

The Victorious

Employer: EMPLOYMENT AND LABOR NEWS FOR WINNING IN THE WORKPLACE

VACCINE MANDATES: HUMILITY, PATIENCE, AND FLEXIBILITY

In this edition of The Victorious Employer, I address the legality of vaccine mandates. In speaking with clients over the past few months, I know the decision regarding whether to get vaccinated is a subject that evokes strong emotion. From fears concerning the continued spread of the virus and its variants to the distrust of those in authority and the information they are sharing, people have strong “vax” and “anti-vax” perspectives that can make the decisions employers need to make about appropriate workplace policy very difficult.

However, in this article, I will not address whether a person should get vaccinated. On a personal note, generally, I do not like to take aspirin. So, I understand that getting vaccinated is a big deal for many people. In the interest of transparency, I will simply say that my family and I are all vaccinated and most of the people who work with me are vaccinated, as well. I have determined that any potential risks presented by getting vaccinated

are outweighed by the benefits. I have a lot of at-risk family members, members of my church, and friends I care for in my life. I have determined that preventing the spread of the disease and reducing the severity of the illness in the event that one of my loved ones or I get sick with COVID-19 or a COVID-19 variant is better than the regret I would feel if I was even remotely responsible for their sickness or death because I did not get vaccinated. My motive for taking this action is simply love. I love my family, friends, and community enough to take a risk on a vaccine that appears to have been administered safely to 167 million Americans while providing significant protection from the sickness and death that this disease causes.

However, that being said, whether to get vaccinated is a personal choice. Indeed, 55% of Nevadans have chosen not to get vaccinated, and my employer clients have called asking whether they should adopt a policy mandating that their employees get vaccinated.

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**JASON
GUINASSO**
PARTNER

We are pleased to present Issue 4 of The Victorious Employer, our periodic employment law newsletter. This and future issues will cover a range of topics of interest to those with an interest in employer/employee interactions.

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Candidly, I don't know whether employers "should" mandate the vaccination of their employees. The term "should" assumes certain values and morals. I would not clothe my legal advice to clients with my own personal values and morals on what they "should" or "should not" do. However, as a lawyer who practices employment and labor law, I do know that employers "can" mandate vaccinations under federal and state law. And many have.

What I have learned since the advent of the pandemic is that we should all exercise a bit of humility in what we know, what we think we know, and what we think others should do or not do. The answers to the many questions COVID has presented to us are not as black and white as many would have us believe. The questions presented often require a nuanced set of answers that do not fit neatly into boxes on a checklist of do's and don'ts.

It is important for employers to acknowledge, whether they agree with their employees or not, that there are valid reasons for people to either delay getting vaccinated or object entirely to being vaccinated. Proponents of vaccination are zealous in their conviction that everyone should be vaccinated. They express their opinions in such strong and unequivocal language that there does not seem to be much room for reasonable dissent. This causes many anti-vax individuals who are employees to either (a) brood quietly in their deep concerns about the uncertainties surrounding the risks of getting vaccinated, or (b) assert their fears and distrust of authority defiantly in their opposition to authority figures at the federal, state, and local level issuing mandates. This becomes more threatening to employees who don't want to be vaccinated for one reason or another when their employers begin issuing mandates.

This circumstance reminds me of the children's poet and author, Dr. Seuss, who might have written a rhyme something like this:



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The Sneetches and Other Stories

(This parody was adapted from "The Sneetches and Other Stories" by Dr. Seuss.)

Now, the Vaccinated Sneetches
had pokes in their arms,

While the No-Vax Sneetches
had none upon thars.

Those pokes weren't so big.

They were really so small,

Pfizer, Moderna and J&J said,
"Safe for them all!"

But because they had pokes
to pause the pandemic,

All the Vaxed Sneetches bragged,
"We're the best on the beaches."

With their snoots in the air,

They would sniff and they'd snort,

"We'll have nothing to do with the No-Vax sort!"

And whenever they met some,

When they were out walking,

They'd hike right on past them,
without even talking.

When the Vaxed Sneetches'
children went out to play ball,

Could a No-Vax sneetch hope to get in the game...?

Not at all.

