

# Column: Revisiting topic of mandatory vaccines in workplace

By Dan Eaton

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COVID-19 infections in San Diego and elsewhere have surged in recent weeks, even with the availability of vaccines shown to be safe and effective virtually on demand to anyone 12 and older. Most corporate chiefs have been encouraging rather than mandating vaccination, acting as “vaccine cheerleaders,” according to a Jan. 25 *Wall Street Journal* article. Some employers now are considering replacing the carrot with the stick.

Time to revisit a question first addressed in this space last November: May private, non-union California employers require their at-will employees to get vaccinated as a condition of employment?



(San Diego Union-Tribune Community Press File Photo)

My answer to that question then was yes, qualified by the employer’s duty to accommodate employees with disabilities, medical conditions, or bona fide religious objections that legally protect them from such a mandate. That conclusion rested on the broad right of employers to set conditions on the employment of employees subject to termination at-will and on employers’ statutory duty to provide a safe and healthful workplace.

Subsequent legal developments have reinforced my conclusion.

In recent months, federal and state workplace safety and civil rights regulators have confirmed, with varying degrees of clarity, that private employers may mandate that employees receive one of the three vaccines the U.S. Food and Drug Administration (FDA) has authorized for emergency use.

In a related development, the California Division of Occupational Safety and Health, commonly known as Cal/OSHA, now requires employers to inform their employees “the fact that vaccination is effective at preventing COVID-19, protecting against both transmission and serious illness or death.” That is important because, according to the Jan. 25 *Wall Street Journal* report, “surveys have found that people often view their employers as more credible sources of information than government, social media or media outlets.”

Courts are starting to weigh in. In June, a federal judge in Texas applied federal law to dismiss a challenge to Houston Methodist Hospital's mandate that its employees be vaccinated or face termination. Jennifer Bridges and 116 of her coworkers argued that federal law requires the Secretary of Health and Human Services to ensure anyone receiving an injection authorized only for emergency use understand the "potential benefits and risks of use" and their "option to accept or refuse administration of the product."

The court said the employees had misconstrued that law. "It confers certain powers and responsibilities to the Secretary of Health and Human Services in an emergency." It "neither expands nor restricts the responsibilities of private employers; in fact it does not apply at all to private employers. ..."

The court also rejected the employees' argument that the mandate was equivalent to forced medical experimentation during the Holocaust in violation of the Nuremberg Code. "The Nuremberg Code does not apply because Methodist is a private employer, not a government. Equating the injection requirement to medical experimentation in concentration camps is reprehensible. Nazi doctors conducted medical experiments on victims that caused pain, mutilation, permanent disability, and in many cases, death."

The court underscored that the hospital was not coercing Ms. Bridges and the other employees. Ms. Bridges "can freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else. [¶] If a worker refuses an assignment, changed office, earlier start time, or other directive, he may be properly fired. Every employment includes limits on the worker's behavior in exchange for his remuneration. This is all part of the bargain."

In other words, the employee's right to choose to refuse vaccination does not include the right to work for a private employer that chooses to mandate vaccination. That will be just as true if, as expected, the FDA fully approves one or more of the vaccines in the coming weeks.

On July 22, *The New York Times* debunked the notion that the Health Insurance Portability and Accountability Act (HIPAA) bars employer vaccination mandates. HIPAA "applies only to companies and professionals in the health care field. ... " The law does not apply to employers.

Nonetheless, the law of mandatory vaccination remains unsettled. Employers continue to face yet other legal risks from mandating vaccination, including the remote risk of liability beyond workers' compensation for employee injuries from side effects from employer-mandated vaccinations. The longer the pandemic advances and the more legal uncertainties recede, however, the more employers will exercise their qualified right to mandate vaccination.

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