

Can tribal employers compel employees to be vaccinated against COVID-19?

My email inbox has received this question numerous times in the last week and therefore I thought it was a good time to address the question.

Answer: Yes with some likely exceptions.

Tribal employers start from the premise that the tribe defines the terms and conditions of employment as an exercise of the tribe's inherent sovereignty. Accordingly, if the tribe mandates vaccines for its employees that is the tribe's right as a sovereign. The opposite is true as well since the tribe can refuse to make vaccines mandatory for its employees. Outside Indian Country the answer to the question of whether employers can mandate COVID-19 vaccines is yes as well with some exceptions. In this article, the general rule is discussed, followed by the exceptions and thereafter some form policies are included.

The analysis below is not generated by caselaw, laws or regulations that directly address the question since the question has not been addressed in our lifetimes. Instead, for non-Native employers the analysis comes from practices and protocols created in response to flu-related risks in the workplace. Moreover, this article addresses the basic question of whether tribal employers can require employees, as a condition of employment, to be vaccinated against COVID-19? This article does not address other inevitable questions like whether the vaccine will be effective, for how long, will there be side effects and will it impact different populations differently.

Support for Yes.

COVID-19 has been devastating for some tribal employers just as it has been devastating for some tribal communities, families and citizens. COVID-19 has had a hugely negative impact on tribal enterprises including gaming. A vaccine that can fight this devastating pandemic will benefit tribes, their governments and the citizens and employees of the tribe.

The federal government's Centers for Disease Control promotes vaccines as beneficial for employers and employees. According to the CDC, the benefits for employers include reduced costs by reducing time missed from work due to illness and that generates improved productivity. Improved productivity can mean better services provided by the tribal government to its citizens and community. Employers also argue that employer provided healthcare typically covers the cost of vaccines without cost to the employee. When an employer realizes less absenteeism, employee morale can improve since Shirley is only doing her job and not absent Sam's job as well. The CDC argues that employees also benefit from less absenteeism, improved health and better morale.

Exceptions to Yes

If the tribal employer mandates a COVID-19 vaccine as a requirement for employees, what are some of the exceptions to consider and what are other issues to evaluate? The following analysis is generated by a review of federal rules that arguably do not apply to tribal employers. The applicability of these federal rules could be impacted by the tribe's receipt of federal funds, work outside the tribe's lands or reservation, execution of a gaming compact that requires compliance with certain standards and promises made to employees by the tribal employer.

The federal government's Equal Employment Opportunity Commission is a federal regulator responsible for interpreting and enforcing certain federal employment laws and in September 2020 it reiterated its 2009 vaccine flu guidance and reengineered it for COVID-19. The EEOC, however, enforces laws that generally do not apply to tribal employers. More specifically, Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act do not apply to tribal employers. In the guidance the EEOC, citing Title VII and the ADA, declares that a mandatory vaccine cannot be imposed by employers but recognize the "no" captures a small exception of employees raising disability and religious objections. Therefore, the EEOC is saying yes for the majority of employees while simultaneously recognizing limited exceptions. Here is part of that guidance:

May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?

No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the operation of the employer's business, which is a lower standard than under the ADA).

Here is the point of citing standards that do not expressly apply to tribal employers. If the federal government's standards generally allow for mandatory employee vaccinations, the threat that the federal government will attempt to impose its standards on tribal employers through grant or funding agreements is not eliminated but less likely. Additionally, in evaluating whether a tribal rule is reasonable, citation to the protocols adopted by other sovereigns can provide one measure of reasonableness. Since the federal sovereign allows mandatory vaccinations for most employees, other sovereigns can view that position as support for the reasonableness of that position.

The federal laws promote the use of accommodations as a way to create an exception to a rule or policy. Since vaccinations are a path to safety in the workplace, an

accommodation or exception to a vaccination policy might mean substituting the wearing of a face mask for a mandatory vaccination as one example. Disability accommodations might include moving the employee's workstation, temporarily reassigning the employee, approving a teleworking arrangement, or offering a leave of absence. A religious accommodation typically involves a sincerely held religious belief but probably does not require employee proof of that belief. For COVID-19, religious accommodations likely are the same as the cited disability accommodations. The federal sovereign has a huge body of law that addresses reasonable disability and religious accommodations, and even though the law likely does not apply, can be consulted as a measure of reasonableness.

