



BOARD OF COUNTY COMMISSIONERS

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TO: Brevard County Board of County Commissioners
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THRU: *EB* Eden Bentley, County Attorney

FROM: Melissa H. Powers, Assistant County Attorney *WHP*

SUBJECT: Options Regarding Mandatory COVID Vaccines for First Responders

DATE: February 3, 2021

Question: What options can the County Commission consider regarding mandating the COVID-19 vaccine for Brevard County first responders?

Short Answer: Mandatory COVID-19 vaccines are allowable when employees pose a "direct threat" to themselves or others by their physical presence in the workplace without being immunized. However, if the vaccine is mandated, the County would have to ensure that the plan would be implemented in a manner that does not violate Federal or State law. In addition, provisions in the current collective bargaining agreement must also be considered.

Discussion: Pursuant to guidance from the U.S. Equal Employment Opportunity Commission (EEOC), an employer is allowed to mandate COVID-19 vaccinations when employees pose a "direct threat" to themselves or others by their physical presence in the workplace without being immunized.¹ In other words, it is permitted if workers would pose a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. "Direct threat" is fully defined as follows:

a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.

¹ See FAQ K.5, [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws | U.S. Equal Employment Opportunity Commission \(eeoc.gov\)](#)

In determining whether an individual would pose a direct threat, the factors to be considered include:

- (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.

See 29 C.F.R. §1630.2(r).

If the County implemented a policy requiring first responders to get the COVID-19 vaccine, either as a condition of employment for new employees or as a mandate for existing employees, the County must do so in a manner that does not violate any Federal or State law. For example, an employer must consider reasonable accommodations for employees with disabilities and those with sincerely held religious objections. To illustrate this point, an employee may have a medical reason for not getting vaccinated. In those circumstances, the employer cannot automatically exclude them from the workplace nor take any negative action against them. The employer must have in place a systematic and interactive process of evaluating requests for reasonable accommodations. Brevard County currently has an existing system in place for considering requests for reasonable accommodations (AO-02) which can be utilized for this purpose.

Other considerations must be carefully contemplated in developing a policy for mandating a vaccine including the following:

Generally, it is unlawful to disclose that an employee is receiving a reasonable accommodation, therefore an employer should not reveal which employees have or have not been vaccinated.

Employers can request a simple proof of receiving the vaccine but cannot ask specific questions that may elicit more specific information about a disability. For example, asking why someone did not receive a vaccine is potentially problematic. One way to potentially avoid this problem is to advise employees that they should not provide any medical information as part of the proof of vaccination.

The fact that the COVID-19 vaccine is being issued under an "Emergency Use Authorization" has been raised in considering mandatory vaccinations. The option not to accept the vaccine is clearly stated in the fact sheets disseminated for people who have the option to receive the vaccine. This language is predicated on Federal law. However, in Florida, an at-will employment state, this likely would not prevent an employer from making a vaccine a condition of employment (the employer would still be subject to applicable federal and state discrimination laws as discussed above). Therefore, while an individual has the option to refuse the vaccine, the County can still require it as a condition of employment so long as the policy is implemented consistently and not done in a manner that violates federal or state discrimination law.

Specific to first responders, the County must consider any applicable contractual obligations in the current collective bargaining agreements with the IAFF union. There is no article in the current agreement that either specifically allows or prevents the County from mandating a vaccine.² However, there are some specific articles in the agreement that should be noted and are discussed below.

Article 3 sets forth Management Rights. These are areas in which it is understood and agreed that Management has the exclusive right to control its operations. Article 3.02(C) states that Management has the exclusive right to "take whatever action may be necessary to carry out the mission and responsibility of the County in unusual and/or emergency situations".

Article 53 establishes an Occupational and Safety Committee to help "maintain high standards of safety and health in firefighting, prevention, training, emergency medical services and other related areas; to eliminate, in so far as reasonably possible, accidents, deaths, injuries, health hazards and occupational illness." Both the Department and Union appoint members to the Committee which typically meets quarterly. The Committee may "research and prepare recommendations on any matter pertaining to the health and safety of bargaining unit members at the request of the Fire Chief."

