

Protecting Liberty in the Age of COVID: What To Do About Employer Vaccine Mandates

John Garen
BB&T Professor of Economics
University of Kentucky

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It is apparent that numerous private companies are imposing, or wish to impose, COVID vaccination and masking requirements on their employees, aligning themselves with many government pronouncements, policies, and recommendations. An initial reaction to this from a free-enterprise perspective is that private firms ought to be able to establish whatever workplace standards they wish, within the usual constraints of Constitutional and employment law. I have come to conclude that this initial reaction is not correct as it misses a good deal of the picture.

Fundamentally, the reasoning is that many companies issuing COVID employee mandates are the cronies of government, dependent on government favors, assistance, contracts, tax breaks, and subsidies. Thus, to remain in political/regulatory favor, they are incentivized to do the government's bidding by issuing COVID directives to employees. Other firms, less ensconced as cronies, most likely feel various forms of pressure by government agencies to follow the government line and to issue employee mandates. Thus, it seems that many private firms are, in an opaque manner, acting in the government's stead. If enough firms feel thus constrained by the government in these respects, the competitive process for employees is stifled and distorted. Firms offer employment conditions biased toward vaccine mandates. Thus, the situation is not one where private firms are simply making their own choices in a market economy. Firms are acting with a tacit and invisible (to outsiders) set of regulations and incentives to follow government "recommendations."

The issue is what to do about it. This is especially pressing at present since many people face either taking the vaccine against their will or losing their job. Should legislatures enact laws that prohibit these sorts of mandates by employers? One the face of it, this seems to be counter to a free-enterprise approach, as noted above. Also, it may open up a host of related problems, including setting a precedent for future government interference with ordinary business and employment activity. Yet one might ask whether such laws are necessary to counter the existing governmental/regulatory pressures. This is especially concerning if competition for workers – via offering more preferred working conditions – is being stifled. Other options are to require that employers allow for broad exemptions to any vaccine mandate or accept financial responsibility for harms they cause. Also, perhaps there are alternatives to limit government interference with business operations in either direction. These are discussed below, following some background material.

What Should Be the Status Quo? The Presumption of Liberty

Regardless of what position one takes on their medical efficacy and safety, there is little doubt that masking and vaccination policy is very contentious. Many distinguished physicians, scientists, medical researchers, and data analysts take opposing positions in this debate.

Though there it is clear that COVID is a serious disease, causing many illnesses and fatalities, there is serious disagreement and discussion regarding the accuracy of the data on disease incidence, its origins, on methods to mitigate its spread, on treatments for COVID, and on the safety and effectiveness of the vaccines, especially in the longer term. [Here](#) is a sampling of a number of these issues.

My reading of this debate is that there is not convincing and broadly accepted evidence that justifies extensive intrusion on people's everyday lives, including the broad-based economic shutdowns of 2020 and the current push for requiring vaccinations. My view is that, absent such clear evidence, individual liberty is not to be restrained. In short, there ought to be a strong presumption of liberty. It should not be lightly rebutted, and the evidence thus far does not reach this standard of rebuttal.

This implies that government should not mandate actions in these respects. But what about private firms and organizations? Owners and managers, as individuals acting on behalf of their organizations, have liberties as well. Should they be allowed to impose masking and vaccination mandates on their employees?

Regulation, Politics, and Quid Pro Quos

The issue noted above is that private businesses seem to be tacitly regulated to pursue employment policies that favor the government line. If so, firms are not simply making choices via the exercise of their rights and liberty. Such tacit regulation is difficult to quantify; the very nature of tacit understandings makes them hard to detect and measure. Yet for crony firms that attain preferred government treatment – via benign or favorable regulation, government programs that subsidize and/or assist them, advantageous tax treatment, or government contracts – there is an implicit quid pro quo, i.e., there is a “price” of gaining such favors. It comes in the form of campaign contributions and related political support – but also in the form of public support of various policies of one's benefactor. Moreover, firms that are not well-ensconced cronies have to beware of the consequences of pushing back against regulators' and government officials' recommendations.

