

# Daily Journal

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PERSPECTIVE

## Employer vaccination programs: Wielding carrots and sticks

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As the U.S. continues to roll out its COVID-19 vaccination program, many employers are considering mandating vaccination to ensure a safe workplace, while concerns of legal challenges remain. A lawsuit filed in February in the U.S. District Court of New Mexico (21-cv-179) by an officer at a county detention center against Dona Ana County in New Mexico, tests federal and local public health laws in the age of COVID-19.

In this case, the county issued a directive that required all county employees who meet the definition of first responders to be vaccinated, with exemptions provided for certain qualifying conditions, such as a history of adverse reactions to vaccines. The plaintiff met the definition of a first responder, but did not have any underlying conditions justifying an exemption under the directive, and received a notice to comply with the mandate, as well as “coaching and counseling” write up for not complying with the directive. At the time the complaint was filed, the plaintiff had not been terminated from his job. The plaintiff’s central argument is that the vaccines, because they are made available through the emergency use authorization process (which is an expedited review process), and have not been fully approved by the U.S. Food and Drug Administration, the county violated federal law by mandating vaccination. Citing 21 U.S. Code Section 360bbb-3(e)(1)(A), which states that health care professionals administering an emergency use product should inform those receiving the emergency use product “of the option to accept or refuse administration of the product,” among others, the plaintiff’s attorney argued that this federal law preempts and voids the county’s



New York Times News Service

A drive-thru COVID-19 vaccination site at Dodger Stadium in Los Angeles, Thursday, Feb. 25, 2021. Thursday, Feb. 25, 2021.

vaccination directive and seeks injunctive and declaratory relief.

The county stands by its vaccination policy, arguing that it helps to provide a safe workplace for employees and protect the safety of inmates who do not have a choice to self-isolate. Among the arguments presented, the county asserts that nothing in federal law “indicates any attempt to occupy the field or prevent localities from requiring the COVID vaccine in vulnerable detention center environments” and that the federal law at most requires potential vaccine recipients to be informed of the consequences of refusing the vaccine. The county also pointed to other cases that upheld the police power of states to require compulsory vaccination.

There is no current legal requirement for employers to offer a vaccination program. Employers can, however, choose to impose a mandatory vaccination policy or offer a voluntary vaccination program for its employees, whether provided on site at the workplace, off site, or through a third party, provided that certain exemptions and accommodations are provided (e.g., for qualified disabilities and sincerely held religious beliefs).

When implementing vaccination programs at the workplace, employers should consider measures to mitigate their exposure to potential liability. For example, pre-vaccination questions by an employer that are designed to qualify employees for the vaccine may be considered “disability-related inquiries” under the Americans with Disabilities Act.

With respect to potential liability related to the administration and use of a COVID-19 vaccine authorized by the FDA under the emergency use authorization process, the Public Readiness and Emergency Preparedness Act is a broad federal law that provides immunity from liability for any loss related to the design, development, testing, manufacture, labeling, distribution, formulation, labeling, packaging, marketing, promotion, sale, purchase, donation, dispensing, prescribing, administration, licensing or use of a covered countermeasure, including COVID-19 vaccines and COVID-19 tests. Accordingly, absent claims of willful misconduct, manufacturers, distributors, program planners, administrators, and other parties in the supply chain are protected from lawsuits involving

claims for injury, death, need for medical monitoring, etc., which will be dismissed by the courts. The federal government has also established a Countermeasures Injury Compensation Program, administered by the Health Resources and Services Administration, to provide compensation to eligible individuals who suffered a serious physical injury as a result of receiving a covered countermeasure, including a COVID-19 vaccine, or certain survivors and estate of such injured recipients.

According to the Centers for Disease Control and Prevention website, “[m]illions of people in the United States have received COVID-19 vaccines, and these vaccines will undergo the most intensive safety monitoring in U.S. history.” As of last week, the CDC COVID Data Tracker, shows over 77 million people in the United States have received at least one dose of a COVID-19 vaccine, and over 41 million people have been fully vaccinated. Based on data reported to the national Vaccine Adverse Event Reporting System, CDC and FDA continue to investigate reports of adverse events and to date have not found evidence of a safety problem with the COVID-19 vaccines.

While the Dona Ana County case provides an interesting test case for the interplay between federal and local laws pertaining to COVID-19 related products that have been authorized under the emergency use authorization process, employers should continue to evaluate their risks and the benefits of offering COVID-19 vaccination programs in view of the needs of the employees and their exposure to COVID-19. Offering carrots to promote good behavior and public health measures can be more effective than sticks. ■

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