

Timothy J. Ford Quoted In Healthcare Risk Management Article, "Vaccine Rollout Brings Legal Labor Concerns For Employers"

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The following excerpts from Healthcare Risk Management share [Tim Ford's](#) perspective about the legal concerns raised by the COVID-19 vaccine.

Employers should be prepared for the issues that will arise relative to their employees and the COVID-19 vaccine, says **Timothy J. Ford**, JD, a partner with Einhorn, Barbarito, Frost & Botwinick in Denville, NJ.

"A common question is whether a healthcare employer can require employees to be vaccinated. The answer is generally yes, but with caveats," says Ford.

The Equal Employment Opportunity Commission (EEOC) recently issued guidance indicating employers may mandate the vaccine, subject to some exceptions. The EEOC emphasizes employers should remember that "guidance from public health authorities is likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety."² *(See the story in this issue for more information on the EEOC guidance.)*

Throughout the pandemic, EEOC has characterized COVID-19 as a "direct threat," which is defined as "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."²

"If an individual with a disability poses a direct threat despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA [Americans with Disabilities Act]. With the vaccine in distribution, it is possible for employers to require employees to be vaccinated in order to

work or to return to work if the failure to vaccinate will result in a direct threat to other employees,” Ford says.

However, as the Pfizer and Moderna vaccines have only received EUAs and not full approval, Ford advises employers to wait until the FDA expands authorization to its standard approval before requiring vaccination.

“Although employers will likely be permitted to mandate the vaccine, that does not necessarily mean an employer should,” Ford notes. “The vaccine is in its early stages. Until the vaccine is more widely accepted by the FDA and by society at large, employers that try to mandate the vaccine for their employees may potentially face legal challenges. Another significant aspect of this issue involves the employment agreements and/or policies, as those will need to be reviewed and amended to account for the vaccination so that enforcement is uniform.”

ADA Exemptions Apply

The EEOC has stated employees may be exempt from a mandatory vaccine if the employee has a covered disability under the ADA that prevents him or her from taking the vaccine, Ford notes. Under the ADA, employers must provide a reasonable accommodation to any employee with a covered disability that prevents them from receiving the vaccine.

Employers are not required to provide a reasonable accommodation if none is available, if the reasonable accommodation would present an undue hardship to the employer, or if the employee would pose a direct threat to the health or safety of others, Ford explains.

In addition, an employee may be excused from the vaccine requirement under the religious accommodation provision of Title VII of the Civil Rights Act of 1964, Ford says. Employees must notify employers of sincerely held religious beliefs that prevent them from receiving the vaccine.

“By not requiring a vaccination, some might believe that the employer is failing to provide a safe working environment under the Occupational Safety and Health Act,” Ford says. “However, there is no precedent for such a result. If your business is in healthcare or senior housing, there may be liability if the vaccination is not mandated.”

The cost of the vaccines is covered by the federal government, Ford notes. However, there may be administrative fees or other costs. If there are costs that are not covered by insurance, employers should strongly consider covering any costs, Ford says, particularly if mandated under the company’s employment policies. Employers also are strongly advised to pay employees for the time to travel to and from the vaccination location.

If an employee refuses the vaccine, the employer may have options that include termination, Ford says. In at-will employment states, employees can be terminated for any nondiscriminatory and nonretaliatory reason. Employers may terminate an employee for refusal to fulfill the requirements of his or her position and/or failure to be present at work. Refusing to take the vaccine could qualify for those reasons, Ford says.

However, if an employee has a recognized disability that would affect his or her ability to return to work in an environment with unvaccinated co-workers, state laws may require reasonable accommodation, Ford says. One of these accommodations may include remote work.

“The COVID-19 vaccination is a starting point in stopping the pandemic, but it is uncharted territory for employers,” Ford says. “Employers can expect further guidance from their states and the EEOC. This is an evolving area of the law with many variables, and as such, prior to implementing any COVID-19 vaccination policies, employers should consult with counsel.”

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