

BALANCING WORKPLACE SAFETY WITH VACCINE REFUSAL DURING THE COVID-19 PANDEMIC

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I. Introduction:

Healthcare workers, as well as other employees who have close contact with members of the public, may be required to be vaccinated against COVID-19 to maintain a safe and healthy workplace. To date, SARS-CoV-2 (the coronavirus that causes the disease known as COVID-19) is responsible for more than 400,000 deaths in the United States. The pandemic continues to rage across the country as more cases are reported and more infectious strains identified. Vaccines to combat the Coronavirus (the “Virus”) are taking time to distribute to Americans, and scientific evidence indicates that new strains of the Virus may be more infectious and more easily transmitted from person to person than the original version. Employers who are hospitals, healthcare facilities or who manage businesses with employees who come into close contact with members of the public have a duty to take precautions to maintain a safe workplace. See Occupational Safety and Health Administration regulations at www.OSHA.gov. While vaccine hesitancy will not likely justify refusing an inoculation, employees may object to taking a COVID-19 vaccine for medical reasons or based on religious beliefs. Objection to vaccines is not new, and the legal issues have been evaluated by courts, commonly in the context of health care workers’ refusal to get vaccinated. What makes the COVID-19 pandemic different than the seasonal flu (the “Flu”) is the increased transmissibility of the Virus and increased risk for serious complications from the disease. Thus, there may be a need to vaccinate on a more widespread basis beyond healthcare workers and first responders.

II. Emerging Issues Regarding COVID-19 Vaccinations:

While numerous vaccines designed to provide immunity against the Virus are being manufactured and more widespread distribution is anticipated in the near future, questions remain as to: (1) when to mandate COVID-19 vaccinations and, (2) what to do when employees refuse to get vaccinated. These issues present questions as to the necessity of vaccines to protect the safety and health of other employees and visitors in the workplace, and under what circumstances an employee can refuse to be vaccinated. There is also an issue of how to reasonably accommodate employees who cannot or will not get vaccinated, and when termination from employment is permitted. The short answer is that given the seriousness of the Coronavirus pandemic, many employers will be justified in asking their employees to get one of the available vaccines to prevent spread of the Virus. Nevertheless, employers with 15 or more employees are legally required to consider, and when feasible, provide accommodations to those employees who for medical reasons cannot get vaccinated or for religious reasons object to receiving a vaccine. An employer must engage in a case-by-case analysis of each situation in which an employee refuses to receive a COVID-19 vaccine so as not to run afoul of federal or state anti-discrimination laws.¹

¹ Texas anti-discrimination laws closely mirror federal statutes. Other states, however, have various anti-discrimination laws, some of which provide more protection for employees than federal or Texas laws. This article is not intended to apply to all states and readers should obtain additional advice in those circumstances.

III. EEOC's Guidance and ADA Considerations:

On December 16, 2020, the Equal Employment Opportunity Commission ("EEOC") issued guidance concerning when COVID-19 vaccines may be mandated without violating federal anti-discrimination laws, particularly the Americans with Disabilities Act ("ADA") and Title VII of the Civil Rights Act of 1964 ("Title VII"). See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws at www.eeoc.gov/coronavirus. The EEOC recognizes that due to the infectious nature of the Coronavirus and the risks for individuals developing serious complications from the disease as compared to the Flu, employers may require employees to get vaccinated to protect other employees, as well as other people who enter the workplace.

