

A Prickly Situation: Employer-Mandated Vaccinations in a Global Pandemic

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This month marked yet another milestone in the COVID-19 pandemic – but one more positive than the milestones that have come before it. On December 15, the first doses of the COVID-19 vaccine were administered to health care workers in the United States. This much-awaited news has given all of us a proverbial light at the end of the tunnel, but like every stage of the pandemic before it, the rolling out of the COVID-19 vaccine will not be without its challenges. While the distribution of the vaccine to the general public is not yet underway, it is expected to be available to some populations, including those who are high-risk, in the near future, giving employers cause to start thinking about how the vaccine will factor into their workplace.

Perhaps anticipating that employers are starting to consider the various workplace issues raised by the vaccine, the U.S. Equal Employment Opportunity Commission (EEOC) released guidance on December 16 covering common problems and best practices for workplace vaccinations. The guidance details the process employers and businesses must follow when instituting a vaccine program and encourages employers to proceed cautiously as they address vaccine-related issues.

We are all anxious to return to a semblance of normalcy – yet, while the vaccine promises to do just that, apprehension, distrust, and concerns over civil liberties may derail that effort. In the workplace, however, employers have options. While many employers whose operations can support long-term remote work are skirting vaccine-related issues (for now) by creating long-term or permanent work-from-home plans, others may not be able to do so. Employers who find that the nature of their work or their workplace culture cannot

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support long-term or permanent remote work do, however, have the option of mandating vaccinations before employees return to the physical workplace. But it is not a mandate that should be instituted without careful evaluation of the risks, potential liabilities, and alternatives.

This guide examines the legality of employer-mandated vaccinations, as well as the risks and potential liabilities. We then discuss alternative approaches to mandating workplace vaccination to achieve company-wide immunization and safety goals.

Legality

Requiring vaccinations as a condition of employment is not new. Health care workers, educators, and employees in a number of other industries are regularly required to provide proof of vaccination as a condition of employment. Whether an employer can mandate a vaccine as a condition of employment depends on the type of employment relationship, however, be it at-will or contractual.

At-Will Employees. In general, employers can mandate that at-will employees receive a vaccination. Both the EEOC and the Occupational Safety and Health Administration (OSHA) have stated that mandatory flu vaccinations are permissible, with the caveat that employers are obligated to consider accommodations for employees with disabilities or religious beliefs that prohibit vaccination. The EEOC has also said, however, that “[g]enerally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it.” The ADA concerns are detailed further below.

Contractual Arrangements. Understanding whether a vaccine mandate is permissible for contracted employees depends heavily on the terms of the contractual agreements. For independent contractors or contract employees who have not yet been engaged, companies may require vaccinations as a condition of engagement if they include appropriate language in the contract that creates and governs the relationship. If a company has an existing relationship with a contractor or an employee who is employed for a set term, things can get more complicated. Generally, companies cannot mandate vaccinations as a term of continuing employment absent existing contractual language that would permit such a mandate or an amendment to the contract. In both instances, we highly recommend a careful review of proposed or existing agreements with the assistance of legal counsel.

Unions. Similarly, employers that are subject to collective bargaining agreements must rely on a careful review of the terms of those agreements to understand what, if any, limitations exist concerning their ability to mandate vaccinations. Employers with unionized workforces must also consider the extent of their duty to bargain over vaccine programs and the effect any management rights clauses may have on the creation and implementation of such programs.

Government Programs. In addition to the foregoing concerns, employers working on government contracts may have additional considerations when deciding whether to mandate vaccinations. In particular, employers with government contracts that include key personnel requirements must proceed with caution before implementing a mandatory vaccination program. For example, suppose a key employee opts to forgo vaccination. In that case, the employer could face the difficult choice of losing the employee or granting an *ad*

hoc exception to the vaccination requirement. The former option could have adverse collateral effects depending on the contract's key-personnel terms, while the latter option could create the potential for discrimination claims.

An additional concern for government contractors relates to the potential need to provide reasonable accommodations to employees who cannot receive the vaccine for health or religious reasons. Government contractors are frequently in a different position than non-contractor employers regarding what is and is not a reasonable accommodation for their employees. For example, many government contractors must work in or access specific client sites or secure facilities, making work from home or isolation accommodations impossible. All these issues can lead to increased liability for government contractors, who are advised to proceed very cautiously before implementing such a program.

State Law. As always, employers must review relevant state law before mandating any vaccinations. Some states prohibit mandatory vaccination requirements, while others have more expansive exemptions from vaccination requirements (such as exemptions for ethical and personal beliefs, in addition to religious beliefs).

Administering a Vaccination Program and Potential Liabilities

Even if an employer can legally mandate that its employees receive a vaccination for COVID-19 or any other virus, there are significant exceptions for employees with sincerely held religious beliefs that prevent them from getting vaccinated and those who need accommodations under the Americans with Disabilities Act (ADA). Additionally, employers must be careful not to run afoul of the National Labor Relations Act (NLRA), which protects even non-unionized employees who take concerted action.

ADA Accommodations. Employers must always be mindful of exemptions and accommodations for employees based on the ADA. An employee requesting an accommodation or exemption from a mandatory vaccination program must first establish a covered disability. There is not currently a consensus among the courts on whether vaccination sensitivity is a covered disability, but other conditions such as allergies or an illness may entitle an employee to an accommodation in lieu of receiving the vaccination. OSHA has also emphasized that "an employee who refuses vaccination because of a reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death (such as a serious reaction to the vaccine) may be protected under Section 11(c) of the Occupational Safety and Health Act of 1970 pertaining to whistleblower rights."

