

The COVID-19 Vaccine: Important Considerations for Healthcare Employers and Employees

John D. Fanburg, Esq.

Managing Member and Chair, Healthcare Law

Anthony M. Rainone, Esq.

Member and Co-Chair, Labor and Employment

January 21, 2021

Federal Laws and Regulations Employers Should Consider

- Federal Constitution
- Federal Statutes
- Federal Agency Regulations
- Federal Agency Guidance
- Federal Common Law and Case Law

Federal Law – U.S. Constitution

- There is no express provision of the U.S. Constitution that prohibits a private healthcare employer from requiring employees/applicants to be vaccinated against COVID-19.

Federal Statutes

- **Americans with Disabilities Act** (*15 or more employees*): Provides rules about employer medical exams and inquiries as well as providing reasonable accommodations
- **Title VII of the Civil Rights Act of 1964** (*15 or more employees*): Provides rules relating to religious accommodations
- **Genetic Information Non-Discrimination Act** (“GINA”): Part of the Federal ERISA law which provides rules relating to group health plan coverage based upon genetic information

Federal Agency Regulations

- FDA Emergency Use Authorization Regulation
- FDA Fact Sheets on the Pfizer and Moderna Vaccines
 - <https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/covid-19-vaccines>

Federal Agency Guidance

- FDA's Emergency Use Authorization of Medical Products and Related Authorities
 - <https://www.fda.gov/media/97321/download>
 - Page 24 discusses information to be given to recipients as a condition of the EUA including that recipients be informed that they have the option to accept or refuse the EUA product, as well as consequences of refusal
- EEOC's December 16, 2020 Guidance
 - <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

Federal Law – Common Law/Case Law

- In 1905, the U.S. Supreme Court rejected a federal constitutional challenge to a Massachusetts law requiring compulsory vaccination relating to smallpox for all adults.
- The statute provided a penalty of \$5 against any adult who refused to get vaccinated.

New Jersey Laws and Regulations Employers Should Consider

- New Jersey Constitution
- New Jersey Statutes
- New Jersey Agency Regulations
- New Jersey Common Law and Case Law

New Jersey Statutes

- New Jersey Law Against Discrimination
- Provides protections comparable to the Americans with Disabilities Act
- Provides protections comparable to Title VII

New Jersey Constitution

- Article 1, paragraph 1:
 - *All persons are by nature free and independent, and having certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.*

New Jersey Constitution *(continued)*

- The New Jersey Supreme Court has made clear that privacy is an inalienable right under this constitutional provision
- Historically this privacy right has been invoked for:
 - Marriage and family
 - Refusal of medical treatment
 - Consensual adult sexual relations
 - Disclosure of confidential personal information
 - Procreation

New Jersey Constitution and Common Law

- But the New Jersey Supreme Court has also made clear that there is no private cause of action for employees of private employers under this constitutional provision
- But the end around of that has been wrongful discharge claims arising under the common law (i.e., court created/recognized claims)

What Does This All Mean?

- Imposing a mandatory COVID-19 vaccine policy is not without legal risk
 - Private civil lawsuits
 - Government action
 - Rife for unionization catalyst
- Recent news reports suggest a substantial percentage of healthcare workers have refused to take the vaccine
 - Are you prepared to terminate a significant number of your employees?
- Employers have alternatives to mandatory policies to achieve their goal (at least substantially)

Alternatives to Compulsory Vaccination

- Encouraging volunteer vaccination
- Bonus/reward for proof of vaccination
- Education webinars about each of the vaccines to assuage employee concerns

Sign Up for Our Updates

- To sign up for our email updates please visit: bracheichler.com/subscribe-to-insights or email akatz@bracheichler.com

Follow Us on Social Media for Updates



**Like Us
on Facebook ▶**

[facebook.com/
bracheichlerllc](https://facebook.com/bracheichlerllc)



**Follow Us
on LinkedIn ▶**

[linkedin.com/company/
brach-eichler-llc](https://linkedin.com/company/brach-eichler-llc)



**Follow Us
on Twitter ▶**

[@BrachEichler](https://twitter.com/BrachEichler)

Contact Us

John D. Fanburg, Esq.

Member and Chair, Healthcare Law

jfanburg@bracheichler.com | 973-403-3107

Anthony M. Rainone, Esq.

Member and Co-Chair, Labor and Employment

arainone@bracheichler.com | 973-364-8372