The ethics of firing unvaccinated employees

Maxwell J Smith

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.1

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.2–4

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; 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).5–8

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
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 some sorts of occupational requirements beyond vaccination. Consider the case of vision standards for drivers of commercial vehicles, first introduced in the USA in 1939.6 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 2001.7 Similar to the example of vision 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 obliga-
tions society has to protect the welfare of children (discharged
in this case via mandated criminal record checks for those inter-
acting closely and frequently with children). Failing to meet such
an employment standard could be considered disqualifying irre-
pective 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 intro-
duced 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 neces-
sary 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 experi-
enced by existing employees unwilling to be vaccinated are
acceptable precisely in cases where vaccination is consid-
ered 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. 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 vacci-
nation 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 Compa-
nies B through Z. But existing employees of Company A are in
a more difficult situation, assuming the vaccination require-
ment 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 main-
taining 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 protec-
tive 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 condi-
tions 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 vacci-
nated 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 signif-
icient harms experienced by existing employees should they be
unwilling to be vaccinated. Consequently, objections to vacci-
nation mandates grounded in the harms experienced by existing
employees who are unwilling to be vaccinated should be consid-
ered unpersuasive unless accompanied by additional grounds for
objection, such as that vaccination is not necessary for the effec-
tive and safe performance of their job.

Now, the objection to vaccination mandates grounded in the
harm 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 objec-
tions and therefore has little to say about the overall justifica-
tion of vaccination mandates. Nevertheless, by systematically
addressing a distinct argument deployed in relation to vaccina-
tion 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).5 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.

Twitter Maxwell J Smith @maxwellsmith

Contributors MJS is the sole contributor to this manuscript and is responsible for the overall content as the guarantor.

Funding The authors have not declared a specific grant for this research from any funding agency in the public, commercial or not-for-profit sectors.

Competing interests None declared.