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Refusing care to the unvaccinated a potential legal and ethical pitfall

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COVID-19

Recent reports of providers refusing to treat patients who are not vaccinated against COVID-19 raise the question: Can providers do that? While there are technical grounds that would arguably allow it, legal experts advise against it.

You may have seen reports about providers who opted not to see patients who remain unvaccinated against COVID-19. Miami family medicine doctor Linda Marraccini, M.D., "posted a note outside the office door and gave patients until Sept. 15 to get vaccinated against COVID-19 or else she will end the doctor-patient relationship," the Miami Herald reported Sept. 9.

Another family doctor, Jason Valentine, M.D. of Mobile, Ala., issued a similar ultimatum in a Facebook post, according to a report in the Washington Post on Aug. 18. "If they asked why, I told them covid is a miserable way to die and I can't watch them die like that," wrote Valentine," according to the report.

Akin to 'firing' a patient

Is a refusal to treat unvaccinated individuals allowed? In theory, yes, but the path is narrow and legal implications are thorny.

David Aylor, CEO of David Aylor Law Offices in Charleston, S.C., says that if the provider can show the patient is not being excluded for their status as a protected class under civil rights laws, she may have a case for excluding the patient on the grounds of vaccination status. Aylor notes the provider also cannot be the only medical practitioner available to treat the patient, e.g., during an emergency.

A near-analogy would be "firing" a patient who won't follow medical advice or who presents a threat to other patients. A vaccination-refusal policy would require a similar protocol ([PBN 7/24/17](#)).

"In the case of a non-emergency situation, though doctors are legally entitled to refuse service, they're obligated by the duty of care doctrine to explain why and offer to connect them to a doctor willing to treat them," Aylor says.

Urging caution

Even if you do all of that right, though, "it's a very slippery slope," says Mariel Smith, a labor and employment attorney at Hall Booth Smith P.C. in Columbus, Ga. That's because such a policy could lead to difficult situations that, if it came to cases, would not look good to a jury or judge, Smith notes.

"Think of someone at the door or in the waiting room, and you telling them, 'Sorry, we can't see you because you [aren't vaccinated]," Smith says. "It could be seen as patient abandonment."

Faisal Khan, senior legal counsel at Nixon Gwillt Law in Cleveland, finds the whole fired-patient model sketchy.

"Intent is definitely a key factor in whether or not a provider is justified in terminating a provider-patient relationship," Khan says.

While a disruptive patient would be covered by that standard, "terminating the relationship based on a competent patient's informed decision to avoid vaccination does not represent any intentional risk to inflict physical harm to the provider, staff or patients," Khan explains. "In this case, the provider is terminating the relationship when the patient does not intentionally seek to harm anyone; the provider is essentially saying you pose a risk even when you don't intend to harm anyone."

Also, treating a patient differently because of their vaccination status invites anti-discrimination scrutiny under civil rights law.

Watch rights, ethics violations

Rich Cahill, Esq., vice president and associate general counsel for The Doctors Company in Napa, Calif., envisions "an investigation by the Office for Civil Rights (OCR) for violation of the Americans with Disabilities Act (ADA), and probably adverse blogging, negative posts on social media and other potential reputational harms." And the patient might also claim exemptions on religious or medical grounds and insist on being seen anyway.

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Anna L. Schroeder, an associate with the Eastman & Smith Ltd. health care group in Toledo, Ohio, argues that "if your motivation is solely to incentivize vaccination, that may be [considered] unethical" because it "would damage trust in the medical profession, something essential between a physician and patient."

"People report physicians [to insurers or medical boards] all the time," Smith says. "Patients report if you open late or close early. Imagine the type of complaints this would raise."

Depending on your motivation, you might be able to get the results you're hoping for from an exclusion policy through less extreme means. For example, if patient safety is your concern, you might be able to justify having separate waiting rooms for unvaccinated patients, Smith says. Although, she warns, you would still have to be careful.

"Suppose all of my elderly patients are saying that, for medical reasons, they're not getting the vaccine," Smith says. "Well, [if I separate them] it appears that I'm discriminating against my elderly patients."

You could also try harder to reach refusenik patients. "Refusing to treat unvaccinated individuals also removes the opportunity to educate them about the vaccine and address any concerns acting as a barrier to vaccination," Schroeder reasons.

"People need access to care and continuity of care more than ever given the pandemic," Khan says. Besides the risk it presents to the practice, excluding unvaccinated patients "certainly is not helping the cause of building the trust between individuals and local communities and their health care providers."

Resources

Miami Herald, "No vaccine, no service. Miami physician orders patients to get a shot or find another doctor," Sept. 9: www.miamiherald.com/news/coronavirus/article253973718.html

Washington Post, "An Alabama doctor watched patients reject the coronavirus vaccine. Now he's refusing to treat them," Aug. 18: www.washingtonpost.com/health/2021/08/18/alabama-doctor-unvaccinated-patients-valentine/



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