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Discrimination Against Employees Without COVID-19 Antibodies

Policies that favor those with immunity to a contagious disease are a novel concept and have not been used in recent United States history. Because of this, it is important to begin thinking about the legal and policy issues associated with banning employees without immunity to COVID-19 from the workplace and the appropriate balance between an individual's right to work and the public health of the nation.

By **Debbie Kaminer** | May 04, 2020 at 10:00 AM



Doctor holding a test kit for viral disease COVID-19 2019-nCoV. Lab card kit test for viral novel coronavirus sars-cov-2 virus. Photo: danielmarin/Shutterstock.com

Over the last few weeks public discussion has focused on how an antibody test for COVID-19 could provide a way to reopen the country while keeping the public safe. In addition to determining both the prevalence and lethality of COVID-19, antibody tests could potentially determine which employees are immune to the disease and therefore can safely return to the workplace. Employees without immunity to COVID-19 are not only at risk of becoming ill themselves but could act as vectors, furthering community spread. Chile has issued the world's

first “immunity passport”—or official certificate of immunity—and countries including Germany and Britain have discussed doing the same. New York state recently completed antibody tests determining that approximately 14% of people in New York state and 20% of people in NYC tested positive. However, uncertainty remains regarding the accuracy of many antibody tests and scientific experts argue that there are not enough tests to meet the volume required. Further, even once there are a sufficient number of reliable tests, many unknowns will remain regarding how effective immunity to COVID-19 is and how long it will last.

Yet despite these problems, it is likely that antibody testing will become more widespread and accurate in the coming weeks and months and either the government or private employers may use these tests, in at least some industries, to determine which employees can safely return to the workplace. Policies that favor those with immunity to a contagious disease are a novel concept and have not been used in recent United States history. Because of this, it is important to begin thinking about the legal and policy issues associated with banning employees without immunity to COVID-19 from the workplace and the appropriate balance between an individual’s right to work and the public health of the nation. In thinking about these issues, it is useful to compare these policies to immunization laws, mandatory retirement laws and the Americans with Disabilities Act.

In some ways the most direct analogy to policies favoring those with COVID-19 immunity is mandatory immunization laws, since both are based on the premise that only individuals with immunity to specific contagious diseases should be permitted in the workplace. Mandatory immunization laws are currently limited to certain professions such as health care. For example, in New York, hospital employees are required to be immunized against Measles Mumps and Rubella (MMR) and influenza or wear a protective mask. N.Y. Comp. Codes R. & Regs. tit. 10, §405.3. There is a recognition implicit in these laws, that certain professions are associated with a higher risk to public health. Additionally, many states permit not only medical, but also religious and philosophical exemptions (which have become controversial) to their vaccination laws. It would require a dramatic change of approach to immunity requirements to implement them in a way that would address the current pandemic effectively.

In any case, mandatory immunization laws differ significantly and crucially in that they presume the existence of a safe and effective vaccine. For example, since there is no vaccine for COVID-19 immunity can only be achieved through acquisition of the disease and subsequent recovery. An immunity requirement could lead desperate employees to intentionally become infected so that once they recover, they can return to their jobs. This could lead to the COVID-19 equivalent of chicken pox parties with financially desperate employees risking their health so that they can continue to earn a living.

Policies banning employees without COVID-19 antibodies from returning to the workplace are also analogous to mandatory retirement laws. The basic premise behind such laws, which are simply legalized age discrimination, is that once employees reach a certain age, there is a significant likelihood they will be unable to safely and efficiently perform their jobs. Employers

are permitted to discriminate in this way against employees who are members of a group defined by age, regardless of the competence or qualification of any individual group member.

Mandatory retirement is generally illegal under the Age Discrimination in Employment Act but there are exceptions, such as the bona fide occupational qualification (BFOQ) defense which applies when a maximum retirement age is “reasonably necessary to the normal operation of the particular business.” 29 U.S.C. §623(f)(1). For example, the Federal Aviation Administration has set the maximum age limit for pilots flying large commercial aircraft at 65. [49 U.S.C.A. §44729\(a\)](#). Courts have upheld challenges to mandatory retirement policies covering corporate and charter pilots under the BFOQ exception. Age discrimination is justified for this particular profession, based on the risk to the public since older pilots generally have slower reflexes. Even though individual older pilots may be qualified and competent, courts have held that their individual rights are outweighed by the risk of public harm.

Similarly, any law or policy favoring those with COVID-19 immunity is based on the premise that those without the antibodies can become sick themselves and ultimately infect others and are therefore statistically a public health danger. While this undoubtedly is a valid concern, just as mandatory retirement is not permitted in all professions and must be justified by a BFOQ, a requirement of COVID-19 immunity might not be justifiable in all workplaces and perhaps should be justified by some version or type of BFOQ.

Finally, an analogy can be made with the Americans With Disabilities Act, which both prohibits discrimination against and mandates reasonable accommodation of “qualified individuals with ... disabilities.” The ADA specifically states that employees who pose “a direct threat to the health or safety of other individuals” do not meet the qualification standards of the ADA (42 U.S.C §12113b) for protection from discrimination. The EEOC regulations further define a direct threat as “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.” 29 C.F.R §1630.2 (r). So, for example, an employee who has Parkinson’s disease or epilepsy might pose a direct threat to other people if their muscular or neurological disability inhibits their ability to control their movements in a manner that impacts public safety.

Individuals without immunity to COVID-19 are not disabled under the ADA’s definition of disability since lack of immunity is not a physical impairment that limits a major life activity.

However, an analogy can be made, since employees without COVID-19 immunity could spread the disease and therefore pose a “direct threat” to public health. Yet just as the ADA requires an individualized assessment of whether an employee is a direct threat, any policy favoring those with COVID-19 immunity should focus on the specifics of the profession and workplace in question.

Based on these comparisons to ADEA and the ADA, employers and policymakers should consider adopting different immunity policies for different professions and workplaces, recognizing the potential harm of policies that favor those with COVID-19 immunity. Factors to

consider could include the nature of the job, whether social distancing is realistic in a particular workplace, how often an employee needs to go to the workplace, and the ability of employees to use various forms of protective personal equipment when doing their job.

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