

May Employers Mandate COVID-19 Vaccines?

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Given pending anticipated FDA approval of Pfizer's COVID-19 vaccine, and encouraging vaccine results from Moderna and AstraZeneca, many employers are wondering whether they may legally mandate vaccinations for their employees. The answer is likely yes, subject to important qualifications. Mandatory vaccines have been commonplace in the healthcare industry for years, and the EEOC has issued past guidance suggesting that employers may mandate vaccines assuming they provide exemptions for employees who cannot take the vaccines for medical or religious reasons. OSHA has issued similar guidance.

While employers may likely mandate vaccinations for their employees, doing so raises a host of legal and practical considerations that employers must consider before any such programs are implemented. These include:

- The need to accommodate employees who, because of a medical condition, cannot take the vaccine;
- The need to accommodate employees who, because of a sincerely held religious belief, cannot take the vaccine;
- Potential liability concerns under workers' compensation and other laws if employees take the vaccine and develop an adverse reaction;
- Potential labor law and related protections for employees who may oppose taking a vaccine based on perceptions that it is unsafe; and
- Practical concerns like developing—and evenly enforcing—policies that discipline employees who do not take vaccines.

In light of the potential legal issues implicated by mandatory vaccinations programs, and pending further definitive guidance from relevant state and federal authorities, many employers outside of certain high-risk fields like the healthcare industry may determine that voluntary – but highly encouraged – vaccines are the safest way to protect themselves, their employees, and their customers.

Background

While some COVID-19 vaccines may be available in the United States as early as late December 2020, a Centers for Disease Control and Prevention ("CDC") advisory panel has recommended that healthcare workers and long-term care residents be vaccinated first given anticipated limited supply of the vaccines. Employers who wish to mandate vaccines for employees may thus have to wait months before any such plan may practically be implemented.

Historically, employers in the healthcare industry have mandated certain vaccines for their employees (including pursuant to some state mandates), but this practice has been rare outside of that field. But COVID-19 may change that. The Equal Employment Opportunity Commission (“EEOC”) issued guidance in 2009 during the spread of the H1N1 virus which provided insights into whether mandatory vaccinations may violate certain federal anti-discrimination laws. The agency reissued this guidance in March 2020. However, certain news reports suggest that the EEOC may be working on updated guidance pertaining specifically to COVID-19, and similar guidance may also be forthcoming from the Occupational Safety and Health Administration (“OSHA”).

Pending further formal guidance from the EEOC, OSHA, and other federal and state authorities, employers should tread lightly with respect to mandated vaccinations because COVID-19 is materially different from the H1N1 virus and other communicable illnesses which have been addressed in previous guidance. Additionally, the vaccines now being considered for distribution will likely be distributed pursuant to the Emergency Use Authorization (“EUA”) authority of the Food and Drug Administration (“FDA”), which mandates less rigorous review of vaccines than that required for full FDA licensure. This could result in real (or perceived) concerns that the vaccines currently being considered for distribution may not be as safe as other vaccines which have been granted full FDA licensure in the past—which, in turn, could expose employers to greater liability if employees have adverse reactions to mandated vaccinations (as discussed further below).

Disability and Religious Discrimination Concerns

The EEOC's previous (and subsequently reissued) guidance pertaining to the H1N1 virus indicated that employers could mandate vaccines for employees if exemptions were provided in relation to disability and religious concerns. Nonetheless, the agency stated that “ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it.” Except for certain high-risk workplaces (such as healthcare facilities, bars, etc.) and/or workplaces in which other mitigating measures (such as social distancing, masking, etc.) may not effectively protect employees and customers from the virus, voluntary—but highly encouraged—vaccinations may be the safest approach for employers due to the myriad legal issues implicated by mandatory vaccinations and absent definitive guidance from the EEOC, OSHA, or other relevant authorities.

Disability Discrimination Concerns. As to discrimination concerns, vaccinations are considered “medical examinations” under the Americans with Disabilities Act (“ADA”), and thus cannot be mandated by employers unless they are “job-related and consistent with business necessity” (including when they are necessitated by a “direct threat”). This standard has historically been satisfied with respect to employers in the healthcare industry given the unique needs of that industry, but it is less clear whether it would be met with respect to employers outside of that industry. The answer is likely yes—at least for a virus as serious as COVID-19—but forthcoming EEOC guidance may shed more light upon precisely when this

standard is satisfied with respect to the coronavirus (e.g., potentially in relation to certain types of workplaces).

Assuming a mandatory vaccination is otherwise permitted under the ADA's "medical examination" standard, the ADA still requires exemptions from mandatory vaccinations where employees have ADA-covered disabilities that may prevent them from taking the vaccine. This could include employees who, because of underlying conditions, either cannot take the vaccine at all, or, alternatively, cannot take it until its risks are better understood given the current EUA approval under which the vaccines are first likely to become available. (The Pregnancy Discrimination Act ("PDA") offers similar protections to employees with temporary disabilities relating to their pregnancies or childbirth. Any such employees might also require exemptions from vaccine mandates as a "reasonable accommodation"—as discussed next.)