The upshot is that there is tacit pressure to go along with government pronouncements. The extent of the pressure is difficult to say. This is due to the implicit nature of the quid pro quos. However, there can be no doubt that the federal government dangles a large carrot and wields a big stick over private economic activity. The U.S. government has a budget of over one-fifth of the entire economy, coupled with powerful regulatory authority. Its influence is large, creating a great deal of reliance on government. State government programs, taxes, and regulation add to this reliance even further

Reliance on government, with the incentives that go along with it, may be even stronger if proximate versions of the recently proposed infrastructure and discretionary spending bills pass into law. Each ramps up both government spending and regulatory activity substantially, especially in the transportation, construction, energy, manufacturing, healthcare, and education

sectors. The “carrot” of government contracts/assistance and the “stick” of regulatory scrutiny, already sizeable, seem to loom even larger.

It is possible that some private firms, in an assessment of what their employees and/or customers desire, would adopt masking and vaccination mandates. Moreover, some business owners and managers may have the earnest belief that such mandates are the best way to deal with COVID, though other owner/managers likely have contrary views. Even granting this, it still is true that federal and state governments each have large budgetary scope and regulatory powers over private firms. I cannot imagine that the influence of such power does not have a substantial effect on firms’ policies.

What to Do

The above argument is that, at present, private firms are not simply making choices in a free enterprise setting. Thus, taking a hands-off approach simply lets the tacit regulatory process continue and government agencies get their way, albeit in a murky and clumsy way. For those interested in protecting the individual rights of workers, this simply fails to work. Moreover, this puts people in the bind of taking a vaccine against their judgment or losing their job. And for many people, this bind is occurring right now.

Legislation that places an immediate ban of private sector vaccine mandates gives immediate relief to workers from having their liberties tread upon. I do not like this approach, but it may be the lesser of evils. Legislative interference in business and employment activity is generally a bad idea and, in most cases, putting more regulations on top of bad regulations makes things worse. Moreover, such legislation may establish further precedent for an even larger role for government.

But are there alternatives that give immediate safeguard to workers’ rights and liberties?

In the long term, it is desired to strip away the excesses of the big spending, regulatory state that incentivizes and pressures private businesses to adopt government “recommendations.” This is a big project and one that will take a long time. While worthwhile, it provides no immediate relief to workers.

An alternative similar to a ban on vaccine mandates is to allow businesses to mandate employee vaccination, but allow broad and exemptions for religious, health, or conscientious reasons. The three exempt categories could encompass virtually everyone. If the exemptions are easy enough to obtain, the exemptions rule could make business mandates nearly meaningless, thus protecting worker liberty.

Another alternative to require that businesses which mandate vaccinations to assume liability for any subsequent harm that they cause. Since those who cause the harm (employers who mandate vaccines) must assume financial responsibility for it, this is more consonant with a free enterprise approach. However, it is almost impossible to fully compensate someone for a devastating medical event. Having severe paralysis from a vaccine reaction but “compensation” of, for example, a half a million dollars is still not a good deal in many peoples’ minds, I suspect.

Having to take a vaccine exposes people to such a risk. The intent of this approach, though, is to deter business from mandating vaccines in the first place. [Proposed legislation](#) in Kentucky is an example of this approach.

A different approach suggested to me by a friend and colleague is the following. Allow businesses to adopt whatever COVID policies they choose, but ban government agencies from requiring, coercing, inducing, or incentivizing private organizations to adopt vaccines mandates.

Here is language suggested to me:

“Neither the Government of the Commonwealth of Kentucky, nor any city, county, or regional government jurisdiction therein, nor their agencies, subdivisions, officials, agents, contractors, or assignees may require, coerce, induce, or incentivize a private business, organization, corporation, or entity or its owners, shareholders, employees, representatives, contractors, or assignees to obtain or document information about an individual’s vaccination status, the presence or absence of pathogens, antigens, or antibodies, or medical history as a condition of employment, patronage, commerce, association, entry, or use, or as a condition for access to property, funds, services, goods, or opportunity.”

Here, firms are allowed to issue mandates (or not) as long as they are not coerced or incentivized by government. In principle, firms may choose their employment policies without government interference. This is an attractive idea and principle. The question is whether it is enforceable. The tacit nature of regulation and pressure may make it very difficult to establish whether a business’ policy was due to pressure from a government entity or not. This could make this approach problematic.