

# Pandemic Changes Little When It Comes To Work Rules

By Paul Clolery

**I**t is often said that in a national emergency nothing is off the table. Rules and regulations can be bent, amended or tossed in unusual circumstances, say, like in a pandemic.

Well, not so fast. Most federal and state workplace regulations remain in effect during the COVID-19 pandemic. Workplace accommodation rules also remain on the books. Employers still can't ask certain questions before admitting an employee to the workplace. There's even liability when employers attempt to shield workers by providing immunizations and other preventive care.

If and when a vaccine for the coronavirus is available, an

employees to get the influenza vaccine rather than requiring them to take it. She pointed to the EEOC 2009 publication *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* which was issued in 2009 and updated slightly in March 2020 due to coronavirus.

EEOC updates include that “employers and employees should follow guidance from the Centers for Disease Control and Prevention (CDC) as well as state/local public health authorities on how best to slow the spread of this disease and protect workers, customers, clients, and the general public.” The update retains the principles from the 2009 document but incorporates new information to respond to current employer questions.



employer probably won't be able to demand staff be inoculated even when it is proven safe and effective.

“An employee may be entitled to an exemption from a mandatory vaccination requirement based on an Americans With Disabilities Act (ADA) disability that prevents the person from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense),” according to Christine Saah Nazer, a spokesperson at the Equal Employment Opportunity Commission (EEOC).

ADA-covered employers should consider simply encouraging

Saah Nazer noted that as of the update (and the writing of this story) there was no vaccine available for COVID-19. The EEOC officials recognize that guidance from public health authorities will change as the COVID-19 situation evolves.

A key phrase is “direct threat.” The ADA guidelines show that whether pandemic influenza rises to the level of a direct threat depends on the severity of the illness. If the CDC or state or local public health authorities determine that the illness is like seasonal influenza or the 2009 spring/summer H1N1 influenza, it would

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not pose a direct threat or justify disability-related inquiries and medical examinations.

“By contrast, if the CDC or state or local health authorities determine that pandemic influenza is significantly more severe, it could pose a direct threat. The assessment by the CDC or public health authorities would provide the objective evidence needed for a disability-related inquiry or medical examination, according to the guidelines.

Employers should rely on the latest CDC and state or local public health assessments during a pandemic. While the EEOC recognizes that public health recommendations may change during a crisis and differ between states, employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information.

Based on guidance of the CDC and public health authorities as of this past March, the COVID-19 pandemic meets the direct threat standard. The CDC and public health authorities have acknowledged community spread of COVID-19 in the United States and have issued precautions to slow the spread, such as significant restrictions on public gatherings, according to Saah Nazer. The EEOC guidelines show that numerous state and local authorities have issued closure orders for businesses, entertainment and sport venues, and schools to avoid bringing people together in close quarters due to the risk of contagion.

“These facts manifestly support a finding that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time. At such time as the CDC and state/local public health authorities revise their assessment of the spread and severity of COVID-19, that could affect whether a direct threat still exists,” according to the EEOC directives.

That’s where regulations start clashing. You can try to prevent someone with COVID-19 from entering the workplace, but the steps available remain limited, according to Jeffrey S. Tenenbaum of the Tenenbaum Law Group, a practice specializing in nonprofit law and based in Washington, D.C.

“While obviously not completely analogous, the EEOC has advised that flu vaccinations may not be mandated for all employees,” said Tenenbaum. “Exceptions have to be made for requests for disability, medical or religious accommodation,” he said. “It is not lawful to require all employees to be vaccinated. And, it must be coupled with appropriate notice to employees. As such, the EEOC has advised that employers should consider encouraging, rather than requiring, employees to get the flu vaccine each year.”

It might evolve into a Constitutional fight if the federal government attempts to mandate citizens get vaccinated, Tenenbaum said. Even in the heyday of polio, the federal government did not mandate taking the vaccine.

An example, he said, is the potential liability if a firm offers flu

vaccines on premise. Even though waivers would be signed, there still are issues, such as employees feeling pressured into being inoculated by management or their peers.

COVID-19 has “been a real challenge for most nonprofits,” said Ronald W. Taylor, partner and chair of the Maryland Labor and Employment Practice Group of Venable LLP. “They have to assure employees they have implemented plans to adequately protect them from getting COVID. It’s an art and a science to interact,” he said. Managers must let workers know they have created a safe environment and communicate to people who might be skeptical or whose depth of knowledge on the topic might be shallow, he explained.

It is vital for employees to feel comfortable with the information. “You must be fair to appear fair,” said Taylor. That does not mean the decisions will be easy. The workplace has to be made safe, communicated to employees and then managers have to enforce work rules to keep everyone safe.

Face coverings are an example of the challenge. There are multiple types of high-end masks, the so-called N95 and KN95 masks with medical and non-medical protection levels. Mandating someone wear an N95 or KN95 in the office might “trigger additional obligations to ensure the person is able to wear it,” said Taylor. Not only can it be stressful to some people, the masks are also known as negative pressure respirators. Employees with respiratory and other health conditions such as congestive obstructive pulmonary disease might not be able to wear one.

A bandanna, technically, is not personal protective equipment (PPE) but other more comfortable, yet, protective face coverings might be acceptable. Again, the key is communication as to what is acceptable in the office.

That’s when individual assessments come into play, both Tenenbaum and Taylor counseled. Reasonable accommodation must be made so the employee can get back to work. The issue might be a question of what is reasonable. While engaging in an interactive process, a manager might ask a person balking at a particular face covering rule if there is “some other mask you can wear,” said Taylor.

If someone can’t wear a face covering, the person might be assigned to an area where social distancing can be accomplished. Working from home might be an option if that is not possible due to job requirements and physical plant.

Taylor said that there might come a point in the safety exploration that it is clear the person cannot perform their duties without becoming a possible direct infection threat, even if the person tests negative for COVID-19. A process might have to begin for the person to be separated from the organization.

Nonprofit managers are going to be walking “a delicate line” for a long time, said Tenenbaum. There is a possible avenue for discrimination claims whether requiring certain compliances or even if there is peer pressure.

Educating managers and staff as to acceptable behavior in the workplace includes compassion for and acceptance of others in the setting, he said. **NPT**