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# Legal Matters®

## COVID-19 vaccines can pose traps for unwary employers

**T**he rollout of the Pfizer and Moderna COVID-19 vaccines provides hope for employers that they will soon return to normal operations and profitability.

Many employers may be considering mandating that their workers get vaccinated. But before mandating such a policy, it's important to talk to an employment attorney about the potential legal traps.

For one thing, a broad mandate could create issues for an employer under the Americans with Disabilities Act, which requires employers to make "reasonable accommodations" for employees with a medical condition that substantially limits at least one major life activity. If there's a legitimate medical reason why a particular worker cannot take the vaccine, you may need to offer a medical exemption.

It's also important to note that under the ADA, employers must show that any medical exam or disability inquiry is "job related and consistent with business necessity," so you need to be careful about asking your workers any pre-vaccination questions if you plan on making the vaccine mandatory. If the vaccination is voluntary, on the other hand, pre-vaccination questions will not be considered disability-related inquiries.

A related consideration is pregnancy-related medical conditions. Not only might these constitute disabilities under the ADA, but the federal Pregnancy Discrimination Act also requires employers to

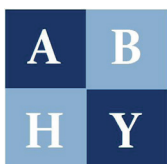


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accommodate pregnant women. If an employee cannot be vaccinated safely due to pregnancy, you may be required to consider measures that will enable the employee to continue working for you.

You could also have employees who don't want to take the vaccine for religious reasons. This is an area where you need to act with particular care. That's because Title VII of the federal Civil Rights Act of 1964, which prohibits workplace discrimination based on race, national origin, sex and religion, appears to allow workers to opt out of vaccinations on religious grounds. In fact, the U.S. Equal Employment Opportunity Commission, which enforces federal antidiscrimination

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# Interview feedback didn't support discrimination suit

A recent case from Michigan illustrates that a rejected job applicant seeking to win a discrimination case can't just show that the employer had prejudices. He or she must also show that such prejudices drove the hiring decision.

The applicant, Daniel Wiegert, interviewed with Blue Cross Blue Shield of Michigan for a position in its "human performance" department.

During the interview, Wiegert sensed things weren't going well. He told his interviewers, Valarie Keesee and Steven Weingarden, that while he had a disability related to his past military service that caused him to have a flat affect and lack of outward emotion, he was happy to be there.

He didn't get the position, but Weingarden gave him feedback in a follow-up call. According to Wiegert, Weingarden told him he was "emotionless, monotone, like battle-scarred, shell-shocked veteran" and that there was "no way" he would ever be able to work "in the applied world."

Wiegert sued Blue Cross, alleging violations of the state's disability rights statute. But a trial judge found insufficient evidence to show he didn't get the position because of his disability.

The Michigan Court of Appeals agreed, pointing out that while Weingarden's statements were



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evidence of "discriminatory animus," Wiegert still needed to show that this was a "motivating factor" behind him not getting the position. Weingarden's comments didn't accomplish this, since Keesee made the final hiring decision and there was no evidence that Weingarden's biases impacted her choice.

The decision suggests that job candidates have an uphill battle in winning cases like this. Still, "feedback" like Weingarden's leave employers vulnerable to discrimination suits, so it's a good idea to enlist an employment attorney to review your interview processes and train your staff on appropriate ways to interact with candidates.

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## States clamping down on unemployment claims

Recent cases from two different states suggest that courts are taking a harder line against employees seeking unemployment benefits after they leave.

In a case out of Missouri, a part-time Walmart fitting room associate was fired after missing five days of work in a month, which exceeded the number of permissible absences in a six-month period.

The state's unemployment division denied her unemployment claim, despite her assertions that her absences were due to illness, car trouble and bad weather.

On appeal, the worker argued that Walmart failed to show she willfully violated its policy and thus she should get benefits.

But the Missouri Court of Appeals pointed out that the state legislature had tightened unemployment standards six years earlier by eliminating a requirement that the employer show that rules violations were deliberate.

The other case, from Rhode Island, involved a man who spent 39 years working in a job that involved unloading trucks and heavy lifting. In 2017, he accepted a voluntary retirement offer extended to all employees over 65. His job was never in jeopardy and the company wasn't planning layoffs.

A year later, the man applied for unemployment, saying he only accepted the one-time severance package because the work was getting more difficult and unsuitable for him. But the review board denied his application for lack of evidence that he couldn't perform his duties or that he had no reasonable alternative but to resign. Because he couldn't show he left for "good cause," the board said, he was ineligible for benefits.

A state court judge upheld the denial, saying his claims that the job was "getting harder" weren't enough to show good cause.

