

MEMBER QUESTION

Topic: Staff Vaccination Requirements

Date submitted: 12/10/2020

Can a public library compel staff members to get vaccinations for COVID-19, when they are available? If so, can an employee request an exemption? Do we need waivers of library liability if a staff member chooses not to get vaccinated?

WNYLRC ATTORNEY'S "RECENTLY ASKED QUESTIONS" RESPONSE

From: Stephanie A. Adams, Esq.

Date: 12/18/2020

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This is an incredibly sensitive, important, and complex set of questions. I know a lot of people out there in "library land" are waiting on the answer—from many different perspectives.

So we're going to take it slow, break it down, and unpack the components of the answers one step at a time.

Step 1: Considering requiring immunization to COVID-19 as part of a library's evolving Safety Plan

As I have emphasized in numerous pandemic-related answers, any library operating in any capacity right now should have a trustee-approved Safety Plan tailored to its unique operations. The plan should evolve as new safety-related information emerges, and as library operations change.

As of this writing,¹ some libraries are open to visit. Some are doing only curbside. Some are offering more remote programming. Some have used their information management and lending capacity to distribute PPE, food, and living supplies. Because of this diversity of service, they all should have different Safety Plans.

The Safety Plan of a library closed to the public for everything but curbside will be different from the Safety Plan of a library open for socially distant use of computers and lending. The

¹ December 18, 2020. For many of you, that means you've been shoveling lots of snow (we're looking at you, Binghamton).

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Safety Plan of a library distributing fresh produce will be different from a library streaming programming from its community room to an audience within its area of service (and beyond). The Safety Plan of a library operating with ten on-site staff in December should be different from the one they used when there was only one employee on-site in June.

Just like the decision to use a particular mode of sanitization, as a library undertakes and changes its unique services, the decision to require immunization of employees should start with vaccination's role not as a stand-alone solution, but as part of an overall approach to limiting the impact of the pandemic on your library, its employees, and your community. Do the services your library needs to provide the community warrant immunization of employees? If so, keep reading.

Step 2: Wait, so does what you said in "Step 1" mean a public library can go ahead and require employees to be vaccinated?

Yes...and NO.

I say "yes," because under the right conditions, the law does allow employers to impose conditions for safety, and that can include mandatory vaccination.² However, I also say "NO," because the phrase "the right conditions" carries a lot of complexity for three little words. To be safe, the default assumption of a library³ should always be that it *can't* require immunization of its employees...and then work to find the way, if well-informed risk management and an updated Safety Plan warrants it, it *can* require immunizations (and just as critically, if it *should*).

Step 3: Assessing if a library *can* require vaccination of employees

Before a library gets too far into an internal debate about if it should amend its Safety Plan to require vaccination of employees, it should assess if it is in a position to do so. This means having an experienced HR administrator or attorney look at the organization's bylaws, policies, and employment relationships to see if there are any steps or bars to the requirement.

What could such a bar look like? The most common impediment a library will run into on this is an employment contract—either for individual employees, or with an entire employee union (a

² See the case Norman v. NYU Health Systems (2020) (SDNY), 2020 U.S. Dist. LEXIS 180990 *; 19 Accom. Disabilities Dec. (CCH) P19-109

³ And in this case, I use "library" in its broadest sense: public, association, and even libraries operating as part of a larger institution (such as a college, hospital, or museum). School libraries, in particular, may both fall under the policies of the institution they are within, but might also have different operations, activities, and exposure that warrant independent risk analysis.

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"collective bargaining agreement"). The bottom line on this type of impediment: if there is a contract in play, a library must be very tactical, collaborative, and strategic prior to creating—or even considering—immunization as an employment condition.⁴

Another bar might be language in an employee handbook or a pre-pandemic policy. Still another might be that "gray area" when library employees are considered employees of a school district, village, or town.

The best overall guidance I can offer on this Step is: assessing if your library is positioned to require immunization is a critical step to using vaccination as a tool in your Safety Plan. Bring in a ringer to help your library assess the extent of what it can do.

Step 4: Assessing if a library *should* require vaccination of employees

Okay, let's say you consulted with the best employment lawyer in your village/town/district, they took a close look at whatever relevant contracts and policies your library has, and they have said: "No problem, you can require this."⁵

The next important thing to consider is: *should* your library require this?

Compelled immunization⁶ is an incredibly sensitive area of policy and law. Since the time Ben Franklin started insisting on smallpox immunizations,⁷ this public health issue has had passionate rhetoric on both sides of the debate.

I have worked with families whose children have documented contraindications for certain vaccines, and it is not a simple issue. And right now, a public discussion is happening about why

⁴ I can't be more specific than that, since in some cases, there may be "emergency" management clauses that could easily allow the requirement of further safety measures, while in other cases, there could be language that makes it clear such a requirement will have to be a point of discussion. The important take-away here is: if there is a contract in play, *don't wing it*. Bring in your lawyer.

⁵ The actual answer will of course be in writing and will likely be much more extensive than "*No problem!*" It should also be included in the records of library leadership to document the appropriate level of risk analysis.

⁶ When I say "controversial," I mean legally. The science is solid: immunization saves lives.

⁷ Ironically, Franklin's young son would die of smallpox before he could be immunized, in part because Franklin's wife Deborah was wary of the new treatment. Franklin was devastated by the loss of his small, precocious son, and some scholars say it caused a rift in his marriage that was never healed.

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people who are African-American might not trust being offered a first round of vaccination.⁸ These are life-and-death issues.