Unilaterally implementing a policy to mandate the COVID-19 vaccine for first responders could potentially be a basis of an unfair labor practice claim under section 447.501, Florida Statutes. For example, the Union could argue that such unilateral action constitutes a failure to bargain collectively in good faith on an item that is a term or condition of employment. Generally, terms and conditions of employment are considered mandatory subjects of collective bargaining. However, when an action arguably falls under both a management prerogative and is a term and condition of employment, Florida courts have stated that "a balancing test should apply to determine which characteristic predominates." *Fraternal Order of Police, Miami Lodge 20 v. City of Miami*, 609 So.2d 31,34 (Fla. S.Ct. 1992)

In the *FOP, Miami Lodge 20 v. City of Miami* case, the issue was mandatory drug testing, not vaccines, however, the analysis would likely be similar. The fundamental issue contemplates the nexus of mandatory areas of bargaining (such as conditions of employment) and management rights. The Florida Supreme Court has held that under some circumstances, unilateral action by management taken in order to ensure public safety was not considered a mandatory subject of collective bargaining.

The concept of an employer unilaterally imposing mandatory policy changes that affected union employees to address an "overriding need" to protect the public was also addressed in the case of *Laborers' International Union of North America v. Greater Orlando Aviation Authority*, 869 So.2d 608 (Fla. 5th DCA, 2004). Instead of mandatory drug testing, the policy change involved criminal offense reporting requirements established after the 9/11 terrorist attack. The 5th DCA

² Employers in some health care industries (nursing homes and hospitals) and the military have required flu vaccines in the past. Currently, neither Florida law nor the collective bargaining agreement mandate any vaccine to work as a firefighter, paramedic or EMT. Article 53.07 of the current collective bargaining agreement states that the County agrees to vaccinate bargaining unit members against Hepatitis B at the employee's discretion and at no cost to the member.

held that, as in the *FOP, Miami Lodge 20 v. City of Miami* case, the need to protect the public justified the unilateral action to change a policy.

While the above cited cases provide some guidance on situations where unilateral action to change a policy that affects terms and conditions of union employees and sets forth a balancing test to be applied, it would not prevent a legal challenge from being asserted by the union.

Options:

Based on the foregoing, the Board of County Commissioners can consider the following options:

- 1) Do not implement a Board Policy mandating first responders (firefighters, paramedics and EMTs) receive a COVID-19 vaccine as a condition of employment;
- 2) Implement a Board Policy, subject to federal and state law, mandating COVID-19 vaccines for new-hires in those first responder positions;
- 3) Implement a Board Policy, subject to federal and state law, mandating COVID-19 vaccines for all first responders, including both existing employees and new-hires;
- 4) Direct the County negotiating team to invite the Union to impact bargain on a new vaccine policy;
- 5) Direct the Fire Chief to request the Occupational Health and Safety Committee established under Article 53 of the collective bargaining unit to research and prepare recommendations regarding a vaccine policy;
- 6) Take Board action to encourage COVID-19 vaccination of the County's first responders, but not mandate it.

Conclusion: EEOC guidance is clear that an employer can mandate the COVID-19 vaccine for employees that fit the definition of "direct threat." Given the severity of the ongoing pandemic and the risk of serious illness and death from the COVID-19 virus as well as the exposure they have to the public to perform the essential duties of their job, first responders would likely fit the "direct threat" definition. Therefore, the Board of County Commissioners could consider implementing a policy so long as it did not violate federal and state discrimination laws by allowing for appropriate reasonable accommodations. Taking this action without inviting the Union to impact bargain on a new vaccine policy could also trigger litigation based upon allegations of an unfair labor practice pursuant to Florida law. Alternatively, the Board could take no action or take some other Board action (in addition to the current incentive program), such as a resolution to encourage its first responders to get the COVID-19 vaccine to protect themselves, their co-workers and the public or direct the Fire Chief to research and prepare recommendations on a vaccine policy for first responders.