Verification & Privacy

If a tribal employer requires employees to be vaccinated, the employer will want to receive verification of compliance from employees. Because tribal employers are respectful of their employees, tribal employers adopt policies that require maintenance of medical records in a confidential manner. The tribal employer's privacy policy likely controls since federal privacy rules included in the ADA likely do not apply to tribal employers and HIPAA is likely not triggered unless the private health information comes directly from the tribe's hospital or clinic.

Please understand that seeking verification **directly** from a federally funded health care provider, including the tribe's clinic or hospital, will likely generate HIPAA (Health Insurance Portability Accountability Act) concerns. By requiring employees to disclose their private health information to the employer, the information is not disclosed by the tribal hospital or clinic.

Practical Considerations

First, tribal employers should consider whether a vaccine policy will be mandatory or voluntary. In addition to human resources and legal, tribal leadership should be consulted on this question. In consulting with tribal leadership, there are relevant questions to be addressed:

Is a vaccine job related and consistent with business necessity?

What reasons, if any, will form the basis of an exception (or exemption) to the mandatory policy?

How will employees react to the policy? How will employee reaction impact morale and retention?

Is it better to encourage vaccinations instead of mandating them? Is that option more aligned with our tribe's values?

Second, the answer generated by the first question should be documented in an employee policy. Sample policies follow this discussion.

Third, if there are exemptions to a mandatory vaccination, what is the protocol for seeking and obtaining the exemption?

Fourth, if the tribal employer requires vaccination verification, are there protocols in place to protect employee privacy in medical information? What are the short term and long term consequences of refusing to be vaccinated?

Pay

Must employees be paid for the time spent to get a vaccine?

The Fair Labor Standards Act, which may or may not apply to tribal employers, requires that employers reimburse employees for expenses incurred on the employer's behalf, or where the employee is required to spend money for the convenience of their employer, to the extent that failing to reimburse would, effectively, cut into the employee's FLSA-protected wages. Whether employers will be *required* to cover some or all of the costs or time associated with getting the COVID-19 vaccine will depend on the circumstances specific to the employee. If the tribe requires the vaccine on the basis that it is job-related and consistent with business necessity, the respectful recommendation is that the employer include the time spent getting the vaccine as hours worked, and cover the cost of the vaccine itself, to avoid a pseudo-deduction to FLSA-protected wages. If the vaccination is voluntary and the vaccine is not arguably job-related and consistent with business necessity, the FLSA may not require treating vaccination time as time worked but there is a generosity argument in paying for that time.

Union Contracts

Under a collective bargaining agreement between a tribal employer and a union, consult the management rights, health and safety, and any other applicable provisions within the agreement that may apply, along with any relevant past practices in effect.

Liability

From the big picture perspective and therefore without discussing every plausible cause of action or scenario, there are probably two liability concerns with a mandatory vaccine policy. First, under a negligence theory the employer has a duty to protect its workers and mandating an employee to be vaccinated unreasonably endangers the employee. By unreasonably endangering the employee, the employer has breached its duty to the employee and is therefore negligent. The second theory focuses on a tribal employer's alleged failure to respect employee disability, religious and other potential civil rights by mandating the vaccine. I strongly recommend consulting with the tribe's lawyers on this question of liability and in that consultation the analysis may follow this logic.

Under a negligence theory of liability, there is the question of whether an employer mandating a vaccine can be held legally responsible for an employee's adverse reaction to the vaccine. The argument against a negligence theory is the reasonable basis to believe a vaccine, in most instances, will protect employees. As the argument goes, since the vaccine will protect employees, requiring it cannot be negligent. Moreover, other sovereigns have endorsed vaccines further establishing their reasonableness. The Occupational Safety and Health Administration has, like the EEOC and CDC, endorsed the idea of vaccines. OSHA requires employers to communicate the benefits of vaccines to their employees and employees can seek an exemption from a vaccine requirement based on a reasonable belief that the employee has a medical condition that creates a real danger of serious injury or death if vaccinated.

As to the theory that tribal employers may not allegedly fail to grant disability and religious rights to employees, the federal laws that extend those protections likely do not apply. Whether similar tribal laws and policies permit a judicially enforced or other administrative remedy, is a question for tribes to consider after reviewing specific laws and policies. Additionally, there could be other jurisdictional and immunity defenses depending on the facts and circumstances.

