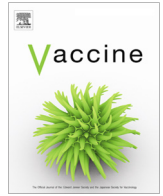


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Commentary

The Americans with disabilities act and healthcare employer-mandated vaccinations

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Battles around workplace vaccination policies often focus on the annual influenza vaccine, but many healthcare employers impose requirements for additional vaccines, because of the increased likelihood that employees in this sector will interact with populations at increased risk of acquiring or experiencing harmful sequelae of vaccine-preventable diseases. The federal Centers for Disease Control and Prevention and many states recommend healthcare employees receive numerous vaccines, including measles, mumps, and rubella (“MMR”); tetanus, diphtheria, and pertussis (“Tdap”) [1]. However, recent outbreaks of once-eliminated diseases that are now resurgent and the rising antivaccination movement raise questions about how far employers can go to mandate vaccinations.

While healthcare institutions are increasingly mandating that employees receive vaccinations [1], employee objections to vaccines, including litigation, have increased in recent years [2]. Employer policies must comply with the Americans with Disabilities Act (“ADA”), which prohibits discrimination on the basis of disability [3]. Disability is defined as “a physical or mental impairment that substantially limits one or more major life activities,” a history of disability or being regarded as having a disability [3]. In this context, the impairment would be an underlying condition that results in a heightened susceptibility to medical risks from a vaccine. Although the ADA permits mandatory vaccine policies under certain circumstances, employers must consider “reasonable accommodations” [3], which are changes to the job or work environment that permit an employee with a disability to perform the essential functions of the job. Employers do not have to provide accommodations if it would result in an “undue hardship” [3] (significant difficulty or expense with respect to the provision of an accommodation) or a “direct threat” [3] (a significant risk of substantial harm to the health or safety of the employee or others, which cannot be eliminated or reduced by a reasonable accommodation). In this circumstance, a “direct threat” is a significant risk of spreading a vaccine-preventable illness to others. Two recent cases suggest how employers seeking to protect their work-

force and the patients they serve by requiring vaccines can work within the framework of the ADA to implement these policies.

1. Recent cases

In the Eighth Circuit case *Hustvet v. Allina Health Systems*, a former nurse at a rehabilitation clinic sued her former employer under the ADA and Minnesota Human Rights Act [4]. Hustvet made three claims: her employer’s health screening for immunity to certain diseases, including rubella, violated these laws; her employer failed to accommodate her allergies and chemical sensitivities that prevented her from obtaining a MMR vaccine required by her employer; and her employer terminated her as a result [4]. First, Hustvet alleged that Allina violated the ADA when it required her to complete a health screen as a condition of employment [4]. The Eighth Circuit affirmed dismissal of the ADA claim. First, the court reaffirmed that the “ADA does not forbid . . . [employee] medical examinations (vaccine immunity or titer test) and inquiries” that are “job-related,” “consistent with business necessity,” and “no broader or more intrusive than necessary” [4]. Applying this principle, the court concluded that requiring employees with constant patient contact to be tested to immunity to infectious diseases like rubella was related to their job duties, consistent with business necessity, and no broader than necessary [4]. Second, the court held that it did not need to reach the failure to accommodate issue because the plaintiff was not disabled within the meaning of the ADA and thus not entitled to any accommodation. The court found that the record did not support that the plaintiff’s chemical sensitivities and/or allergies substantially limited her ability to perform a major life activity [4]. It noted, for example, that the plaintiff never sought serious medical attention or left work due to an allergic or chemical reaction, had never seen an allergy specialist, and had never been prescribed medication or an EpiPen because of a reaction. Based on the evidence, the court classified her condition as “garden variety allergies to various items that moderately impact her daily living” [4]. Finally, the court rejected the plaintiff’s retaliation claim because she had not shown that her request for an accommodation was the reason for her firing [4].

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In an unpublished opinion, the Third Circuit Court of Appeals permitted similar claims to proceed in *Ruggiero v. Mount Nittany Medical Center* [5]. The plaintiff in that case was a nurse who claimed she could not receive a required Tdap vaccine because of medical conditions (severe anxiety and eosinophilic esophagitis) [5]. She instead proposed that she wear a mask when interacting with patients as other employees who refused the influenza vaccine purportedly did [5]. Unlike the Eighth Circuit, the Third Circuit held that Ruggiero stated enough to proceed on her claims that she was disabled within the meaning of the ADA; that the medical center refused to offer her a reasonable accommodation by rejecting her offer to wear a mask and refusing to propose any alternatives; and that she was terminated because of her request for a reasonable accommodation [5].