For employees who have qualifying disabilities that prevent them from taking the vaccine, employers would have to consider "reasonable accommodations." These could include an exemption from mandatory vaccination and alternative measures to protect coworkers and customers from the non-vaccinated employee—for instance, additional personal protective equipment ("PPE") for the non-vaccinated employee, moving the employee's workstation to a different location, temporarily reassigning the employee, or permitting the employee to telework or take a leave of absence. The ADA requires that employers provide such "reasonable accommodations" for employees' qualifying disabilities absent "undue hardship," which is broadly defined as significant difficulty or expense. All such potential accommodations—plus others—would likely have to be explored through the ADA-mandated "interactive process" (i.e., an interactive dialogue between the employer and employee designed to determine a "reasonable accommodation") where an employee invokes a qualifying disability and claims inability to take the vaccine.

Assuming these accommodation issues may successfully be navigated, employers would still be prohibited under the ADA from mandating vaccinations before extending a conditional job offer to employees—and even then could only mandate the vaccine if all employees entering into the same job category were subject to this same "medical examination" (i.e., the vaccination). Employers likewise could not legally mandate vaccinations as part of the application process under the ADA.

Religious Discrimination Concerns. Title VII of the Civil Rights Act of 1964 ("Title VII") imposes similar accommodation requirements for employees who cannot take a mandated vaccine due to a "sincerely held religious belief, practice, or observance." While purely secular objections may not qualify (e.g., objections that vaccines are purportedly unsafe, but do not violate an employee's sincerely held religious beliefs), courts have occasionally extended significant deference to employees' expressed religious beliefs even where such beliefs are unorthodox and/or not widely shared.

As is true with respect to employees' qualifying disabilities under the ADA, employers are required to reasonably accommodate employees' qualifying

religious objections under Title VII, at least absent “undue hardship” to the employer. But “undue hardship” is defined less stringently under Title VII than it is under the ADA. An employer need merely show more than “*de minimis*” (i.e., minimal) cost to the operation of the employer’s business to establish “undue hardship” under Title VII.

While mandatory vaccinations would likely not run afoul of federal anti-discrimination laws if accommodations were made for employees with qualifying disabilities or qualifying religious objections, employers must nonetheless be aware of any state-specific anti-discrimination laws that may mirror the general accommodation obligations of the ADA and/or Title VII, but potentially apply different standards to what constitutes “undue hardship.” Employers are required to comply with the more stringent of any federal or state anti-discrimination laws that apply to their operations.

Employer Liability Concerns

Before implementing any mandatory vaccination program, employers should also consider potential liability concerns associated with both mandating vaccines, and with not mandating vaccines.

As to the former—and particularly in light of the EUA procedures under which the vaccines are likely to first become available—employers must consider the possibility of liability if employees have adverse reactions to mandated vaccines. While such cases have not yet been tested in courts with respect to COVID-19, similar cases (at least in some states) suggest that adverse reactions to mandatory vaccinations may form the basis of a viable workers’ compensation claim. The details on potential workers’ compensation liability will vary from state-to-state and will likely evolve as COVID-19 cases are litigated (and also potentially as state legislatures define COVID-19-specific rules in the context of workers’ compensation claims). It’s further possible—albeit less likely—that adverse reactions could lead to tort claims notwithstanding the “exclusive remedy” generally provided by workers’ compensation laws. (Workers’ compensation laws generally reflect a policy decision to replace traditional common law tort claims—such as negligence claims—with a statutory scheme prescribing specific remedies for employees who are injured in their workplaces. These workers’ compensation remedies are usually “exclusive,” subject to certain exceptions, meaning that they preclude employers from alternatively suing under common law claims.)

Employers concerned about potential liability related to mandated vaccinations should also keep tabs on relevant federal legislation—both currently in effect, and potentially forthcoming in relation to additional COVID-19 relief measures currently being considered by Congress. For instance, the Public Readiness and Emergency Preparedness Act (“PREP”) may provide immunity from certain types of liability arising from the administration of vaccines to “covered persons” under the Act—which, in turn, can include “program planners” of certain COVID-19 countermeasures, including certain private sector employers (as specified under advisory guidance from the Department of Health & Human Services).

On the flip side, employers should also consider the potential liability of not mandating vaccines. For instance, 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—although other protective measures (e.g., social distancing, masking, etc.) are likely sufficient to satisfy this standard. Indeed, OSHA recited in 2009 guidance relating to the H1N1 virus that while employers could require employees to take vaccines, employees "need to be properly informed of the benefits of vaccinations." OSHA further recited in this guidance 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 OSHA's whistleblower protections. As noted above, OSHA may issue updated guidance specific to COVID-19 vaccinations in the weeks or months ahead.