Of course tribal employers should not rely on the information in this article but instead should seek qualified legal analysis.

For additional information on the topic of mandatory vaccines in the workplace there are excellent articles at the following websites: Ogletree Deakins, Fisher Phillips, Constancy Brooks Smith Prophete and Littler. On the Littler site I recommend the Jeff Nowak article and the 10 page report titled "The Race for a COVID-19 Vaccine." Send me an email and I will send all the articles to you. I am at richard@richardmcgeelaw.com.

Policies

The below policies come from the website of the law firm Fisher Phillips. The form policies have been modified to remove references to "company" and replaced with ABC Tribe or Tribe. All credit goes to the Fisher Phillips firm for these policies. In addition to the policies included below, the Fisher Phillips site includes additional useful form policies titled:

Request for Medical Exemption-Accommodation Related to COVID-19 Vaccine

Request for Religious Exemption-Accommodation Related to COVID-19 Vaccine

Remember the Fisher Phillips forms are geared toward compliance with federal laws that may, or may not, apply to tribal employers. The forms below and the forms on the site, should be reviewed by legal counsel for the tribal employer before used.

Mandatory Policy

Vaccination Policy

Consistent with its duty to provide and maintain a workplace that is free of recognized hazards, the ABC Tribe ("Tribe") has adopted this policy to safeguard the health and well-being of employees and their families, its customers and visitors, others who spend time in its facilities, and the community from infectious conditions that may be mitigated through an effective vaccination program.

Scope

This policy applies to all employees. It does not apply to customers and visitors. The policy applies to vaccinations identified by the Tribe's Safety Committee.

Policy

The Tribe's Safety Committee maintains and promulgates a list of the vaccines that this policy encompasses and the applicable deadline(s) for complying with this policy. This list of vaccines also advises employees of dates when vaccines will be made available at designated locations.

Before expiration of the corresponding deadline, all employees must either (a) establish that they have received the designated vaccine(s); or (b) obtain an approved exemption as an accommodation. The process for seeking an accommodation is explained below. Employees who do not fulfill one of these two requirements will be placed on unpaid leave and their status will be evaluated periodically.

To establish that they have received a vaccination, employees may present written evidence of immunization from the designated site or from another authorized healthcare provider.

The Tribe will assist employees by providing on-site access to immunizations or identifying sites where employees may receive the vaccinations. The Tribe will pay for the cost of the vaccination.

Requests for Exemptions as Accommodations

To assist any employee who is disabled, who is pregnant, who is a nursing mother, who has a qualifying medical condition that contraindicates the vaccination, or who objects to being vaccinated on the basis of sincerely held religious beliefs and practices, the Tribe will engage in an interactive process to determine if a reasonable accommodation can be provided so long as it does not create an undue hardship for the Tribe and/or does not pose a direct threat to the health or safety of others in the workplace and/or to the employee. To request an accommodation for one of the above reasons, please notify the POSITION TITLE in writing at [insert email/contact]. Once the Tribe is aware

of the need for an accommodation, the Tribe will engage in an interactive process to identify possible accommodations. If you believe that you have been treated in a manner not in accordance with this policy, please notify the Tribe immediately by speaking to the POSITION TITLE. You may request an accommodation without fear of retaliation.

Non-Mandatory Policy

Vaccination Policy

Consistent with its duty to provide and maintain a workplace that is free of recognized hazards, the ABC Tribe ("Tribe") has adopted this policy to safeguard the health and well-being of employees and their families; our customers and visitors; others who spend time in our facilities; and the community from infectious conditions that may be mitigated through an effective vaccination program.

Scope

This policy applies to all employees. It does not apply to customers and visitors. The policy applies to vaccinations identified by the Tribe's Safety Committee.

Policy

The Tribe's Safety Committee maintains and promulgates a list of the vaccines that this policy encompasses and the applicable deadline(s) for complying with this policy. This list of vaccines also advises employees of dates when vaccines will be made available at designated locations.

The Tribe strongly encourages all employees to receive the designated vaccines before expiration of the corresponding deadline. Those who do not timely establish that they have received the vaccine must either (a) wear an approved face-covering at all times while in the workplace; or (b) obtain an approved exemption from the requirement to wear an approved face-covering in lieu of being vaccinated.