According to the EEOC's latest guidance, even under the ADA, an employer may have a "qualification standard" that includes a requirement that an individual not pose a "direct threat" to the health and safety of others in the workplace. COVID-19 may be a direct threat if the employer finds that the unvaccinated individual would expose others to the virus. In such a case, the employer must then try to provide a reasonable accommodation that would eliminate or reduce the risk.

As with other ADA accommodations, an employer is not required to provide an accommodation that creates an "undue hardship." What constitutes an "undue hardship" in the context of COVID-19 is an evolving issue, but the EEOC has stated that "the circumstances of the pandemic [are] relevant to whether a requested

accommodation can be denied because it poses an undue hardship.” There is a possibility that some states or localities may mandate the vaccine for state citizens or subgroups of citizens to preserve health and welfare. In that case, an employer may be able to cite the state mandate as support that there is an undue hardship. Allowing an employee to opt out of the vaccine may not be feasible if such an action puts clients and other employees at risk, but the employer will have to consider other options such as work-from-home arrangements or increased infection control procedures.

Screening Questions. Some employers may feel the need to ask employees screening questions before mandating a vaccination or administering the vaccination on-site. These questions are likely to elicit information about a medical condition and are therefore subject to the ADA standards for medical inquiries. Thus, employers must be able to show that these screening questions are “job-related and consistent with business necessity.” Employers should also consider alternatives to asking screening questions, such as requiring employees to receive vaccinations from a third party, in which case the ADA is not implicated, or making vaccination voluntary.

Religious Accommodations. Under Title VII, a “sincerely held religious belief” may entitle an employee to religious accommodation, although personal and ethical anti-vaccination positions will not. Thus, to be entitled to an accommodation, the employee must first demonstrate that they have a “sincerely held religious belief” that prevents them from receiving the vaccine. If an employee can meet that burden, their employer must engage in the interactive process to determine a suitable accommodation. Like with ADA accommodations, an employer may deny such a request if it poses an “undue hardship,” although the threshold for showing a particular accommodation presents an undue hardship is lower in the religious accommodation context.

Concerted Action. Even in non-unionized workforces, employees have a right under the NLRA to engage in concerted action for the purpose of “mutual aid and protection.” This right may protect employees who choose to work together to protest against a mandatory vaccine policy, organize discussions around the policy, or band together to refuse immunizations. It is vitally important that employers consult with legal counsel to understand how to frame their responses to such activities to avoid an unfair labor practice charge.

Workers’ Compensation. If an employer mandates the vaccine, an employee’s adverse medical reaction to a vaccine may trigger coverage under the various state workers’ compensation regimes. Accordingly, employers considering a mandatory vaccine requirement should evaluate the potential implications of such adverse reactions and the potential for workers’ compensation claims, especially given that the COVID-19 vaccine is a new vaccine with unknown long-term effects.

Employee Relations

In addition to the legal issues, employers should also consider the impact of a mandatory vaccination program on employer-employee relations, especially given the apprehension around the COVID-19 vaccine and the intensity of the social and political conversations surrounding the pandemic generally. For example, in an August 2020 study, nearly a third of Americans reported that they would refuse a COVID-19 vaccine. Not a day goes by without another news story about someone refusing to wear a mask, which is by every measure

a much less invasive method of infection control. There will almost certainly be employee backlash to a mandatory vaccine program, one that may also impact public relations in a time when employers are under increased scrutiny for their handling of workplace issues and pandemic-related issues in particular.

Alternatives to a Mandatory Vaccination Program

Given the potential for backlash, as well as the risks of liability described above, employers should consider whether there are alternative approaches from a mandate that can achieve company-wide or nearly company-wide vaccination. For example, companies could offer an incentive, such as a monetary bonus or a special recognition payment, to employees who participate in a wellness program and make the vaccine a key qualifier for the payment. Such an incentive can be rolled into existing wellness programs, but companies can also set up a simple wellness program internally. Other options include giving employees time off to get the vaccine or providing the vaccine at work, covering the cost of vaccination, or promoting the vaccine through company-wide messaging or educational programs.

Of course, this approach does not guarantee 100% workplace vaccination compliance, and it is not without risks. Employers that offer a cash payment to those who receive vaccinations could find themselves facing a discrimination suit from employees who are unable to receive a vaccine for either medical or religious reasons. Employers could consider having a partial mandate for only those parts of the organization that cannot work remotely or may be at higher risk of exposure, but would need to be careful not to accidentally single out certain populations such as older workers. Ultimately, any program, whether it is a mandatory vaccine program or an incentive program, must be designed carefully with discrimination concerns in mind and with careful consideration of practicalities such as how such a program will be administered.

Next Steps

The vaccine is here. It may not yet be available to the general public, but that day is coming. Employers should start planning now for this next phase of the COVID-19 pandemic and how the vaccine will fit into their organizations' plans for moving forward. The necessary first step is to very carefully consider whether a mandatory policy is truly necessary for the business or whether alternatives, or even a carefully executed partial mandate, are viable options. Even though we are all anxious to get back to normalcy, if remote work is an option, it may be worth sticking with that approach in lieu of a mandatory vaccine program for a while longer.

Every business and organization wants to be on the cutting edge and a leader in their industry, but as with everything COVID-19, no employer should feel the need to rush to take advantage of the vaccine. The vaccine certainly brings a sense of turning the corner, but as always, a measured approach is the best approach.

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