

Employers Might Require Vaccinations, Legal Experts Say

By **Marco Poggio**

Law360 (February 11, 2021, 2:10 PM EST) -- As state governments struggle to provide the coronavirus vaccine for the people who want it — no easy task given a shortage of vaccines and red tape preventing millions of people from accessing it — the conversation is quickly moving to the next step: Will employers have the legal power to require employees to get the shot?

While legal experts say the answer is likely to be "yes," employers, employees and unions are on a collision course on the issue, which is stirring up controversy even though the scenario seems still distant.

Robert N. Swidler, the vice president of legal services for St. Peter's Health Partners, a nonprofit health care network operating in the Albany, New York, region, said the legality of mandatory vaccination in the workplace will be soon be resolved, either by state governments exerting executive power or, ultimately, by court decisions.

"There's no law that prohibits it," said Swidler, speaking at a Tuesday panel on the legal implications of vaccine distribution hosted by the New York City Bar Association.

Most workers in New York are "at-will" employees, Swidler said, and employers have a duty under federal labor law to ensure a safe and healthy work environment. Health care employers have additional power to control their workforce given to them by federal and state regulations.

"It's pretty clear that we're going to see all kinds of business entities mandating vaccination. We'll probably see some bars and restaurants doing that, stores, taxis, airplanes," Swidler said.

Employees who are hesitant to get the vaccine will end up going against the grain because their employers will have great leverage, he said.

"It doesn't mean that an employer can restrain an employee and force them to get vaccinated," Swidler said. But employers will be able to make vaccination a condition of employment, and use disciplinary action and potentially even termination as leverage.

Employees who wish to dodge the vaccine and the consequences of not getting it — whether that means keeping their jobs or avoiding disciplinary actions — will have to fall under legally recognized exemptions.

A major exemption — the only one involving a large number of people — could involve members of unions who have collective bargaining agreements with their employers. In such cases, employers will have to engage with union members to come to resolutions. Legal precedent as to which side might have the upper hand is blurry. Decisions by courts and the National Labor Relations Board, an independent federal agency that protects the rights of private-sector employees to organize and advocate for themselves with or without a union, are mixed, Swidler said.

Generally, unions across industries have been advocating for vaccine access since the Moderna and Pfizer shots first became available. On Tuesday, the United Food and Commercial Workers International Union, which represents 1.3 million front-line essential workers, became the latest major union demanding vaccine access for its members.

But while there is strong support for facilitating employees' access to the shots, mandating vaccination is controversial.

"It is our union's job to protect people's employment. Protecting our members who, for some reason or another, because of their own judgment about their health, because of their own position, don't want to take a vaccine, is something that we would take very seriously," said Sharon Persinger, the treasurer of the Professional Staff Congress, the union representing about 30,000 employees of the City University of New York.

Persinger told Law360 Pulse the union has yet to take an official position on mandatory vaccination, in part because the conversation is still focused on how to provide access to members who want to get vaccinated voluntarily.

"Our present concerns for our members are much more on the other side," Persinger said. "I hear, 'I want a vaccine. I'm eligible. I can't get an appointment.'"

Persinger herself, who's over 65 and eligible under the state's guidance to get inoculated, took her chances staying up until late at night, when the online portal managing appointments opens rare slots for people to get booked for the shot, to no avail.

Bill Granfield, the president of UNITE HERE Local 100, a union representing 17,000 food service workers in the New York City metropolitan area, said the organization is engaging with employers about a possible mandatory vaccination.

"We thought a great deal about this issue. It's very much a concern," Granfield said.

The union supports giving its members the broadest possible access to the vaccine in order to accelerate the path to a return to normalcy in the hospitality industry, Granfield said.

"In terms of a company making it mandatory, here's our position: right now, no," Granfield said, adding that once the vaccine will become more widely available, the union will negotiate terms of a mandatory vaccine rollout that include protections for people with medical, disability-related and religious exemptions.

"The companies will have to bargain with us to ensure that there are accommodations that don't discriminate against people in those categories," Granfield said.

Representatives for unions representing transportation workers and municipal employees did not return requests for comment.

