

The Discriminatory Nature of Mandatory Vaccines

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Opinion

The discussion of COVID vaccine mandates by employers is a hotly debated topic. Another issue that is a major consideration in diversity, equity and inclusion (DE&I). Many employers are struggle with each topic individually. However, these topics are not as separate and distinct as many perceive. With the Biden Administration's recent policy statement regarding mandatory COVID vaccination [1], many employers, when mandated, may experience high rates of turnover in unvaccinated populations [2]. The CDC [3] notes that full vaccination rates are lowest in communities in color. As a comparison, the CDC data indicates that those identifying as Caucasian have a fully vaccinated rate of 61.4%. The next highest category was Hispanic/Latino with a fully vaccinated rate of 16.7%. The Black/NonHispanic fully vaccinated rate was 10%, whereas Asian/NonHispanic was 6.4%. Finally, the American Indian/Alaska Native fully vaccinated rate was 1%.

Employment law breaks discriminatory practices into either intentional, as measured by disparate treatment, or unintentional, as measured by disparate or adverse impact [4]. Adverse impact is the application of a universal business practice that disproportionately impacts one group over another. For example, in the 1950s, law enforcement hiring practices mandated an officer height of 5'8" [5]. This universal standard was applied to all candidates. However, women and some persons of color were disproportionately selected out due to average height that was less than the standard. The standard for determining adverse impact is the four-fifths or 80% rule [6]. According to this standard when a minority group, as measured by rate, is less than 80% of the majority group rate, there is prima facie evidence of adverse (disparate) impact. Applying this standard to vaccination rates under the assumption that the vaccine refusal rate is standard across groups, the prima facie rate for disparate impact is 49.12%. As previously noted, the highest fully vaccination rate for communities of color is 16.7%.

At a time when DE&I initiatives are of primary concern to all employers-public and private sector-a universal vaccination mandate under the threat of termination may not be the best policy when considered light of DE&I initiatives. The underlying assumption that termination rates based upon vaccination rates mirrors the fully vaccination rate is most-likely assumption. However, there is reason to question this assumption based on the CDC data. The CDC data also contains vaccination rates for partially vaccinated in the last 14 days. The partially vaccinated data calls into question the termination rate assumption. For example, 52% of partially vaccinated were Caucasian, whereas Hispanic/Latino respondents were 21.9% with Black respondents approximating 14%. Both American Indian/Alaska Native and Asian showed partial rates that were less than the fully vaccinated rate. The additional data does indicate prima facie disparate impact. Therefore, the question may be better framed as how much adverse impact instead of if adverse impact.

While HR departments are struggling with DE&I initiatives with the intention of creating a fairer and more inclusive work environment. The Biden Administration may be creating a headache for these departments with the conflicting direction of vaccine mandates. What is an HR department to do? It is better to not mandate vaccines and have employees face weekly testing instead of mandate with termination. The reputational effects and financial penalties are much greater for discrimination charges than vaccine. Once the HR department is aware of the possible disparate impact, one could argue that the discrimination is no longer unintentional but intentional. This foreknowledge implies a moral obligation to resist. The foreknowledge that a group may be disproportionately affect by a human resource policy, the executives are under a moral obligation not to comply.

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