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# The ethics of firing unvaccinated employees

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## ABSTRACT

Some organisations make vaccination a condition of employment. This means prospective employees must demonstrate they have been vaccinated (eg, against measles) to be hired. But it also means organisations must decide whether *existing* employees should be expected to meet newly introduced vaccination conditions (eg, against COVID-19). Unlike prospective employees who will not be *hired* if they do not meet vaccination conditions, existing employees who fail to meet new vaccination conditions risk being *fired*. The latter seems worse than the former. Hence, objections to vaccination mandates commonly centre on the harms that will be visited on existing employees who are unwilling to be vaccinated. However, because this objection does not necessarily entail the claim that vaccination is unnecessary for the effective and safe performance of certain jobs, those making this objection should have less of an objection, or no objection at all (at least on these grounds), to introducing vaccination requirements in some cases for *prospective* employees. Yet, in this paper, I shall argue that if one has reason to believe vaccination requirements can be justified for prospective employees, one should also believe they are justified for existing employees *despite* any asymmetry in consequences experienced by the two groups. As a consequence, common objections made against vaccination mandates grounded solely in the harms that may be experienced by existing employees who are unwilling to be vaccinated should be considered unpersuasive.

## INTRODUCTION

Some organisations make vaccination a condition of employment. This means prospective employees must demonstrate they have been vaccinated (eg, against measles) to be hired. But it also means organisations must decide whether *existing* employees should be expected to meet newly introduced vaccination conditions (eg, against COVID-19). Unlike prospective employees who will not be *hired* if they do not meet vaccination conditions, existing employees who fail to meet new vaccination conditions risk being *fired*.<sup>1</sup>

Many likely share the intuition that being fired for failing to meet vaccination conditions is worse than not being hired for failing to meet vaccination conditions. Why is this the case? First, organisations can for the most part be as exacting as they would

like when establishing requirements for prospective employees (so long as they do not discriminate on protected human rights grounds), including level of education, prior experience, health and safety conditions and so forth. But introducing new conditions for existing employees seems unfair or unreasonable since those conditions do not reflect what they agreed to when initially hired. Second, while prospective employees can certainly be negatively impacted by such conditions insofar as they may have one less job opportunity, the toll for existing employees seems worse: those unwilling to meet newly established conditions risk losing their job and income, often with little notice or recourse. It is therefore unsurprising that objections to vaccination mandates commonly focus on the harms associated with people losing their jobs.<sup>1,2</sup>

With that being said, it is important to note that such an objection does not necessarily entail the claim that vaccination is unnecessary for the effective and safe performance of said jobs. If this were the case, the objection should centre on the baseless nature of the requirement, not (only) the harms that may be experienced by existing employees who are unwilling to be vaccinated. Hence, those making this particular objection should have less of an objection, or no objection at all (at least on these grounds), to introducing vaccination requirements for *prospective* employees. However, in this paper, I shall argue that if one has reason to believe vaccination requirements are justified for prospective employees, one should also believe they are justified for existing employees, despite any asymmetry in consequences experienced by the two groups. What this reveals is that common objections made against vaccination mandates grounded solely in the harms that may be experienced by existing employees who are unwilling to be vaccinated should be considered unpersuasive.

## BONA FIDE OCCUPATIONAL REQUIREMENTS

The ethical and legal justification for vaccination mandates commonly begins with the argument that, for some jobs, vaccination constitutes a bona fide occupational requirement<sup>3</sup>; that is, something every individual performing a job must do or have done (with reasonable exceptions) because it is considered necessary for the effective and safe performance of that job (ie, safe for all those who may be affected within or by an occupational environment, including employees and the public).<sup>4,5</sup>

Now, if one is unconvinced that vaccination can ever be a bona fide occupational requirement, they are unlikely to think it is ethically acceptable to not hire or fire people on the basis of their vaccination status. Hence, to examine the question at hand, we must assume vaccination can at least in

<sup>1</sup>Vaccination mandates do not always entail or necessitate the firing of employees who are unwilling to be vaccinated. This example is adduced because it is one of the more severe consequences that may be visited upon existing employees who are unwilling to comply with vaccination mandates, which helps illustrate the difference in possible consequences for existing employees relative to prospective employees.