- A. Medical Reasons to Refuse Vaccines under the ADA. The ADA allows Employers to impose safety standards to prevent employees from posing a "direct threat" to the health and safety of other individuals in the workplace. See 29 C.F.R. 1630.2(r). If a disabled person cannot receive the vaccine for medical reasons, such as an allergic reaction, the ADA requires the employer to show that an unvaccinated person presents a risk of substantial harm to others that cannot be eliminated or reduced by reasonable accommodations that will not present an "undue hardship." See 29 C.F.R. 1630.2(o). When an employee requests an exemption from vaccination, the employer must engage in an "interactive process" with that employee to consider potential reasonable accommodations, such as working apart from others or working at home before terminating that employee. The company may request supporting documentation when necessary to confirm the medical reasons for vaccine refusal. Employers should visit the Centers for Disease Control ("CDC") website for information concerning the risks unvaccinated employees pose to one another and to visitors in the workplace depending on the type of business and proximity of individuals in the workspace, bathrooms, kitchens and other common areas. See www.cdc.gov.
- B. Religious Objections to Vaccines under TITLE VII. Under Title VII, if an employee states that he or she will not obtain the vaccine based on a sincerely held religious belief, practice or observance, the employer must evaluate whether a reasonable accommodation exists that would not result in an "undue hardship" for the company. See 42 U.S.C. § 2000e-2(e). Undue hardship in the religious exception context means anything more than a *de minimus* cost or burden on the employer. A company may request documentation if necessary to verify the sincerely held religious belief or practice that is for one reason or another in doubt. See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws at www.eeoc.gov/coronavirus. Accommodations may include moving the employee to a different position with less contact with people or allowing the employee to work from home, when feasible. When a reasonable accommodation that would not present an undue hardship on the employer does not exist, or is rejected by the employee, the employer may exclude the employee from the workplace.

IV. Historical Analysis and Precedent on Objections to Vaccines:

Historically, employers such as hospitals and healthcare providers have required workers who will be in close contact with vulnerable patients to get a Flu vaccine as a continued condition of employment, absent a verifiable medical reason for refusal. Although the Flu is not as easily transmitted, nor as dangerous, to as many individuals as compared to the Coronavirus, there is

precedent for employers to follow regarding how to handle situations in which employees refuse to get vaccinated despite the risks to other individuals, some of whom may be more vulnerable.

For example, in *Robinson v. Children's Hospital*, No. 14-10263-DJC, 2016 WL 1337255 (D. Mass. Apr. 16, 2016), the court granted summary judgment in favor of a hospital that treated critically ill children, and terminated a plaintiff-employee for refusing to get the Flu vaccine. *Id.* at *10. In accordance with the American Academy of Pediatrics, the hospital mandated that all healthcare workers and those who had close contact with patients, receive an influenza vaccine unless the vaccine posed a serious health risk to that individual. Robinson was an administrative associate who had close proximity to patients when they checked into the hospital. She but refused to take the vaccine on religious grounds because the vaccines contained pork products. *Id.* at *2-3. In upholding judgment in favor of the hospital, the court made the following findings:

- A. Medical Reasons for Refusing the Vaccine. Robinson said that she would not get a vaccine because she had had an allergic reaction to the influenza vaccine in the past. *Id.* at *4. However, Robinson could not produce any medical documentation to support a medical exemption from taking the vaccine and her request for that exemption was denied. *Id.*
- B. Religious-Based Reasons for Refusing the Vaccine. Robinson also claimed that she could not take the vaccine for religious reasons. A religious discrimination claim requires a “*prima facie*” case that the employee has a *bone fide* religious practice or sincerely held belief that conflicts with the employer’s rule. If the employee can make that showing, the burden shifts to the employer to show that “it offered a reasonable accommodation” or that a reasonable accommodation would constitute an “undue burden” if implemented. *Id.* at *5; *Weber v. Roadway Exp., Inc.*, 199 F.3d 270, 273 (5th Cir. 2000). An accommodation constitutes an “undue hardship” when “it would impose more than a *de minimis* cost to the employer. *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 134 (1st Cir. 2004). This includes economic costs and non-economic considerations such as having to compromise an existing seniority system. *Id.* at 134-135. The totality of circumstances is reviewed when determining whether an employer acted reasonably in offering one or more accommodations. 2016 WL 1337255 at *6. For example, offering an employee a transfer to another position within the company is ordinarily viewed as a reasonable accommodation. *Id.* (citing *Bruff v. Northern Mississippi Health Services, Inc.*, 244 F.3d 495, 499, 502 n.23 (5th Cir. 2001) (attempts to locate alternative position, even at reduced salary, so that therapist whose religion arguably prevented her from counseling gay patients was a reasonable accommodation, and hospital did not discriminate by ultimately terminating therapist)).
- C. Reasonable Accommodation and Undue Hardship. In *Robinson*, the hospital worked with the employee in several ways to accommodate her request for an exemption to getting the Flu shot. First, the hospital requested that she produce medical documentation to support her fear of an allergic reaction. Second, the hospital attempted to locate another position for Robinson in which she would not have close contact with patients, but those attempts failed. Third, when Robinson was unable to locate another position, the hospital granted her request for two months of earned time-off and an additional two weeks of leave, after which her termination was deemed to be a voluntary resignation. *Id.* at *6-7. Although the hospital

