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IMMUNITY FROM COVID-19 VACCINATION; IMMUNITY AFTER RECOVERING FROM COVID-19?

BY: SCOTT A. O'MARA

On October 22, 2021, a judge in Kern County determined that the power of the State is such that it can mandate vaccinations for certain employees. The judge stated that the Court was not in a position to dictate which and when such steps should be addressed by the State to deal with the COVID-19 pandemic. This finding is similar to litigation in other states enforcing the vaccination mandate through either executive order or legislation to control the spread of COVID-19. There are some limited exceptions based on religious perspectives and beliefs. The rationale for government mandated vaccinations is based upon the attempt of the government to control the spread of the pandemic, and does not reflect the potential immunity obtained by some individuals who have been infected with COVID-19 and subsequently recovered. Therefore, having had COVID-19 could potentially be viewed as a vaccination.

The argument being made against vaccination mandates is that they violate meet-and-confer collective bargaining between unions and employers. In many situations, however, the courts have responded by finding that such mandates adhere to the power vested in the Federal Government and states to control the spread of disease. State interests in maintaining public health empower employers, the state, cities and other municipalities to mandate vaccinations, and failure to do so can be a basis for termination. Again, mandating vaccinations do not reflect an aspect of immunity which can be in a worker's system from having experienced COVID-19 and recovered from it – a medical change which, in essence, may constitute a COVID-19 vaccination.

A recent study by the University of Pennsylvania acknowledges that there are ways to control the advancement of COVID-19. The first way is through vaccination. The second way discussed is that people who have acquired a sufficient level of immunity to infection can limit the advancement of the coronavirus. This concept of a community level of immunity through infection is one that is being looked at and may not mandate vaccination. Each individual has a different response to COVID-19 exposure, but of particular significance is the recognition that individuals who have not been vaccinated

indeed can develop immunity to the occurrence of COVID-19. While studies indicate that this group can benefit from being vaccinated, the findings reveal that individuals who have this immunity have a much lesser likelihood of reacquiring the virus even without a vaccination.

Another level of analysis suggests that some workers who recover from COVID-19 still need to be vaccinated. The approach of local governments, counties, cities, states and the Federal Government has been to embrace the concept of a blanket mandate to vaccinate everyone.

Of note, the antibody levels in both vaccinated individuals and people who have recovered from COVID-19 infections drop over a period of time, resulting in reduced immunity in both groups.

In a study done by Rockefeller University on August 24, 2021, it was discovered that individuals who have previously contracted COVID-19 show a more potent antibody response than those who were solely vaccinated for the virus. Previously infected COVID patients appeared to develop memory D cells which produce more potent antibodies than memory cells developed through vaccination.

Research has further shown that recovered COVID-19 patients possess neutralizing antibodies up to a year after infection, and such infection assists in offering protection against developing variants. The study states: “Both groups retained the ability to neutralize all the variants of the coronavirus, but those previously infected displayed overall better neutralization capacity.”

The Chief Medical Adviser for the President acknowledges we are learning more about post-infection immunity, but nevertheless recommends vaccinations.

In August 2021, Dr. Michel Nussenzweig at Rockefeller University recommended that even individuals who have recovered from COVID-19 should be vaccinated, because the combination of vaccination and prior infection produces the highest level of protection.

Dr. Michael Osterholm, Director of the Center for Infectious Disease Research and Policy at the University of Minnesota, has stated that he believes the level of protection from previous infections over time will not be accepted as immunity. However, the science of immunity without vaccinations is ever evolving and will change as more information is developed. Cornell Law School uses the term “vaccine” to mean “any substance designed to be administered to a human being for prevention of one or more diseases” (26 U.S. Code 4132).

At this time, differences of opinion clearly exist as to the individual situations for people who have been vaccinated and those who have not been vaccinated but have been infected by coronavirus and recovered from the disease with some degree of immunity. This conflict is good in that it creates knowledge regarding both the benefit of the vaccine for those who have been vaccinated, and the benefit of having experienced COVID-19 for many who have been infected and recovered.

While medical studies reflect that the vaccination has value, there needs to be further understanding as to both pre-existing immunity and subsequent immunity for COVID-19 survivors. Existing studies clearly indicate that coronavirus survivors do have some degree of immunity. The question then becomes: *What are the differences for those who have been vaccinated and those who have been infected by COVID-19 and recovered?*

It would appear that the courts, in embracing vaccination mandates, should seek further information as to the immunity which does exist for COVID-19 survivors. *How similar is their protection to being vaccinated? Is it similar to the extent that they can be held exempt from vaccination mandates?* Hopefully, the future will soon provide these answers.



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