of a simple vaccination to an ongoing medical regimen** by which the employer periodically informs employees that new medical treatments will be required throughout the year.

This article is *not* intended to give a full and comprehensive review of the relevant legal and practical considerations involved. It is not intended to give a comprehensive “road map” to relevant case law on this subject. Rather, in light of the unique nature of these vaccine mandates,

this article is intended to give both first responders and government employers information to consider when making decisions that could impact public safety, personal liberty and legal liability.

Employee Rights and COVID-19 Vaccine Mandates

At the present time, the FDA has *not* approved a new round of “booster” shots for the general public, but prominent government officials are indicating that the possibility of new booster approval is coming. With that approval, it is foreseeable that many of the same employers who are seeking to mandate the initial vaccination will similarly mandate the next round of boosters, with potentially more to come in the future. Therefore, **even for employees who have already received their vaccination, that may not prove to be sufficient to be deemed “fully vaccinated” as new boosters are approved and distributed. That makes this issue relevant, not only to the currently unvaccinated, but to the first responders who have already taken the first vaccination but will be required to submit to further booster vaccination shots moving forward.**

Now, or in the event of future booster mandates, employees should be aware of the two most commonly cited exemptions sought by employees. The first are medical exemptions and they are fairly straight-forward in principle, but extremely case-specific relative to an individual employee. Likely to require the cooperation of a medical professional, those seeking a medical exemption are asserting that it is medically unnecessary, or possibly medically dangerous, for them to receive the vaccination, according to the professional opinion of a licensed medical professional.

The second, religious exemptions, are distinct from medical exemptions in that there is likely no need to gain the consent of a religious leader or theologian to assert the exemption. You do not need a priest, rabbi or pastor to somehow approve of your request. All that is required is that the employee has a *sincerely held religious belief* that would be violated by receiving the vaccine. For practical purposes, the issue is whether an individual has sought their conscience through prayer or meditation and have concluded that it would be a violation of their conscience. A sincere belief that a higher spiritual power is informing your discernment that the medical treatment in question poses a threat to you, your unborn child or your family is likely sufficient under the law to assert a religious objection and seek an exemption and accommodation.

There are **three practical points to be considered whenever an employee is facing pressure from an employer to receive a medical treatment to which they object on medical or religious grounds.** More fundamentally, **these considerations should be kept in mind when receiving any directive which an employee believes is a violation of conscience:**

(1) **Make the objection and request for exemption and accommodation known in writing.** The request does not need to include any intimate details beyond the simple assertion that you are making.

(2) **If your employer rejects the request for an exemption and you have chosen based on careful consideration not to receive the medical treatment—do not resign from your position but allow your employer to take adverse employment action so as to avoid any confusion as to the nature of your separation. As with any directive which you believe is a violation of your conscience, asserting your right to object should not be subject to confusion due to your resignation.** This may be relevant in the event that you explore future legal options with regard to your termination.

(3) **If your employer rejects the request for an exemption and you have chosen not to receive the medical treatment, based on careful consideration—make sure that you have retained a clear written record of your request for exemption and accommodation.** This may be relevant in the event that you explore future legal options with regard to any side effects that you suffered as a result of the medical treatment you received without your full consent, as it was a condition of your employment.

Management Considerations

As with any significant policy initiative, employers should consider the clear purpose of the rule, particularly if the violation of the policy could result in termination. **Clearly define the government interest—public safety, employee safety, etc.—and be sure to clearly articulate the “why” behind the policy in communicating it to employees.** Whenever possible, go beyond the “ask, tell, make” approach. Instead, take the time to address employee concerns and err on the side of giving employees more time (rather than less) to come into compliance. Furthermore, if the employer has plausible information indicating that the policy implementation will mean terminating a large number of officers, deputies, firefighters or EMTs, make sure you consider the practical impact that those terminations will have on public safety and employee safety.

In implementing any vaccination mandate policy, clarify whether exemption requests will be considered and how those requests will be evaluated. In accepting or rejecting exemption requests, be careful to clearly articulate—for the purpose of fair treatment as well as future litigation—why each and every request was accepted or rejected on its own merits without bias or favoritism prohibited by law.

Also, with respect to exemption requests, be very clear and intentional in whose word is taken at face value and who is subject to further investigation. Any investigation as to the sincerity with which a religious exemption is requested, for instance, should not appear to be based on favoritism, politics or protected class membership, among other lawfully prohibited factors.

Similarly, investigations into medical exemption requests should be undertaken only after considering the possible legal implications of requiring personal health information that may have ramifications under statutes such as the Americans with Disabilities Act (ADA).

Lastly, **employers should be mindful of possible disparate impacts of vaccine mandate enforcement.** Are more racial minority employees likely to be disciplined or terminated? Or more female employees? Or more pregnant female employees? Although a policy's disparate impact does not necessarily mean that the policy itself is unlawfully discriminatory, employers should expect any disparate impact will be subject to legal scrutiny.

About the Author

Matt Dolan is a licensed attorney who specializes in training and advising public safety agencies in matters of legal liability. His training focuses on helping agency leaders create sound policies and procedures as a proactive means of minimizing their exposure to costly liability. A member of a law enforcement family dating back three generations, he serves as both Director and Public Safety Instructor with Dolan Consulting Group.

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