

The Forbidden COVID-19 Chronicles May 10 2021 Some Good News About Employers and COVID Vaccines

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In recent newsletters, I've been providing data which explains why many (if not most) people are choosing *not* to get a COVID vaccine. I'll return to that series next week, but thought it was important to bring you some new information about employer-mandated vaccines, since this is a major concern for many people right now.

The COVID-19 vaccines currently available in the U.S. were approved under Emergency Use Authorization and are considered investigational. They are not fully licensed. Both states and private businesses cannot mandate that anyone receive a product that is not fully licensed by the FDA.

According to 21 U.S. Code § 360bbb-3 - Authorization for medical products for use in emergencies, people must be informed of the following:

(I) that the Secretary [of Health and Human Services] has authorized the emergency use of the product;

(II) of the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown; and

(III) of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.¹

According to the FDA, federal law prevails:

"FDA believes that the terms and conditions of an EUA issued under section 564 preempt state or local law, both legislative requirements and common-law duties, that impose different or additional requirements on the medical product for which the EUA was issued in the context of the emergency declared under section 564 ... In an emergency, it is critical that the conditions that are part of the EUA or an order or waiver issued pursuant to section 564A — those that FDA has determined to be necessary or appropriate to protect the public health—be strictly followed, and that no additional conditions be imposed."²

The executive secretary of the Advisory Committee on Immunization Practices (ACIP), a committee of the Centers for Disease Control, confirmed this during a meeting in August 2020:

"I just wanted to add that, just wanted to remind everybody, that under an Emergency Use Authorization, an EUA, vaccines are not allowed to be mandatory. So, early in this vaccination phase, individuals will have to be consented and they won't be able to be mandated."³

Ignoring laws has become the rule rather than the exception these days, so it is not surprising that some employers are harassing their employees about COVID vaccines and some are outright ignoring the law and requiring vaccination.

New guidance from the U.S. Occupational Safety and Health Administration (OSHA) seems to imply that employers who require a COVID vaccine may have some liability for injury or death. The information appears on the OSHA Q&A section on COVID-19:

Question: If I require my employees to take the COVID-19 vaccine as a condition of their employment, are adverse reactions to the vaccine recordable?

Answer: If you *require* your employees to be vaccinated as a condition of employment (i.e., for work-related reasons), then any adverse reaction to the COVID-19 vaccine is work-related. The adverse reaction is recordable if it is a new case under 29 CFR 1904.6 and meets one or more of the general recording criteria in 29 CFR 1904.7.⁴

In response to this, many employers have said they have changed or will change their vaccination policy from mandated to recommended. Some employers claim that the burden of keeping track of injuries due to the vaccines is just too much!!⁵ Really??

But there is a bigger problem for employees than just keeping track of which employees are harmed by the job. If adverse reactions from employer-mandated COVID vaccinations are considered work-related, then employers may find themselves liable for injuries and deaths from the vaccine. Injured employees, or the families of those who die as a result of the vaccine, may decide to sue employers, particularly since the vaccine makers are protected from liability by the government.

Here's what I advise:

If your employer is harassing you to get one of these vaccines, or requiring it, calmly show him/her this information, along with some of the reports of injuries and deaths, and ask these questions:

- What arrangements have you made to fund expenses related to injuries or deaths resulting from this vaccine? Have you set aside financial reserves?
- Can you please provide me with evidence that you are financially able to cover medical expenses related to any injuries I might have?
- If not, is Workers' Comp going to cover my expenses? Have you spoken with our provider about this? Can you please provide me with written proof that Workers' Comp will cover my expenses if I'm hurt? Or my family's claims if I die after receiving the shot?

Then, again calmly, explain that you will carefully consider whether or not to agree to one of these experimental vaccines AFTER you have been given this information.

My expectation:

Few employers will want to take on this risk.

¹ <https://www.law.cornell.edu/uscode/text/21/360bbb-3>

² <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/emergency-use-authorization-medical-products-and-related-authorities>

³ https://www.cdc.gov/vaccines/videos/low-res/acipaug2020/COVID-19Supply-NextSteps_3_LowRes.mp4

⁴ <https://www.osha.gov/coronavirus/faqs#vaccine>

⁵ Jeff Yoders. OSHA Imposes New Guidance For Employer-Required COVID-19 Vaccines. *Engineering News Record* May 3 2021 <https://www.enr.com/articles/51691-osh-imposes-new-rule-for-employer-required-covid-19-vaccines>