That said, those on the front lines of public service, during a time of pandemic, are at higher risk of both getting infected, and spreading disease. Science shows vaccination will mitigate that risk. Thus, under the right circumstances, encouraging such employees to be vaccinated is the right thing to do, and in some cases, employers have made the decision that *requiring* vaccination is the right thing to do.

The consideration of this question is classic risk management. What critical services is your library providing to the community? What exposure to possible infection do those services create? Does social distancing, PPE, and sanitization mitigate those risks within acceptable tolerances, or would requiring vaccination of employees demonstrably make those employees and the community safer? Are there certain duties that merit requiring immunization, and other duties (jobs performed 100% remotely, for instance) that do not? And critical: is mass employee immunization in step with the approach of your local health department?⁹

There is no cookie-cutter answer to these questions, but a responsible decision to require immunization of employees as part of a well-developed and evolving Safety Plan should answer them all.

Step 5: Developing a robust policy that includes consideration of civil rights, the ADA¹⁰ and privacy

So, let's say your library has followed Steps "1" through "4" and has decided it can, and should, update its Safety Plan to encourage or require immunization of employees.

The next step is developing a policy that:

⁸ If you know your history, you know these fears are based in reality. If you want to learn more, a good place to start is this New York Times article: <https://www.nytimes.com/2020/12/06/opinion/blacks-vaccinations-health.html?searchResultPosition=4>

⁹ Whenever possible, confirming Safety Plans, and significant revisions of Safety Plans, with the local health department is a very good idea.

¹⁰ The ADA is a critical consideration here. A good place to start for further information on this is the EEOC, at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>. However, this is just a starting place; as you can see by the linked guidance, this part of your policy cannot be a simple cut-and-paste job.

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- Demonstrably does not discriminate or have an unintentional disparate impact on any protected class of people (race, religion, sex, etc.);
- Has appropriate measures for people to opt-out based on a disability accommodation under the ADA or the New York Human Rights Law;
- Protects the privacy of those who either meet the requirement, are granted an accommodation to not meet the requirement, or who must be terminated due to refusal to meet the requirement.¹¹
- Manages liability through good planning and the transmission of accurate information, not (just) waivers of liability.¹²

I also suggest that the library strongly consider ensuring, well in advance, that: 1) the vaccine is available to employees, and 2) that employees don't have to pay for it. This is because 1) once the library has identified that there are risks in its operations that would be best mitigated through immunization, those activities should be limited until the mitigation is in place, and 2) there can be legal complications if the vaccination requires personal expense. While this advance planning and cost containment is not precisely a legal compliance concern, they are close first cousins, and should be addressed as part of the Safety Plan.

Step 6: If a library decides to require immunization, develop a PR Plan (optional, but a very good idea)

I don't need to tell a library audience that what a public library does on this topic will be scrutinized, criticized, and eventually, also a model for the rest of your community.¹³ Since any decision on this point will have its critics, and also (hopefully) its fans, be ready to let your public know, simply and straightforwardly, the basis for your library's decision.

I like the classic "FAQ" approach. Here are two model FAQ's for two libraries that did the legal analysis and safety assessment, and come to the following decisions:

FAQ: I was told the library board is requiring all the employees to be vaccinated for COVID, is that true?

¹¹ I know, this sounds cold; and it is. Considering if a library is actually prepared to terminate employees for refusing to meet the requirements should be part of your library's analysis here, too...because once you develop the policy and start requiring it, granting exceptions without justification can create serious legal complications.

¹² The member asks about waivers for employees who decide not to be immunized. A waiver of liability should only be used if it is part of a well-developed Safety Plan, and customized for the purpose by an attorney.

¹³ Although I just did. Ah, rhetoric.

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FAQ ANSWER: Since re-opening on DATE, the NAME Library has had a Safety Plan. Now our Safety Plan does include supporting voluntary immunization of employees.

FAQ: Voluntary? So you are not requiring it?

FAQ ANSWER: Our risk analysis and still-limited operations showed that we could meet the community's needs by requiring masks, social distancing, and routine sanitization. We have now added supporting employees in getting vaccinated on a voluntary basis.

FAQ: Will you ever require it?

FAQ ANSWER: Only if our operations change and an updated risk analysis shows us that it is best for our employees and for the community.

Another "FAQ" example, for a library that came to a different conclusion, is:

FAQ: I was told the board is requiring all the employees to be vaccinated for COVID, is that true?

FAQ ANSWER: Since re-opening on DATE, the NAME Library has had a Safety Plan. Now our Safety Plan does include mandatory immunization of employees who are able to be vaccinated.

FAQ: Why is the library requiring employees to get vaccinated?

FAQ ANSWER: Feedback shows that the community needs us providing critical services right now. Our risk analysis showed that in addition to requiring masks, social distancing, and sanitizations, immunization by employees would protect their health, and the community's, while we provide those services.

FAQ: The vaccine is not 100% available yet. Did your employees have to do this on their own?

FAQ ANSWER: Our library worked with [INSTITUTION] to make sure our employees had access to this safety measure, without cost to them.

And that's it.¹⁴

The important take-away I want to emphasize here is that for individual libraries, there are no quick answers to these questions.

Libraries of all types will be assessing their unique legal and risk positions, and will need to make carefully documented and executed decisions. Libraries within larger institutions may

¹⁴ I could go on with a few more FAQ's to illustrate the diversity of approaches available (they are kind of fun to write), but I trust you get it.

need to fight for consideration separate from other operations. Public libraries will need to consider the heightened transparency and public accountability they operate under. Library systems will be thinking about how they can protect their employees while also supporting their members. And for the employee on the ground, they'll be thinking about keeping themselves, their families, and their communities safe.

By taking careful, deliberate, and well-informed steps, the answers to the member's questions can be found.

Thank you for a vital question.

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