You could only play if you had pokes in your arms,

And the No-Vax children had none upon thars.

When the Vaxed Sneetches had frankfurter roasts,

Or picnics or parties or marshmallow toasts,

They never invited No-Vaxers, they'd boast.

They left them out cold,
in the dark of the beaches.

They kept them away, don't let them come near!

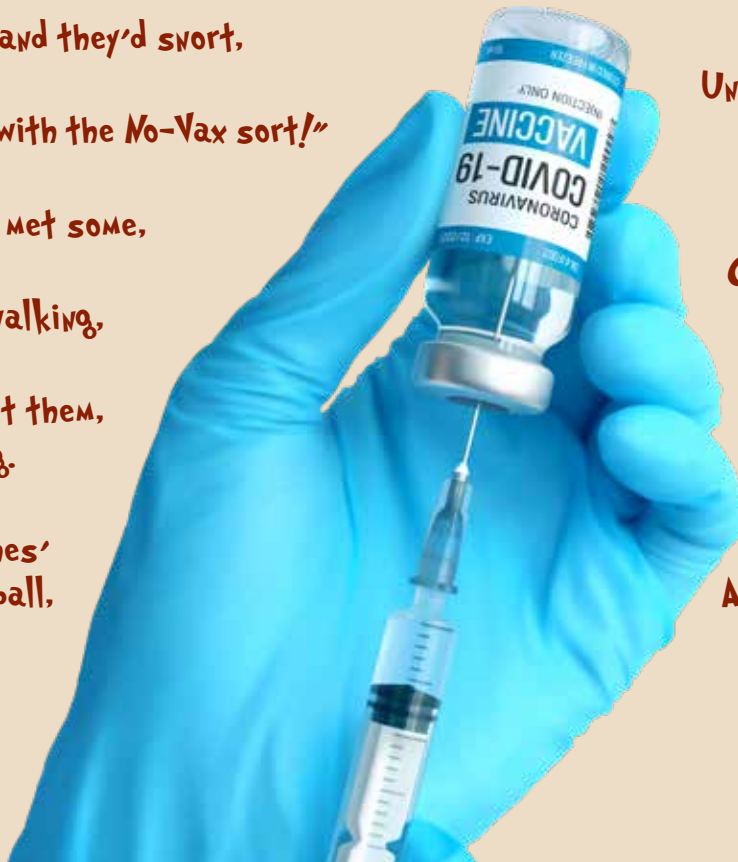
And at work and at play that's how it was,
year after year.

Until a No-Vax Sneetch called
his attorney and asked,
on a whim,

Can my employer make me get
a poke in my skin?

The attorney answered,
"Why, yes, they sure can,

If they honor Title VII,
ADA and all workplace bans."



All kidding aside, many employers are faced with serious decisions and have been asking what they can do if their employees refuse to get vaccinated.

Some employers want to terminate workers who won't take the vaccine, while others want to require unvaccinated employees to submit to weekly testing and take other safety precautions.

The Equal Employment Opportunity Commission (EEOC) has weighed in with guidance that answers some workplace vaccination questions. For example, the agency said that federal anti-discrimination laws don't prohibit employers from requiring all employees who physically enter the workplace to be vaccinated for COVID-19. Any vaccination mandate implemented should be job-related and consistent with a specific business necessity.

Employers that encourage or require vaccinations, however, must comply with the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964, and other workplace laws, according to the EEOC. This means an employee with a religious objection to receiving the vaccination should be respected and accommodated. Title VII requires an employer to accommodate an employee's sincerely held religious belief, practice, or observance, unless it would cause an undue hardship on the business. Courts have said that an "undue hardship" is created by an accommodation that has more than a "de minimis," or very small, cost or burden on the employer.

The definition of religion is broad and protects religious beliefs and practices that may be unfamiliar to the employer. Therefore, the EEOC recommends that employers give employees the benefit of the doubt

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"Some employers want to terminate workers who won't take the vaccine, while others want to require unvaccinated employees to submit to weekly testing and take other safety precautions."



that an employee's request for religious accommodation is based on a sincerely held religious belief. Most employers are not theologians, priests, or rabbis, so they should not attempt to judge the validity of a person's professed religious conviction.