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some instances be plausibly considered a bona fide occupational requirement. And because the objection to vaccination mandates grounded in the harms experienced by existing employees who are unwilling to be vaccinated does not necessarily entail the claim that vaccination is unnecessary for the effective and safe performance of certain jobs, we can assume some making this objection will agree vaccination can represent a bona fide occupational requirement in at least some cases.

A bona fide occupational requirement is a requirement for new employees as it is for veteran employees. It is connected to the functions of the position, not the length of time an employee has been employed. Nevertheless, a unique case exists when a bona fide occupational requirement is established only *after* an employee has been hired. In such cases, one's intuition may be that it is reasonable and fair to expect prospective employees to meet the bona fide occupational requirement but unreasonable and unfair to expect employees whose employment predates the establishment of the requirement to do so. But this does not stand up to scrutiny.

To see why, it is helpful to consider other sorts of occupational requirements beyond vaccination. Consider the case of vision standards for drivers of commercial vehicles, first introduced in the USA in 1939.<sup>6</sup> The purpose of such standards was to identify a level of vision that must be met in order that commercial drivers will not present a safety risk to themselves or the public. These standards did not exist when some drivers of commercial vehicles were initially hired. Should such drivers have been exempted from the standards, allowing them to continue driving even if unable to meet new vision standards? No, because doing so would suggest it is unacceptable for *prospective*, but not *existing*, commercial drivers to present a safety risk to themselves or the public, and there are no reasonable grounds to think this is the case. Moreover, it undermines the aim of the standards, that is, to reduce the safety risk to drivers and the public.

Consider another example, that of criminal record checks for teachers, which first became mandatory in the Canadian province of Ontario in 2001.<sup>7</sup> Similar to the example of visual standards for commercial drivers, it would be incoherent to agree such standards are necessary for health and safety but exempt teachers whose employment predates 2001 from meeting them. Doing so would suggest the risks associated with *existing* teachers having a criminal record are acceptable but the risks of *prospective* teachers having a criminal record are not.

By the same token, if one believes vaccination requirements are necessary for the effective and safe performance of a job, like vision standards for commercial driving or criminal record checks for teachers, so much so that it is justifiable to introduce them for prospective employees, then one should consider it justifiable to introduce them for existing employees as well. Existing employees should not be 'grandfathered' (ie, exempted) out of a policy since the health and safety justification for the policy is no different for them. That existing employees may be fired, for example, for failing to meet the requirement does not affect the necessity or rationale of the requirement. If conditions for the effective and safe performance of a job change—for example, emerging evidence suggests asbestos is harmful to human health, new and improved safety helmets are invented or a pandemic of a novel virus occurs—it is reasonable for new health and safety conditions for employment to be established in response (indeed, employers may have *duties* to introduce such conditions in response), and the justification for meeting those conditions should be the same for both existing employees and prospective employees. Hence, if the conditions for the effective and safe performance of a job change, it is not unfair nor

unreasonable to expect existing employees to meet those conditions (with reasonable exceptions), despite the fact they were not included in their original employment agreements. The upshot is that the locus of scrutiny should continue to be on whether vaccination constitutes a bona fide occupational requirement. If it is, then it is difficult to see why this requirement should not apply equally to prospective and existing employees.

### ASYMMETRY IN CONSEQUENCES

Now, one may agree the health and safety justification for vaccination requirements is the same for all relevant existing *and* prospective employees but still insist such groups ought to be treated differently due to the asymmetry in consequences members of the two groups will experience should they fail to meet those requirements. In other words, one may agree there are no reasonable grounds to think it is acceptable for one group but not the other to present a safety risk to fellow employees or the public (eg, by not adhering to vision standards, criminal record check requirements or vaccination requirements), but nonetheless argue the consequences resulting from non-compliance with relevant employment conditions outweigh those risks in the case of existing employees but not prospective employees.