Labor Law and Other Considerations

Employers considering mandated vaccinations should also consider potential labor law and similar implications of any such requirements. Given both the politicized nature of responses to the COVID-19 pandemic, and the "anti-vax" movement which pre-dated the novel coronavirus, employers attempting to implement mandatory COVID-19 vaccines could face individual or coordinated resistance from employees in a workforce. If employees were to band together to protest mandatory vaccinations, such actions could constitute "protected concerted activity" under Section 7 of the National Labor Relations Act ("NLRA") and insulate protesting employees from alleged retaliatory actions such as termination for refusing to be vaccinated. Section 7 of the NLRA protects, among other things, employees' right to protest allegedly unsafe work rules. And Section 7 protections apply whether or not the workplace at issue is currently unionized.

As for unionized workplaces, any mandated vaccination program would also likely be a mandatory subject of bargaining with the union and could not be unilaterally implemented by an employer absent first bargaining to impasse with the union. Exceptions might include if an applicable collective bargaining agreement ("CBA") reserves sufficient employer discretion to implement health-related work rules under the agreement's "management rights" and "zipper" clauses. But even then, employers of unionized workplaces would still likely be required to engage in "effects bargaining" with the union to discuss how the program would be implemented.

Employers should also be aware of similar state laws that might also provide protection to employees who protest mandatory vaccinations. These could include state "lawful off-duty activities" statutes, which broadly prohibit employers from terminating employees for engaging in lawful activities outside of their workplaces. If employees were vocal anti-vaccination advocates outside of the workplace, and if they were terminated for refusing to take an employer-mandated vaccine, they could claim—truthfully or not—that they were terminated for their lawful off-duty

advocacy and not for refusing the employer's lawful vaccine mandate. This danger would be particularly acute where the employer was otherwise aware of the employee's lawful off-duty activity, and/or where this activity took place in close temporal proximity to (*i.e.*, shortly before) any termination for refusal to receive the vaccine.

Other Practical Considerations

As indicated above, voluntary vaccinations may be the safest approach given the myriad legal issues implicated by mandatory vaccination, at least absent definitive guidance from the EEOC, OSHA, or other relevant authorities. But practical considerations relating to any mandatory vaccine program may also militate against making vaccines mandatory.

For instance, any mandatory program would likely require employer policies addressing such issues as who pays for the vaccines, whether employees receive paid time off to get vaccinated, how employees prove their vaccinations, whether employees would be required to re-vaccinate if vaccine protection wears off, and what happens if vaccines are not available. Similarly, employers would likely have to decide whether they would actually terminate employees for not receiving the "mandatory" vaccinations—and additionally make sure that any such discipline were uniformly implemented to avoid discrimination claims. (Relatedly, if an employer were to mandate vaccinations for only certain segments of its workforce, it may need to conduct a prior review to ensure that the program—although uniformly applied to all employees in the selected job classification(s)—does not have an "adverse impact" on individuals in certain protected groups. For instance, if employees in certain segments of the workforce to be vaccinated (*e.g.*, front-line workers) happen to be disproportionately members of protected groups, and if only those employees are subject the vaccine mandate (including potential discipline for non-compliance) such employees could potentially bring an "adverse impact" discrimination claim claiming that the mandatory vaccination program unlawfully targets protected individuals.)

Conversely, if employers elect to make vaccinations voluntary, there are still steps they may profitably take to ensure greater compliance. For instance, they might consider encouraging vaccinations through their wellness programs (*e.g.*, with the promise of gift cards or discounts on health insurance premiums) although such programs have to be truly voluntarily and carefully designed to comply with the ADA, the Health Insurance Portability and Accountability Act ("HIPAA"), the Genetic Information Nondiscrimination Act ("GINA"), and other relevant laws. Aggressive informational campaigns can also encourage employees to get vaccinated—including public vaccinations by an organization's leaders to help set an example for other employees.

Conclusion

While employers may likely mandate COVID-19 vaccines for their workforces subject to the qualifications and required exemptions discussed above, the safest approach—at least outside of certain critical industries like healthcare in which the vaccinations are truly essential (and in relation

to which employers would best be situated to survive legal challenges to any mandatory vaccination programs)—would be to make vaccination voluntary, but highly encouraged. Like much of the response to the COVID-19 pandemic, the legal implications of a mandatory vaccination program remain a moving target, so employers should check for the latest guidance from the EEOC, OSHA, and other relevant state and federal authorities before implementing any mandatory program. And employers should also be aware of any potential efforts in state legislatures to pass laws that either mandate widespread COVID-19 vaccinations (which, although unlikely, would nonetheless be legal under long-standing U.S. Supreme Court precedent), or, conversely, expressly prohibit state-mandated vaccinations. Vaccinations are a hot button political issue and are likely to remain the subject of both intense interest and potential state legislation as various state legislatures reconvene in the new year and as viable vaccines become more readily available in months ahead.

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