
“YOU ARE NOT THROWING AWAY YOUR SHOT!” – EMPLOYER CONSIDERATIONS REGARDING MANDATORY COVID-19 VACCINATIONS

On December 11, the Food and Drug Administration (FDA) authorized Pfizer’s COVID-19 vaccine for emergency use. A second hearing to review the emergency use authorization application submitted by Moderna is set for December 17. These developments, along with encouraging vaccine results from Johnson & Johnson and AstraZeneca, have led many employers to ask whether they may legally require employees to be vaccinated, and whether a mandatory requirement, if legally permissible, is wise.

Can employers require employees to be vaccinated?

The answer is “Yes, but...” Generally, employers may require vaccinations for COVID-19. The EEOC previously had implied that mandatory vaccine programs for certain serious diseases were permissible. Yesterday, the EEOC provided new guidance to employers on COVID-19 vaccinations. In doing so, the agency confirmed the general rule that employers may mandate vaccinations. Employers must, however, be careful in addressing employees who object to vaccination, particularly those who object on disability or religious grounds. Guidance will also be forthcoming from the Occupational Safety and Health Administration (OSHA), although it is not expected that OSHA will require all or even most employers to require mandatory vaccinations.

How do we accommodate employees with disability- or religious-based objections?

The Americans with Disabilities Act (ADA) may require exemptions when employees have covered disabilities that prevent them from taking the vaccine. In this instance, employers must consider reasonable accommodations, such as additional personal protective equipment for the non-vaccinated employee, relocation, or permitting the employee to work remotely. The new EEOC guidance states that if no reasonable accommodation is possible, it is lawful to exclude the employee from the workplace. In other words, it is not a required reasonable accommodation to simply excuse the employee from the vaccination requirement and allow the employee to work as usual. For now, it is difficult to predict how likely it is that an employee will have a valid medical reason to decline to be vaccinated, as the drug manufacturers, FDA, and/or the CDC may continue to modify medical limitations on the various vaccines.

Title VII of the Civil Rights Act of 1964 imposes similar accommodation requirements for employees who cannot take a vaccine due to a “sincerely held religious belief, practice, or observance.” Generally, if an employee provides a religious-based objection to a vaccine, an employer should assume the validity of the religious precept and the sincerity of the employee’s belief. The new EEOC guidance provides, however, that if an employee requests a religious accommodation, and the employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer is justified in requesting additional supporting information. Once that issue is

resolved, the employer must determine whether an accommodation is warranted. As with disability-based accommodations, potential accommodations must be explored. If there is no accommodation that can be provided without an undue hardship (which is a lower standard for religious objections than under the ADA) the employer can exclude the employee from the workplace. Thus, again, allowing an employee to work as usual without taking the vaccine is not a required accommodation.

It is important that employers distinguish generic challenges to mandatory vaccines from religious or disability-related objections. While this topic was not directly addressed in the most recent guidance, it is expected that the EEOC will treat generalized “vaccine uncertainty” much like its previous guidance regarding unsubstantiated uncertainty about returning to the workplace amidst the pandemic. In other words, absent a recognized disability that contributes to the vaccine uncertainty, employers may treat employees who question the vaccine the same as employees who express generalized fears about returning to the workplace, and may likely require compliance absent valid requests for a disability- or religious-based reasonable accommodation.

What potential legal liabilities could arise from a mandatory COVID-19 vaccine program?

Employers also must consider the potential liability concerns arising from mandatory workplace vaccinations. While the details on potential workers’ compensation liability will undoubtedly evolve as COVID-19 cases are litigated, employers who subscribe to workers’ compensation likely will be covered in the event employees have adverse reactions to a mandated vaccine, and such employees will be precluded from alternatively suing under common law claims. Also, OSHA’s “General Duty Clause” requires employers to furnish a workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm” to employees. Employees may assert that workplaces that do not mandate vaccines against COVID-19 violate this provision. As noted above, OSHA may issue updated guidance specific to COVID-19 vaccinations in the weeks or months ahead. On the other hand, given the politicized nature of individual responses to the pandemic, companies could easily face coordinated employee resistance to a mandatory COVID-19 vaccine program. If employees collectively protest such a program, such actions could constitute “protected concerted activity” under the National Labor Relations Act and insulate protesting employees from alleged retaliatory actions for refusing to be vaccinated. These protections apply whether or not the workplace at issue is actually unionized.

What is the best approach for my company at this point?

Practical and administrative considerations may tilt the scales toward voluntary vaccination compliance. For example, before rolling out a mandatory vaccination program, an employer will need to implement policies and practices addressing how the vaccine is paid for, whether time spent getting the vaccine is paid or unpaid, penalties for noncompliance, and documentation requirements. (Importantly, the new EEOC guidance states that vaccines themselves are not medical examinations and requesting proof of receipt of a COVID-19 vaccination is not a disability-related inquiry.) Also, as the vaccine is currently being released in a phased approach, it may be several months before a mandatory program can be reasonably implemented.

While employers in certain industries—such as healthcare—may decide that a mandatory employee vaccination policy is necessary, and may even be required given the particular nature of their business and workforce, the new EEOC guidance suggests employer encouragement of voluntary vaccinations may be the most practical approach. For instance, the new guidance states that in the event an employer provides required COVID-19 vaccines onsite, the pre-screening vaccination questions may implicate the ADA’s provision on disability-related inquiries, and the employer must show that such inquiries are “job-related and consistent with business necessity.” To meet this standard, the EEOC states that the employer must have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others. By contrast, employers who offer a vaccination on a voluntary basis do not—assuming the employee’s decision to answer the pre-screening questions is also voluntary—have to meet the “job-related and consistent with business necessity” standard. Of course, if an employee receives an mandatory vaccination from a third party that does not have a contract with the employer, (such as a pharmacy or other health care provider), the ADA’s restrictions on disability-related inquiries would not apply to the third party pre-screening questions.

Employers electing to take the ‘voluntary vaccination’ approach may nevertheless take steps to ensure maximum employee compliance. For instance, employers may opt to cover some or all of their insured employees’ costs associated with vaccination (if any), or offer employees paid time off specifically to get the vaccine. Companies may also want to consider conducting informational campaigns to encourage employees to get vaccinated, including public vaccinations by top executives or other members of management to set an example for other employees.

While employers may likely mandate COVID-19 vaccines for their workforce subject to the qualifications and required exemptions discussed above, the safest approach at this point is to make vaccination voluntary, but highly encouraged. Like everything else associated with COVID-19, however, the legal implications of a mandatory vaccination program are subject to change, and employers should continue to monitor recent developments and consult with counsel for specific guidance tailored to the particulars of their workforce.

QUESTIONS?

Our Employment & Labor practice group is here to answer any of your COVID-19 related questions and will continue to keep you informed of major developments that will impact employers.

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