This argument is plausible if analysed in terms of costs and benefits, which may correspond to one way policymakers seek to justify vaccination mandates, for example, by showing their benefits outweigh their costs. Though, this involves a tricky empirical question that turns on whether the harms (however defined) experienced by existing employees who are unwilling to be vaccinated (eg, being fired) 'outweigh' the harms (however defined) that could be expected to occur in the absence of a vaccination requirement (eg, infections, illness, hospitalisations, deaths and related sequelae).

But proceeding in these terms ignores another way in which vaccination mandates may be justified that does not simply rest on a favourable cost-benefit ratio. Health and safety employment standards may be justified when they are seen as necessary for the effective and safe performance of a job, not only when the harms averted by the safety standard outweigh the harms that may be experienced by employees unwilling to meet them. One straightforward reason that may be supplied for why this is the case is because proceeding otherwise would be to ignore any legal and ethical *duties* employers and/or employees have to protect the health and safety of other employees and the public. Another reason is that some harms, like preventable nosocomial infections in high-risk settings, may be considered ethically unacceptable and thus worthy of taking steps to prevent even if those steps involve significant costs. In such cases, failing to meet what are considered to be health and safety employment standards could be considered disqualifying irrespective of the harms visited on those unwilling to meet them.

Again, an example may be illustrative. Consider Jurisdiction A, which has a criminal record check requirement for teachers, and Jurisdiction B, which does not. Imagine a school year where no children are harmed in any way at the hands of teachers in either jurisdiction, but where 10 teachers in Jurisdiction A are fired as a result of failing to comply with its criminal record check requirement. Putting aside challenges related to counterfactuals (ie, it is difficult to know whether the requirement in Jurisdiction A was in fact responsible for the lack of harm to children experienced in that jurisdiction), an argument resting strictly on a favourable cost-benefit ratio may suggest the harms associated with 10 teachers losing their jobs outweigh the harms averted by the criminal record check requirement. Jurisdiction B does

not have such a requirement and their outcomes related to child welfare were the same as Jurisdiction A, and so this represents a more favourable cost-benefit ratio. But this ignores the obligations society has to protect the welfare of children (discharged in this case via mandated criminal record checks for those interacting closely and frequently with children). Failing to meet such an employment standard could be considered disqualifying irrespective of the harms visited on those unwilling to meet it.

Hence, that the consequences may be particularly severe for existing employees should they fail to meet newly introduced employment conditions, or that such harms are seen to outweigh possible benefits, does not tell us whether those consequences are necessarily unjustified. Firing a 30-year veteran of a job—someone who has a mortgage and several kids to feed—is something we should try to avoid if we can, and so the pertinent question is whether it is *truly* necessary to fire that person based on their vaccination status; whether vaccination is *truly* necessary for the effective and safe performance of her job. Or, put in another way: whether vaccination should be considered a bona fide occupational requirement. If one were to agree vaccination constitutes a bona fide occupational requirement, it would therefore be inconsistent to argue vaccination mandates are unjustified due to the harms experienced by existing employees who are unwilling to be vaccinated. Indeed, the harms experienced by existing employees unwilling to be vaccinated are acceptable *precisely* in cases where vaccination is considered a bona fide occupational requirement. Taking a condition to be a bona fide occupational requirement is, in effect, taking it to be *settled* that the consequences for employees who choose to not meet the employment condition should not outweigh the consequences expected to occur in the absence of that condition or because of some ethical and legal duties employers and/or employees have to protect the health and safety of other employees and the public. In fact, the process for establishing a bona fide occupational requirement does not generally even consider the consequences for employees who choose to not meet them.<sup>5</sup> Conversely, in cases where vaccination is *not* considered a bona fide occupational requirement, the ratio of costs to benefits is likely to have greater moral salience in evaluating the prospect of a vaccination requirement.

Lest one thinks the conclusion to this particular argument begs the question, it is helpful to emphasise the distinct insights it generates. First, it tells us that the harms existing employees may experience as a result of being unwilling to get vaccinated cannot on their own be dispositive that it is wrong to require them to be vaccinated. We should therefore be sceptical of arguments that simply count the harms experienced by existing employees who are unwilling to be vaccinated as a sufficient reason to object to vaccination mandates. Second, it tells us that it would be inconsistent to agree an employment condition counts as a bona fide occupational requirement but argue the consequences for employees who are unwilling to meet that requirement are so severe that we should not expect existing employees to meet it.

