

MANDATING COVID-19 VACCINES — BALANCING THE RISKS AND BENEFITS

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As government stay-at-home orders continue to be modified and COVID-19 vaccines become available, employers who are in the re-opening process are asking: 1) can I require all my employees to receive the COVID-19 vaccine and 2) should I require all employees to receive the COVID-19 vaccine? For employers leaning in the direction of requiring vaccinations for their employees, they would be well advised to consider the Equal Employment Opportunity Commission's (EEOC) guidance on the topic, taking into account the requirements of the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act and the regulations issued by the Occupational Safety and Health Administration (OSHA). The guidance, statutes and regulations would suggest the answer to the query would be, "Yes, employers may mandate that employees receive COVID-19 vaccines, but" This article will explore the challenges.

Exceptions to Requiring the COVID-19 Vaccine

Health Conditions

Employers may require the COVID-19 vaccines as long as appropriate exceptions are made for individuals who have a health condition prohibiting them from receiving the vaccine. If an employee provides the appropriate documentation from a medical provider indicating (s)he should not receive the COVID-19 vaccine, the employer should proceed with the interactive process required by the ADA to find a reasonable accommodation that allows the employee to continue performing the essential functions of their job without the COVID-19 vaccine. Reasonable accommodations may include less face-to-face interaction with other individuals, use of PPE, or teleworking, if feasible for the position.

Sincerely Held Religious Beliefs

A second exception is the religious exemption, which is recognized by Title VII and includes individuals with sincerely held religious beliefs that prohibit vaccinations. Title VII instructs employers to offer reasonable accommodations in such a case, and employers must do so with relatively little interrogation as to whether an employee's belief system is a religious belief. While an employer may make a reasonable inquiry into the sincerity of an employee's belief or

practice (including a request for supporting information from those who are aware of the employee's religious beliefs or practices), courts consistently give great deference to an individual's religious beliefs. An employer should ordinarily assume that an employee's request for religious accommodation is indeed based upon sincerely held religious beliefs.

Union Collective Bargaining Agreements

The third exception is for union employees who have entered into a collective bargaining agreement that prohibits mandatory vaccinations. If you have union employees, double check whether the collective bargaining agreement addresses this before requiring the vaccine. Barring these three exceptions, an employer can mandate COVID-19 vaccines. However, the more prudent question may be — just because an employer can, should it? The answer to that question may be less clear, but there are some issues to consider.

Considerations When Requiring the COVID-19 Vaccine

OSHA General Duty Clause

The obvious advantages of mandating the vaccine are limiting the spread of COVID-19 in the employer's workforce, as well as in the community and/or to customers/clients. Further, as employers have a legal obligation to provide a safe workplace for employees, OSHA's General Duty clause comes into play as the specific statute requires employers to provide a workplace free from recognized hazards that are causing or are likely to cause death or serious physical harm. Interestingly, OSHA has stated, under its General Duty clause, employers should not interfere with an employee's right to refuse vaccination based on a reasonable belief that their medical condition might create a real danger of serious illness or death (such as an adverse reaction to the vaccine). Employers may require medical documentation in support of any exemption request based upon a medical condition.

Limiting the Spread and Business Liability

Employers concerned about limiting the spread of COVID-19 among their customers and community are correct to weigh such considerations. Certainly, everyone — including employers — must do their part to slow the spread of this disease. Practically speaking, contact tracing that may be utilized to contain the spread of COVID-19 requires valuable time and resources during a period when most employers are trying to sustain their business model with fewer employees. While there is currently no federal legislation to protect a business from liability claims caused by the spread of COVID-19, many states (Alabama, Arkansas, Georgia, Idaho, Iowa, Kansas, Louisiana, Michigan, Mississippi, Nevada, North Carolina, Ohio,

Oklahoma, Tennessee, Utah and Wyoming) have enacted legislation providing businesses immunity from legal liability for claims related to COVID-19 exposure. However, the extent to which those statutes hold up to legal challenges is to be seen. As an example, if a statute provides that a customer assumes the risk of possibly contracting COVID-19 by entering a business's premises, would the same assumption of risk apply to a family member who then contracts COVID-19 from the customer who entered the business's premises?

Workplace Morale

Mandatory COVID-19 vaccines may also pose morale issues for an employer's workforce. Even for those individuals who do not have a legally recognized exception they can rely on to avoid taking the vaccine, there may be hesitation regarding the vaccine for other issues of mistrust of government authorities and science. Employers will have to weigh the potential impact of mandating vaccines on the morale of their workforce and whether such a mandate would encourage their employees to return to the work site or cause them to seek alternative employers who may accommodate their concerns and fears.

Workers' Compensation Liability

In addition, there is the issue of workers' compensation liability. Would mandatory COVID-19 vaccines curtail workers' compensation liability? That depends on state laws regarding the compensability of COVID-19 injury or death cases. Some states have enacted legislation making COVID-19 a compensable work injury; thus, vaccines may be more helpful to employers in those states to curtail their liability. Regardless of whether being infected with COVID-19 is considered a compensable work injury in your state, employers should also consider whether injuries arising from the vaccine administration itself might be compensable. For instance, in a Georgia case, an employee was found to have sustained a compensable work injury (specifically a tendon tear) to her shoulder as the result of a mandatory flu vaccine. Adverse reactions to the vaccine itself must also go through states' workers' compensation systems, if the vaccine was administered as part of a mandatory vaccine program by the employer. If there is no workers' compensation coverage, the federal Countermeasure Injury Compensation Program (CICP) may reimburse the costs of medical expenses and lost income caused by vaccine injury, only as a payer of last resort. While there has been a push to have the federal government open up the long-established Vaccine Injury Compensation Program (VICP) for claims of injury related to COVID-19 vaccinations, for now, anyone with a claim of COVID-19 vaccine injury or reaction must go through the CICP.

Vaccine Administration and ADA Compliance

The administration of a mandatory COVID-19 vaccine raises many other considerations under the ADA, which cannot be fully unpacked in this article. Employers who require the vaccine must consider whether the vaccine will be administered by the employer (for instance by an in-house nurse) or by a third party. If the employer administers the vaccine, the employer must ensure that any pre-vaccine screening questions comply with ADA's guidelines regarding what information an employer may solicit from employees as the ADA requires employers' medical inquiries be job related and consistent with business necessity.

Providing Incentives

In lieu of requiring COVID-19 vaccines, some employers may choose to provide incentives for employees who receive the vaccine from a third-party provider. In order to avoid allegations of discrimination against employees with a medical or religious exemption, employers might consider alternative ways for all employees to receive the same incentive. Incentives like paid time off for employees who get the vaccine during work hours and/or paid time off for employees who experience side effects (like fatigue) in the days after the vaccine might be low-risk incentives. Employees who do not receive the vaccine are not losing time from work and therefore would not be missing out on the incentive. However, paid sick leave for COVID-19 symptoms should not be conditioned upon receipt of the vaccine. Legislation proposed by the EEOC regarding wellness-related incentives may be forthcoming and may provide additional guidance in the coming months.

As with most legal issues, there is no one-size-fits-all solution to the issue of employers mandating COVID-19 vaccines and the pitfalls posed by taking such a position. Therefore, it would be prudent for each employer to consult with legal counsel regarding its proposed COVID-19 vaccine policies to understand the risks and benefits posed by their position on the issue, as the law continues to evolve at the local, state and federal level.

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