Likewise, people with pre-existing conditions and disabilities that make the vaccine unsafe for them should be excused from a vaccination mandate. However, under the ADA, an employer can have a workplace policy that includes a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace. The EEOC defines a "direct threat" as a "significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation."

The question then becomes from an employment law perspective: Are non-vaxed people a direct threat if they are asymptotic, wear a mask, and otherwise practice good hygiene and social distancing habits? Four factors are generally used to determine whether a direct threat exists: (1) The duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. If an employee who cannot be vaccinated poses a direct threat to the workplace, the employer must consider whether a reasonable accommodation can be

made, such as allowing the employee to work remotely or take a leave of absence.

Some organizations are firing employees who don't comply with a vaccine mandate. A federal judge recently sided with a large hospital system that chose to fire employees who refused the shot. Other organizations are requiring regular testing for those who don't get vaccinated. However, be careful if you are an employer considering testing non-vaxed employees only. The science behind testing non-vaxed people, but not vaccinated people, is changing. In early August, the CDC concluded that vaccinated people may be just as efficient at spreading COVID as non-vaxed people who get the virus.

Now, as a consequence of these findings, the CDS recommends that everyone wear a mask. The CDC and policy makers are also reconsidering when testing should be required of both vaxed and non-vaxed people.

My best legal advice to employers considering mask and vaccine mandates is to exercise a little humility, a lot of patience, and be flexible in implementing COVID vaccination policies. Be gracious in how you communicate your policy. Take time to listen to your employees' concerns.

With this legal opinion in mind, I will close with one more verse from the Dr. Seuss:

*Then, when every last
cent of their money was
spent, the Fix-it-Up
Chappie packed up
And he went.*

*And he laughed
as he drove*

In his car up the beach,

They never will learn.

*No. You can't teach
a Sneetch!*

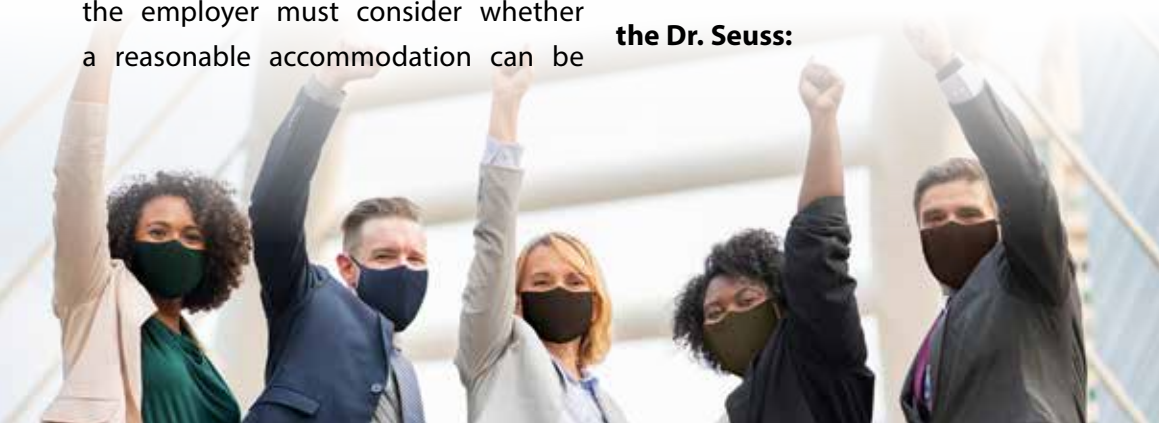
*But he was quite
wrong. I'm quite
happy to say*

*The Sneetches got
really quite smart
on that day,*

*The day they decided
that Sneetches
are Sneetches*

*And no kind of
Sneetch is the best
on the beaches.*

*That day, all the
Sneetches forgot
about the shots in
their arms and whether
they had one, or not,
upon thars.*



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PECCOLE PROFESSIONAL PARK
10080 WEST ALTA DRIVE, SUITE 200
LAS VEGAS, NEVADA 89145
702.385.2500

500 DAMONTE RANCH PKWY., SUITE 980
RENO, NEVADA 89521
775.853.8746

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