To establish that they have received a vaccination, employees may present written evidence of immunization from the designated site or from another authorized healthcare provider.

The Tribe will assist employees by providing on-site access to immunizations or identifying sites where employees may receive the vaccinations. The Tribe will pay for the cost of the vaccination.

Requests for Exemptions as Accommodations

To assist any employee who declines a vaccination and has a qualifying medical condition that contraindicates wearing an approved face-covering, or who objects to

wearing a face-covering on the basis of sincerely held religious beliefs and practices, the Tribe will engage in an interactive process to determine if a reasonable accommodation can be provided, so long as it does not create an undue hardship for the Tribe and/or does not pose a direct threat to the health or safety of others in the workplace and/or to the employee. To request an accommodation for one of the above reasons, please notify the POSITION TITLE in writing at [insert email/contact]. Once the Tribe is aware of the need for an accommodation, the Tribe will engage in an interactive process to identify possible accommodations. If you believe that you have been treated in a manner not in accordance with this policy, please notify the Tribe immediately by speaking to the POSITION TITLE. You may request an accommodation without fear of retaliation.

Accommodation Procedure

Accommodation Procedure for Vaccine

Overview

The Tribe ("Tribe") allows for exemptions to COVID-19 immunization requirements as a reasonable accommodation to assist any employee who is disabled, pregnant, who is a nursing mother, who has a qualifying medical condition that is a contraindication to the vaccination, or who objects based on sincerely held religious beliefs and practices. The following procedure should be utilized when a vaccine exemption is requested as a reasonable accommodation.

Policy

Requests for Accommodation (insert language from the Tribe's vaccine policy here) to assist any employee who is disabled, pregnant, who is a nursing mother, who has a qualifying medical condition that is a contraindication to the vaccination, or who objects to being vaccinated on the basis of sincerely held religious beliefs and practices, the Tribe will engage in an interactive process to determine whether it can provide a reasonable accommodation provided it does not create an undue hardship for the Tribe and/or does not pose a direct threat to the health or safety of others in the workplace and/or to the employee. If you believe that you require such an accommodation, please notify the POSITION TITLE in writing at [insert email/contact]. Once the Tribe is aware of the need for an accommodation, the Tribe will engage in an interactive process to identify possible accommodations. If you believe that you have been treated in a manner not in accordance with these policies, please notify the Tribe immediately by speaking to the POSITION TITLE. You may utilize this procedure without fear of retaliation.

Procedure

The employee requesting an exemption from the vaccine policy as a reasonable accommodation will be provided:

1. A Request for Medical Exemption/Reasonable Accommodation Form or Request for Religious Exemption/Reasonable Accommodation Form to complete and return to the Human Resource Department. If the request for accommodation does not fall into one of these categories, please contact [POSITION TITLE] for more information.

2. The Tribe's COVID-19 vaccine policy.

3. A copy of the Job Description for their position, and/or alternative positions where appropriate.

Interactive Process

After receipt of the employee's Request for Exemption/Accommodation, the Human Resources Department will engage in an interactive process with the employee to identify a possible accommodation. The Tribe reserves the right to maintain a record of each related conversation.

The interactive process is intended to clarify the employee's request and identify the appropriate exemption/reasonable accommodation. Human Resources may ask the employee relevant questions that will enable the Tribe to make an informed decision about the request.

The exact nature of the dialogue will vary. In many instances, both the reason for the exemption/accommodation and the type of exemption/accommodation required will be obvious, and there may be limited need to engage in a detailed discussion. In other situations, Human Resources may need to ask questions and/or seek documentation concerning the nature of the request and to verify the validity of the exemption/accommodation request.

Granting an Exemption/Reasonable Accommodation

Human Resources will complete the Approval section of the Request for an Exemption/Reasonable Accommodation Form when an exemption/accommodation is granted. Human Resources will also provide the employee the specific alternative protective measures required of the employee.

Denying an Exemption/Reasonable Accommodation

Human Resources will complete the Denial section of the Request for Exemption/Reasonable Accommodation Form when an exemption/accommodation is denied with a notation of the reason for the denial. Exemption/Reasonable Accommodation denials may be reviewed for legal compliance.

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