had a duty to try to accommodate her religious beliefs, Robinson had a duty to cooperate in the search for an acceptable reconciliation of competing interests between her religious views and maintaining the safety of vulnerable patients. *Id.* at *8. *See also Bruff*, 244 F.3d at 503 (bilateral cooperation is required in locating reasonable accommodations). The court explained that to grant Robinson’s request to stay in her patient care role and not get vaccinated would have presented an “undue hardship” on the hospital by hindering its ability to protect vulnerable patients. 2016 WL 1337255 at *8-10.

V. Fifth Circuit Analysis of Refusal to Get Vaccinated:

Recently, the Fifth Circuit in *Horvath v. City of Leander*, had an opportunity to evaluate a firefighter’s refusal to get a TDAP vaccine to protect against Tetanus, Diphtheria and Pertussis a/k/a Whooping Cough. In *Horvath*, the plaintiff was a driver/firefighter for the City of Leander’s Fire Department, which included first responder duties for medical emergencies. *Id.* at 789. He refused to take the TDAP vaccine on religious grounds. 946 F.3d 787, 789 (5th Cir. 2020). Horvath was given two options for accommodation: (1) to transfer to a code enforcement position, or (2) to wear a respirator mask during his shifts, keep track of his temperature and submit to medical testing. He rejected both options and was subsequently fired for insubordination. The city refused Horvath’s request to remain in his current position and wear a respirator mask only when assisting patients who were coughing or who had a history of communicable illness. *Id.* at 789-790.

Horvath was fired for violating the city’s Code of Conduct, and sued the city for alleged violations of Title VII, the Texas Commission on Human Rights Act and his First Amendment Free Exercise Rights. *Id.* at 790-791. The Fifth Circuit affirmed the lower court’s judgment as a matter of law for the city. Although the employee may have established that he had a sincerely held religious belief for which he needed a reasonable accommodation, the city offered evidence that Horvath turned down two reasonable accommodations, and was fired for failing to comply with the city’s vaccine directive. *Id.* at 793-794. Importantly, the fact that a new work schedule would have reduced Horvath’s income due to his inability to accept outside work, did not make the alternative job offer unreasonable. *Id.* at 792.

VI. Tips for Balancing Workplace Safety with Vaccine Refusal:

- Evaluate Company Needs. Consider the potential for close contact among employees and between employees and visitors in the workplace. Determine those employees who should receive the COVID-19 vaccine given their risk of transmitting the disease to others. Consult the CDC and Texas Department of Health websites to aid in evaluating those risks.
- Establish a COVID-19 Vaccination Policy. Establish a written policy outlining those employees who will be required to get vaccinated against the Coronavirus once vaccines become available. Notify employees to whom requests for vaccine exemptions should be directed.
- Evaluate Requests for Exemptions to Vaccination. Establish a system for evaluating employee vaccine exemption requests. Remember that although vaccine hesitancy may be insufficient, requests based on medical conditions, including vaccine allergies, and objections based on religious grounds must be evaluated for possible reasonable accommodations that will not create an undue hardship on the company.

- Request Documentation when Needed. When necessary to evaluate a request for vaccine exemption, an employer may request documentation to support a claim of a medical condition or religious belief or practice that prevent compliance with a vaccine mandate.

The information contained in this article is not designed to address specific situations. If you have questions concerning this topic, you may contact me directly or consult with other legal counsel for advice on fact specific matters.



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