2. Analysis

The *Hustvet* and *Ruggiero* cases illustrate three ADA-related issues for employers to consider as they implement a compliant vaccination program in the healthcare sector. One issue is the communicability of the disease targeted by a mandatory vaccination program. In *Hustvet*, the Eighth Circuit noted that requiring immunization against rubella was a necessity for a rehabilitation center even though the disease “does not circulate in the United States” because it can be contracted while traveling abroad and transmitted relatively easily (through the air) [4]. There would likely be a difference between a situation like rubella and requiring immunization against the hepatitis B virus, which is transmitted from person to person when people come in contact with the blood, open sores, or body fluids of someone who has the hepatitis B virus [6]. Federal regulations through the Occupational Safety and Health Administration’s Bloodborne Pathogen Standard require employers to offer the hepatitis B vaccination to all employees who have anticipated contact with blood and other potentially infectious materials [7]. Under the reasoning of *Hustvet* and the ADA itself, the business necessity of a hepatitis B vaccine for employees of a rehabilitation center (as opposed to a surgical center) is weaker than it is for rubella.

A second issue is the employee’s ability to meet ADA requirements. In *Ruggiero*, the case for requiring the vaccination was arguably as strong as *Hustvet* because although the vaccine at issue immunized against tetanus, which is not communicable, it also protected against diphtheria and pertussis, diseases that are communicable through the air like rubella. However, Ruggiero pled enough facts to go forward on her claim that her employer refused to allow her to use another method of preventing the spread of disease (masks) that the employer had already approved in other cases [5]. In these circumstances, the Third Circuit ruled she had, at least, shown enough to proceed. *Hustvet*, by contrast, failed to show she had a disability within the meaning of the ADA; therefore, she was ineligible for reasonable accommodation consideration [5].

A third issue is the dovetailing of old diseases reemerging and skepticism about vaccines rising. Earlier in 2019, for example, New York City faced a large measles outbreak. If a healthcare employer in one of the areas affected by the outbreak instituted a mandatory measles vaccination policy, it may be more difficult for an employee to argue that an alternative is reasonable unless it is also effective in protecting patients. In such circumstances, a court may well be more inclined to uphold an employer’s refusal to accommodate. Further, such employers could claim that accommodating the disability could pose a direct threat to workplace safety, and hence is not required.

The ADA is not the only federal law implicated by an employee’s refusal to receive employer-required vaccinations. Employers

should be aware that Title VII of the 1964 Civil Rights Act entitles employees to reasonable accommodation of sincerely-held religious beliefs – including those that prohibit employees from being vaccinated – unless the accommodation would impose undue hardship on the employer [8]. An employee may also have claims under parallel state law [1,9]. State and federal laws also address employers’ obligations to maintain a safe workplace [6]. State immunization laws for healthcare workers [1] are also relevant in designing and implementing a workplace vaccination policy.

3. Recommendations

While healthcare employers may have legitimate reasons for mandating employee vaccinations, they should give thorough consideration to federal and state employment protection legislations, as well as the objective medical risks applicable to specific employee groups, healthcare settings, and patient populations, before instituting mandatory policies.

Cases like *Hustvet* and *Ruggiero* illustrate the need for healthcare employers to take proactive steps to minimize conflicts between their mandatory vaccine policies and the requirements of the ADA. First, employers can request immunization records from all prospective employees after an offer of employment is made as a condition of beginning work, which the ADA allows [3]. Employers must maintain medical information and vaccination records collected from employees as confidential files in accordance with ADA requirements. Under the ADA, any employment-related documentation containing medical information must be maintained in confidential files completely separate from the general personnel file. Second, employers can reduce the risk of ADA claims by considering reasonable accommodations, depending on the essential job functions [3] and the nature of the work these employees seek to do (e.g., healthcare workers involved in direct patient contact or in vulnerable patient settings, such as the neonatal intensive care unit (NICU) nurses, are different from administrators in the back office). As part of the reasonable accommodation process, employers must engage in a good-faith “interactive process” with the employee to try to reach a solution [10]. That is, both the employer and the employee bear responsibility for identifying a reasonable accommodation; an employer who fails to engage in the interactive process may be seen as acting in bad faith. That process should include efforts to adequately document of the employee’s disability and assess existing practices the employer could allow the employee to use.

Declaration of Competing Interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

Acknowledgement/disclosures

None.

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