

Mandatory Vaccination of Employees

The debate on the COVID-19 vaccination being made mandatory for employees, is one that is both interesting and controversial. The complicated nature of the debate is reflected in the fact that proponents of the vaccination being made mandatory, will always face the push back from those who view that it removes the right of refusal. Where it is not voluntary, there are questions to be raised about the trampling of the freedom of choice of the individual; which in itself is a constitution right. Any determination that the vaccination of employees is mandatory will be reflagged by those who are defenders of constitutional and human rights.

The challenge which employers and even governments will face in any bid to make the vaccination mandatory for employees, is that of having their actions coming into conflict with the Universal Declaration of Human Rights of the United Nations General Assembly. There is the global understanding that the universal basic human rights must be respected and protected by the law. As expressed, the nothing in the Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

Employers are finding themselves in a dilemma, where they are called upon to contemplate how best to meet their obligation and responsibility of providing a safe place of work. They have the dual responsibility of safeguarding the safety, health and welfare of their employees and that of the enterprise/organization. With the right to work being a human right, the employer in attempting to mandate that employees become vaccinated against the coronavirus, would be running the risk of being charged with perpetrating an act of discrimination. Here again the employer comes up against the Universal Declaration of Human Rights, which promotes the none discrimination of anyone. According to the Declaration, 'everyone is entitled to all the rights and freedoms, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs.'

Given the need to recognize the constitutional and human rights of the individual, where does this leave employers as far as enforcement is concern. Dorit Reiss, a law professor who specializes in vaccine policies at the University of California, Hastings College of the Law, promulgates the view that, “Employers generally have wide scope” to make rules for the workplace.”

Experts such as Elisa Lintemuth, an Attorney with Dykema in Grand Rapids, Michagan, suggest that the mandating of vaccinations stands to be beneficial to both employees and employers for the reasons that there can be a decrease the risk of spreading the virus in the workplace, reduce absenteeism, increase productivity and decrease employee health care costs.

In reflecting of these views, it becomes clear that employers are generally entitled to make rules that govern the operations of the workplace. This gives them the latitude to request employees to take safety measures included being vaccinated against the coronavirus. The reality is that the employee cannot be forced to comply with the request. Any pressure brought to bear might generate a response from the employee that the employer is forcing his will upon the employee, and further, is attempting to arbitrary change the conditions of work. Employers must be careful of their actions which follow, as any move to terminate the employee, runs the risk of a charge being brought by the employee on the grounds of unfair dismissal.

Workers are well within the constitutional rights to refuse to comply with the employer’s request to become vaccinated, where they cite medical or religious grounds as the basis of their objection. There is nothing that the employer or the law can do to reverse the stance taken by the individual. There is however an option left to the employer. It has been suggested that the employee is invited and encouraged to sign a waiver or agreement to work under specific conditions, so as to limit any risk that might pose to oneself or others. There is also the suggestion that employers could offer incentives to employees to take the vaccination. Any decision that is taken by an employee should be well guarded. The employee should be wary of any conditions attached, such as a promise of the retention of employment, promotion and/or increase in pay, as these offers may vary from the company’s policy and the collective bargaining agreement, where such exists.

On a cautionary note, going forward, it is conceivable that some jobs and professions by the nature of what the work entails, might mean that vaccination against the coronavirus becomes a requirement. This could possibly apply to health care

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workers and providers, particularly, nurses and doctors. This should not constitute a problem for these workers, as they are currently required to be immunized and protected against Measles, Mumps, Rubella, Hepatitis B, Varicella, Meningococcal, Seasonal Influenza, Tetanus, Diphtheria and Pertussis.

Conscious of the fact that employers would want to stand clear of being accused of mandating or coercing compliance by employees to be vaccinated, there is the added suggestion that workplaces undertake to establish a written policy. What remains unclear is if there is a written policy, the extent to which it borders on infringing the rights of the employee and raises the possibility of the issue of discrimination being practiced. It may be that there is merit in giving consideration to the suggestion put forward by Brett Coburn, an attorney with Alston & Bird in Atlanta, USA. He advanced the view that employers may want to develop vaccination education campaigns, make obtaining the vaccine as easy as possible for employees and to cover any costs that might be associated with getting the vaccine.