

Addressing Workplace Discrimination Over Vaccination Status

By **Karla Grossenbacher**

To be vaccinated or not to be vaccinated?

That is the question dominating the minds of many employees as the COVID-19 immunization continues to roll out in the U.S.

For some, it is an easy decision — when they are eligible to get the injection, they will be in line immediately.

For others, the decision is more complicated. Some have a profound uneasiness about getting the vaccine while it is in U.S. Food and Drug Administration emergency use authorization status.



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Others hold religious beliefs that are not consistent with getting a vaccine. Still others have medical conditions that may make it dangerous for them to get the vaccine, such as pregnancy or certain allergies.

For better or for worse, a dividing line is being created between employees who are vaccinated and those who are not.

For employers looking to return to work their nonessential employees who have been working remotely, one question that is top of mind is whether or not they can return to work only those employees who have been vaccinated or prioritize the return to work of vaccinated employees over other employees.

Some employers also wonder if they can assign work to employees based on vaccination status, letting only vaccinated employees perform job duties in which they interact with the public, visit customer sites or travel.

For many employers, the whole point of having employees be vaccinated is to make such distinctions in an attempt to have a safer workplace.

Generally speaking, making employment decisions based on vaccination status is legally permissible, except potentially where an employee or applicant cannot be vaccinated due to a disability or a religious belief and seeks an accommodation as a result.

For example, guidance put out by the U.S. Equal Employment Opportunity Commission states that employees who have not been vaccinated due to a disability or religious based objection cannot be excluded from the workplace without due consideration being given to an accommodation request and an individualized assessment being made.

Making employment decisions based on vaccination status is generally permissible because vaccination status, in and of itself, is not a protected classification under federal or state law. However, some states are trying to change this.

About one-third of all of the U.S. states have proposed legislation that would make discrimination based on vaccination status illegal.

For example, legislators in Alabama, Connecticut, Kansas, Oklahoma, South Carolina and

Tennessee have introduced bills that would prevent employers from taking adverse action against employees who choose not to be vaccinated.

In the return-to-work context, if these bills become law, the question becomes whether or not requiring an employee to work remotely due to vaccination status, when others are returning to the office, is an adverse employment action.

However, the question of whether or not refusing to allow an employee to physically come to work is an adverse employment action may be irrelevant under some of the bills being introduced at the state level.

For example, in Indiana, a bill has been introduced that would generally prohibit discrimination against employees who "fail to receive any immunization" with respect to the "terms, conditions and privileges" of employment.

Working in the office could be considered a privilege of employment within the meaning of the bill. Indeed, some states are proposing to go so far as to prohibit any negative treatment of unvaccinated employees in the workplace.

For instance, Kentucky has a proposed law that would make it unlawful to "limit, segregate, or classify employees in any way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect status as an employee" because the person "declines immunization."

In Minnesota, legislators have introduced a bill that would prohibit an "agent of business" to "treat differently, single out, deny opportunity, ostracize, stigmatize, or discriminate against an individual as a result of the individual's decision on whether or not to receive a vaccine."

Most notably, the Minnesota bill purports to make violations of the law, if enacted, a felony that carries a ten year minimum prison sentence.

Some of the proposed state legislation could have implications beyond decisions about how and when unvaccinated employees are returned to work. Bills introduced in Kentucky and Hawaii propose to make vaccination status an additional protected classification under their existing state employment discrimination statutes.

The Kentucky bill would make a protected class for a "person who declines immunization," and Hawaii's proposed law would make a protected classification for "invasive medical test status" and "vaccination status."

In addition to making discrimination with respect to terms and conditions of employment illegal, these proposed laws would presumably make harassment in the workplace based on these classifications illegal.

Harassment of those who have not been vaccinated is already a potential legal issue under federal law if an employee is harassed for being unvaccinated and the reason the person is not vaccinated is due to a disability or sincerely held religious belief.

However, the Kentucky bill would expand legal protection to anyone who declines to be vaccinated, and the proposed Hawaii law would protect all employees because everyone has a "vaccination status."

Employees have strong and differing opinions about vaccinations, and these opinions have

the potential to cause friction in the workplace.

In particular, with respect to return to work, some vaccinated employees have concerns about working alongside unvaccinated employees, and this could lead to unwelcome comments to unvaccinated employees about their status and/or the exertion of pressure on them to get vaccinated or stay home.

Employers need to be on the alert for such conduct as employees return to work because it might be being directed toward an employee who has not been vaccinated due to legally protected reasons.

The post-pandemic workplace will be different in many ways from the pre-pandemic workplace and the potential for new forms of discrimination and harassment is one more minefield employers will need to navigate.

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