### THE NATURE OF EMPLOYMENT CONDITIONS

A final way in which the introduction of new employment conditions is morally distinct for existing employees relative to prospective employees is that existing employees are in a much more difficult position to not agree to such conditions. If Company A has a vaccination requirement and Companies B through Z do not, prospective employees who are not vaccinated

and are unwilling to get vaccinated can apply to work at Companies B through Z. But existing employees of Company A are in a more difficult situation, assuming the vaccination requirement was introduced during their tenure. For existing employees, their choice is between employment and unemployment (in the case where the consequence of failing to comply with the vaccination mandate is being fired). It is a choice between maintaining their income—which they likely expected to maintain in their financial planning—and losing their income. While they ultimately have a choice in the matter, the consequences of that choice for existing employees may make them feel like they have little choice at all.

But this is not terribly instructive since it is true of many employment conditions. For instance, if Company A requires employees to wear safety helmets and Companies B through Z do not, prospective employees can take this into account when choosing where to apply for work. If they are unwilling to wear safety helmets, they can apply to work at Companies B through Z. By contrast, if Company A has a compelling reason to change its policy on personal protective equipment and begin requiring employees to don safety helmets, existing employees of Company A may feel they have little choice but to comply with this change, for their choice is between employment and unemployment; between maintaining their income and losing it (assuming, again, that the consequence of failing to comply with the change is being fired). But this asymmetry in consequences between prospective and existing employees does not suggest that only prospective employees should be required to wear safety helmets. Nor does the severity of consequences (ie, being fired) for existing employees unwilling to meet those new conditions suggest the shift to wearing safety helmets can *never* be justified (with the possible exception of cases where employment contracts are explicit about such conditions and changes to them, which is less likely to be the case for possible future vaccination requirements for novel emerging pathogens).

### CONCLUSION

A common objection to vaccination mandates is that the harms visited upon existing employees who are unwilling to be vaccinated are unacceptable, and this renders vaccination mandates unethical. This paper has argued why such harms should not on their own count as a sufficient reason to reject vaccination mandates. If one were willing to agree that vaccination mandates are justified for prospective employees, one should also believe they are justified for existing employees *despite* the more significant harms experienced by existing employees should they be unwilling to be vaccinated. Consequently, objections to vaccination mandates grounded in the harms experienced by existing employees who are unwilling to be vaccinated should be considered unpersuasive unless accompanied by additional grounds for objection, such as that vaccination is not necessary for the effective and safe performance of their job.

Now, the objection to vaccination mandates grounded in the harms experienced by existing employees unwilling to be vaccinated is but one of many distinct objections to vaccination mandates. This paper made no attempt to address other objections and therefore has little to say about the overall justification of vaccination mandates. Nevertheless, by systematically addressing a distinct argument deployed in relation to vaccination mandates, we were better able to evaluate the force that

argument ought to have (if any) in more comprehensive arguments in favour of, or in opposition to, vaccination mandates.

Indeed, a separate, but related, objection to vaccination mandates concerns the possible *aggregate* consequences for industries or sectors that may result from the cumulative firings stemming from vaccination mandates, for example, the possibility of an overall reduction in the health workforce, which may translate into poorer health system performance and poorer health outcomes for patients (which is an empirical hypothesis in need of validation in order to be forceful).<sup>8</sup> Because this objection is distinct from the objection grounded in the harms *experienced by existing employees* who are unwilling to be vaccinated, it is beyond the scope of this paper. But this objection, like many others, is nonetheless deserving of attention.

Finally, nothing in this article should be taken to suggest we should not attempt to limit the negative consequences experienced by employees affected by vaccination mandates, for example, by offering reasonable and available alternatives, like remote work, or by providing reasonable accommodations to those for whom vaccination is medically contraindicated or in accordance with human rights obligations, or that we should be indifferent to the consequences of vaccination mandates for existing employees. What this paper hopes to have shown is that the mere fact that consequences exist for existing employees, or that such consequences may be severe for existing employees, should not on their own count as sufficient reasons to reject vaccination mandates.

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