

Report on Patient Privacy Volume 21, Number 6. June 10, 2021 'Do the Best' But Mind the Myriad Laws: Grappling With COVID Vaccination Issues

By Theresa Defino

“For the first time in the history of the United States, an employer is forcing an employee to participate in an experimental vaccine trial as a condition for continued employment.”

So begins the provocative lawsuit filed against Methodist Hospital System in Houston by 117 employees who do not want to be vaccinated against COVID-19.^[1] Despite the assertion, workers are not being asked—or forced—into a study.^[2] But until the case is decided, health care organizations will want to move cautiously regarding COVID-19 vaccinations, while ensuring they comply with employment as well as privacy laws—among others.

To better understand the details, *RPP* spoke to Joseph Lazzarotti, a principal in the Berkeley Heights, New Jersey, office of Jackson Lewis PC. Lazzarotti founded and directs its Privacy, Data and Cybersecurity Practice Group and is also a part of the firm’s Employee Benefits Practice Group.

Lazzarotti noted employers will need to pay attention to more than just HIPAA. Regulations and guidance issued by the Equal Employment Opportunity Commission (EEOC) are also in play, as can be state laws.

***RPP:* What positions are health care employers taking toward mandating a COVID-19 vaccine?**

JL: A significant consideration for a lot of health care organizations that I’m seeing is the Food and Drug Administration (FDA) grant of emergency use authorization for the vaccines. So people are still kind of squeamish about mandating them. I suspect that, if that changes to full approval, we will see more mandate it.

***RPP:* Is it illegal to mandate vaccinations now?**

JL: From an employment perspective, based on the EEOC’s more recent guidance, federal laws do not prevent employers from requiring employees entering the workplace to be vaccinated for COVID-19. Of course, there are exceptions. Reasonable accommodation, such as for religious objections, need to be provided. Some employers may have to work with union representatives. And, some state laws may affect the nature and scope of a mandate.

***RPP:* So are you advising doctors, offices or hospitals to encourage but not mandate? Or what is your approach?**

JL: I think the safest course right now, if you really want to push vaccinations, is to figure out how you can provide incentives. Employers not providing or contracting with a third party to provide vaccines have some flexibility in the kinds of incentives they can provide. Some employers are including vaccinations as part of wellness programs tied to their existing group health plans. In this case, they have to observe the HIPAA and Affordable Care Act rules concerning those programs. EEOC really hasn’t spoken clearly on this with formal guidance, but you can’t offer a substantial incentive that undermines the voluntariness of agreeing to be vaccinated. You could offer a water bottle, a gift card, but you couldn’t take \$50 off the employees’ monthly health premium for a year. You can’t pay their gym membership; you can’t pay for airline tickets.^[3]

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