

# Timothy J. Ford Quoted In NJ.com Article, "What Can My Employer Do If I Refuse A COVID Vaccine?"

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As published by [NJ.com](https://www.nj.com), August 29, 2021

By Karin Price Mueller | NJ Advance Media for NJ.com

Now that the Pfizer COVID vaccine has received full approval from the Food and Drug Administration (FDA), more companies are mandating their employees get vaccinated.

Other companies are not mandating vaccines but instead are using different incentives to encourage workers to get the shot, such as bonuses, gift card offers or paid time off.

But Delta Airlines took a different approach, charging a \$200 monthly health insurance surcharge for employees who refuse the vaccine.

Employers are allowed to charge a premium under federal law for health insurance coverage if it's part of a wellness program, said Timothy Ford, partner and member of the employment and litigation departments at Einhorn, Barbarito, Frost & Botwinick in Denville.

Many companies have done it with smoking cessation programs, he said.

"Will it be challenged legally? I'm sure there will be challenges that it potentially violates the Affordable Care Act or HIPAA, but it remains unclear how successful those challenges will be," Ford said, noting that charging higher premiums for smokers has survived legal scrutiny.

But are there other kinds of fines that employers can impose if someone refuses to take the vaccine?

Employers can do anything unless law or a union stops them, said Alan Hyde, a professor at the Rutgers Law School.

“There is no right to resist vaccination. None. There is no right to resist approved vaccines. There is no right to refuse emergency vaccines. That’s what ‘emergency’ means,” he said. “They may require unvaccinated employees to pay for health insurance. They may fine them if they don’t get vaccinated,” he said

More employers are simply making vaccination a condition of employment, something the Equal Employment Opportunity Commission (EEOC) has said is legal. But some companies worry, in this labor climate, that they will lose workers who don’t want to get the vaccine.

“In many situations it’s not practical to terminate employees because replacements are not readily available,” said Brent Pohlman, a partner with Mandelbaum Salsburg in Roseland. “In that situation, in my opinion, employers are permitted to mandate weekly or twice weekly testing of those employees who refuse to be vaccinated and who the employer cannot, as a practical matter, terminate.”

But in the end, much will depend on how employers handle exceptions to a vaccine mandate, said Frank Custode, partner and chair of the employment practice at Curcio Mirzaian Sirot in Roseland.

“Any time an employer treats employees in protected classes in a disparate manner, there are potential liability concerns,” he said. “The most common anticipated recourse against employees who are unvaccinated is termination of employment. However, employers who decide to go that route do so at their own risk, especially if disability and religious-related exemption requests are at issue.”

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