

Legal Issues Related to Dental Staff and COVID-19 Vaccine

by C.Scott Litch Chief Operating Officer and General Counsel



This column draws your attention to an ADA fact sheet¹ that answers a number of legal questions about dental employers and COVID-19 vaccines for employees. Excerpts from some of the key Q and As are included below. I encourage readers to review the entire document, which is available on the AAPD website² and on the ADA's website under their COVID-19 center.

“1. Can I as a health care employer require my employees to get COVID-19 vaccines?”

Answer: The answer is likely yes, at least with respect to practice staff with direct patient contact in the operatory, including any employed dentists. Yet, much remains to be determined, not the least of which includes how available vaccines are and will become (currently, the only vaccines authorized by the Food and Drug Administration are for emergency use and do not have final approval; in addition, they are not yet widely available) . . .

State health departments are in the process of prioritizing the classes of individuals to receive vaccines as and when they become available. And, even assuming a vaccine were widely available, the question raises a range of potential legal issues, and some practical challenges, you may wish to consider before making a business decision to require some or all of your staff to be vaccinated.”

“2. What kind of disability/pregnancy-related accommodations should my practice consider in evaluating whether a reasonable accommodation is possible?”

Answer: It is generally assumed that COVID-19 in the health care setting might pose a significant risk of substantial harm to the health or safety of the individual or others, at least with respect to staff members who have direct contact with patients in the operatory setting. For those staff members with such close patient contact, the critical question may come down to whether measures taken before the vaccine became available (i.e., masks, gloves, gowns, shields, protective barriers, social distancing, etc.) would constitute a reasonable accommodation to continue with respect to a staff member with a disability or pregnancy-related condition that could be harmed by a vaccine. The same question would also apply to non-operatory adjustments made before a vaccine became available.”

“4. If I require staff members to be vaccinated, what proof can I request them to provide?”

Answer: Practices should take care not to request any verification that reveals any medical condition of the employee aside from vaccination status, as further inquiries may run afoul of federal or state disability laws. You may wish to advise your staff prior to testing the employee not to submit such information. All the practice needs to know is the employee's name and whether a vaccine has been administered (completely in the case of multi-dose vaccines).”

“6. What should I do if a staff member refuses to be vaccinated? Can I terminate their employment or re-assign them to another position?”

Answer: If an employee refuses a required vaccination, you should gather information about and document why the staff member is refusing. If the reason for the refusal is a claimed disability or religious belief (and your practice has 15 or more employees), you will need to discuss and document efforts to determine whether a reasonable accommodation is possible . . . You cannot retaliate against a staff member who exercises their legal right to a reasonable accommodation, nor can you treat similarly-situated classes of employees differently because of their race, gender, etc. If the staff member resists vaccination for non-disability-related or non-religious, personal reasons, the practice may still wish to consider accommodation should the practice wish to retain the staff member rather than terminating their employment.”

“7. What if I require a vaccination and a staff member suffers an adverse reaction?”

Answer: If a practice requires vaccination as a condition of continued employment, adverse consequences would be compensable to staff under state workers’ compensation laws. Properly-classified independent contractors are not generally entitled to workers’ compensation, in which case the practice may be liable if the vaccine was administered recklessly or negligently.”

“8. May staff members who have been vaccinated refuse to wear a mask and socially distance?”

Answer: Not for a while. The reality is, it may take weeks for the vaccine to take full effect, particularly in the case of a multi-dose vaccine. If a person is vaccinated while already infected by COVID-19, the vaccine may not prevent the spread of the virus to others. The data also suggests that while the vaccines are seemingly highly effective, none of them have been shown to be 100% effective, meaning there still is a chance of contracting COVID-19. Moreover, we do not yet know how effective or long-lasting the vaccine will prove in the long term, or whether someone who receives the vaccine may nevertheless spread the infection to others.”

For further information, contact Chief Operating Officer and General Counsel C. Scott Litch at 312-337-2169 ext. 29 or slitch@aapd.org.

This column presents a general informational overview of legal issues. It is intended as general guidance rather than legal advice. It is not a substitute for consultation with your own attorney concerning specific circumstances in your dental practice. Mr. Litch does not provide legal representation to individual AAPD members.

¹https://success.ada.org/~media/CPS/Files/COVID/COVID-19_Vaccine_FAQs_for_Practice_Owners.pdf

²<https://www.aapd.org/about/about-aapd/news-room/covid-19-status/>

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