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# COVID-19 vaccines can pose traps for unwary employers

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laws, has fined employers over this very issue.

In 2018, for example, the EEOC levied an \$89,000 fine on a North Carolina hospital that fired three employees for refusing to take a flu vaccine on religious grounds. There's no reason to believe the same reasoning wouldn't apply to COVID.

The COVID vaccine may also cause physical side effects. If a worker suffers such side effects after being vaccinated due to an employer mandate, he or she could potentially file for worker's compensation.

A mandate may cause morale problems within the workforce. So if your workplace is one where there's a lower risk of spread (for example, your employees do mostly outside work or they work in spread-out

office space), you might consider whether a mandate is worth the resentment it might spark.

Finally, if you have a unionized workplace, be aware that a vaccination mandate may be subject to bargaining as opposed to something you can hand down by fiat. Even if the existing contract is one that allows you to implement a vaccination program without further bargaining, you may be better off involving the union in such a decision. Doing so could maximize employee buy-in, which could help you avoid costly grievance and arbitration proceedings.



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## Company's attention to worker concerns thwarts lawsuit

A recent New Jersey case serves as a lesson to employers that responsiveness to employee's workplace safety concerns can make a huge difference in defeating lawsuits.

In that case, an accountant with the Ocean County Board of Health worked in a building next to a construction site. The windows in her building were taped due to construction, but she was still concerned about construction debris. She emailed a county administrator asking whether the debris contained asbestos, which she claimed could aggravate an unspecified medical condition.

Several days later, she emailed the administrator again, copying a county health coordinator, saying there was debris on her windowsill and notebooks and asking if the work was being performed safely.

The administrator assured her that testing indicated there was no asbestos-containing material at the construction site.

The employee nonetheless brought further concerns to her direct supervisor. She was moved temporarily to another building and, before being transferred back a couple weeks later, received a report indicating that the construction site was clear of external debris or other hazards.

Soon after that, however, the employee filed a complaint with the state public employees' occupational safety and health program.

The employee also left work early the day after she re-

turned to her original location. When she came back, she brought a doctor's note saying she should avoid exposure to dust and construction materials due to "pulmonary dysfunction." She then submitted a second note requesting she be excused from work due to allergy symptoms of "unknown etiology."

Additionally, she requested worker's comp, claiming her body was itchy and her eyes were swollen. She underwent a physical, although she refused to consent to pulmonary function tests or to allow the examining doctor to speak with her other doctors. The doctor attributed the itchiness to dry skin.

She then requested medical leave, submitting a doctor's note saying she had shortness of breath from exposure to construction dust. But the county tested her work area and found nothing out of the ordinary and state inspectors found no health violations.

When the employee requested an extended leave, she was told instead that her workspace had been moved away from the windows and she would be provided with a respirator and an air scrubber. She still refused to return to work and was terminated.

The plaintiff brought a failure-to-accommodate claim under the Americans with Disabilities Act, but a federal judge threw out her claim. A federal appeals court affirmed, emphasizing that her employer consistently responded to her workplace safety requests. The case shows that employers who are responsive can defend their actions in court.



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### Woman can't sue employer over background check

A woman whose ex-employer conducted a pre-employment background check that didn't technically comply with the federal Fair Credit Reporting Act (FCRA) could not bring a lawsuit against the company over the violation, a federal judge in Massachusetts recently decided.

The employee, Nicole Kenn, applied for a job as a technician with ambulance services company Eascare in 2018.

As part of the application process, she signed a disclosure form and authorization allowing Eascare to perform a background check that included a look into her credit history. The disclosure form also included a waiver that released Eascare from any liability that might stem from the background check.

Kenn resigned a year later and accused the employer of retaliating against her for complaining of sexual harassment by co-workers. She also filed a class action against Eascare under the FCRA, accusing the company of running a pre-employment background check on her

and other workers without proper authorization.

Specifically, she pointed to the fact that Eascare included the liability waiver and other extraneous language on the disclosure form, which violated the FCRA's requirement that the form be a "stand-alone" one. A noncompliant disclosure and authorization form amounted to an unauthorized background check, she argued.

But a U.S. District Court judge dismissed the claim.

While the judge did not disagree that the employer violated the statute, she found that Kenn couldn't show the violation caused her an "injury-in-fact." Accordingly, said the judge, Kenn lacked legal standing to bring her claim.

Although this employer technically violated the FCRA, it won't end up having to pay the \$1,000 in damages per violation plus punitive damages and attorney fees that violations can bring. But this is just one case in one court. Other courts have allowed suits to move forward under similar circumstances.