Swidler said a collective bargaining agreement is not bulletproof. The government might impose a rule that can supersede it.

Other exemptions involved individuals. Employees may object to vaccination on medical grounds, but the parameters are very narrow. For instance, employees might have to show the vaccine presents a serious risk to their health. The issue gets more complex when employees ask to dodge the vaccine as a reasonable accommodation under the Americans with Disabilities Act. Even in that context, federal guidance will give employers a chance to ascertain whether employees' requests are supported by necessity.

"The employer, when you don't have an apparent disability that would preclude getting a vaccination, can ask for documentation of the need for accommodation," Swidler said.

More in general, employers can prevail if they show that not vaccinating an employee working in a collective environment can expose co-workers to the risk of getting infected.

"In the case of an office or a store, the employer should be able to show that," Swidler said.

Jason B. Klimpl, a partner in Tannenbaum Helpert Syracuse & Hirschtritt LLP's employment team who advises employers across many industries, said pregnancies present a much more unclear

scenario. Pregnancy is not per se a disability, but it could provide a basis for refusing a vaccine, particularly in places where state and local governments have laws giving accommodations to people who are pregnant whether or not they have a disability.

"Employers, in my view, should be careful with respect to pregnant employees and the best practice should be to engage in an individualized assessment," Klimpl said. The lack of scientific evidence of the potential impact of COVID-19 vaccines on pregnancies is enough to cast doubt.

"Given that the science is unsettled, one could see how a worker could be uncomfortable with getting a vaccine," Klimpl said.

Other risks to employers could arise in terms of workers' compensation, Klimpl said. Employees who are required to get vaccinated as a condition for employment could ask to be compensated for their time.

"The employers need to think through the wage-and-hour and compensation effects of that directive, and think about that carefully before doing that," Klimpl said.

If employees get sick from reactions to the vaccine — something that is unlikely but still plausible — they might file worker compensation claims. This scenario brings up risks employers must discuss with their workers' compensation brokers.

"That's a conversation that should probably take place," Klimpl said.

Religious exemptions are also a possible scenario, Swidler said. Such exemptions require an employee to show that they have sincere reasons, whether ethical or concerning the purpose of life, or solidified in certain traditions, to refuse the COVID-19 shot.

"They'll have to address ultimate ideas, not just, 'Hey, I'm a religious person,' or 'I don't want to take the vaccine and let's call that religious,'" Swidler said.

A significant precedent is provided by a 2017 Third Circuit decision in the case [Fallon v. Mercy Catholic Medical Center](#) . An employee at Mercy Catholic Medical Center, Paul Fallon, objected to getting a flu vaccine, saying it was doing more harm than good. The employer terminated him for the refusal. Fallon later sought to qualify his request on religious grounds, but a district court dismissed the case with prejudice saying his beliefs were not religious in nature. The Third Circuit affirmed the decision.

Guidelines provided by the U.S. Equal Employment Opportunity Commission, the federal anti-discrimination agency, give employers parameters to evaluate whether religious objections are sincere, for instance, by considering whether an employee has behaved in a manner inconsistent with their professed belief.

In general, legal experts agree that arguments against mandatory vaccination exist.

Carl H. Coleman, a law professor at Seton Hall Law School, said mandatory vaccination might be the right path ahead in certain contexts, but it should be considered only after efforts to promote voluntary vaccination prove to be unsuccessful.

"This is consistent with the general principle that public health measures should start with the least restrictive alternative possible and work upwards to more coercive and restrictive, instead of starting there as a default," he said.

But just because states can mandate vaccines, doesn't mean they should, according to Coleman, who warned "that broad mandates might backfire by increasing distrust in the system."

Klimpl echoed the same sentiment, applying it to the context of an employer's relationship with its employees.

"There is a risk far beyond the legal risk. The risk is: What is your messaging to your workforce? What does this do to your workplace culture and the morale of your employees if you were to, as an

employer, enact a mandatory vaccination policy?" he said. "I think that those things have to be carefully considered."

--Editing by Katherine Rautenberg.

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