



MAY EMPLOYERS MANDATE COVID-19 VACCINES?

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CONSIDERATIONS FOR EMPLOYERS

- 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
- Practical concerns like developing—and evenly enforcing—policies that discipline employees who do not take vaccines



RELIGIOUS BELIEF EXEMPTION

- Once on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship
- The employer can request additional supporting information from the employee
- Courts have occasionally extended significant deference to employee's expressed religious beliefs even if unorthodox



DISABILITY DISCRIMINATION

- The ADA requires exemptions from mandatory vaccinations where employees have a covered disability
 - Underlying conditions
- The Pregnancy Discrimination Act also provides exemptions
- Employers cannot mandate vaccinations as part of the application process



EEOC GUIDANCE

- New EEOC [guidance](#) on “Vaccinations” was issued in mid-December
 - ADA and Vaccinations
 - ADA and Title VII Issues Regarding Mandatory Vaccinations
 - Title II of GINA and Vaccinations



MEDICAL EXAMINATIONS

- The EEOC does not consider the vaccination itself to be a “medical examination” for purposes of the ADA
 - Applies to COVID-19 vaccines that have been “approved” or “authorized” by the FDA
- Pre-screening questions
 - Would likely elicit information about disabilities
 - Could implicate Title II of the Genetic Information nondiscrimination Act (GINA)



PRE-SCREENING QUESTIONS

- If you administer the vaccine, you must show that any pre-screening questions are job-related and consistent with business necessity to comply with the ADA
- There are two circumstances in which these screening questions can be asked without needing to satisfy the “job-related and consistent with business necessity” requirement
 - Vaccination on a voluntary basis
 - Third party vaccination



PROOF OF VACCINATION

- The EEOC indicates you can require workers to prove they have received the COVID-19 vaccine
 - Simply requesting proof of receipt of the vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry
 - However, subsequent questions, such as asking *why* an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that disability-related inquiries be “job-related and consistent with business necessity”



EMPLOYEES OPTING OUT

- Non-vaccinated employees cannot be excluded from the workplace without reasonable accommodation which can include
 - Additional personal protective equipment (PPE)
 - Moving the employee's workstation
 - Erecting plexiglass barriers
- If threat cannot be reduced to an acceptable level
 - This does not mean the employee can be automatically terminated
 - The employer may need to permit then non-vaccinated employee to telework or take a leave of absence



LABOR LAW PROTECTIONS

- Employees could band together to protest mandatory vaccinations and could constitute “protected concerted activity”
- Any mandated vaccination program would likely be subject of bargaining with the union
- Would require discussion with the union on how the program would be implemented



EMPLOYER LIABILITY - MANDATING VACCINATION

- Employers must consider the possibility of liability if employees have adverse reactions to mandated vaccines
- An adverse reaction to the vaccination may be subject to a workers' compensation claim
- Adverse reactions may lead to tort claims
- The Public Readiness and Emergency Preparedness Act (PREP) may provide immunity from certain types of liability



EMPLOYER LIABILITY - MANDATING VACCINATION

- Other considerations
 - Payment for the vaccine
 - Paid time off
 - Termination
 - Protected groups
- If you mandate vaccinations and play no role in the administration of the vaccination
 - Avoids being subject to ADA standards for pre-screening questions
 - Reduces the risk of violating GINA



EMPLOYER LIABILITY - NO MANDATE

- Employees may assert that workplaces violate OSHA's "General Duty Clause" requiring a workplace free from recognized hazards



PRACTICAL CONSIDERATIONS

- Whether you simply encourage or mandate vaccinations, you should be prepared to implement related policies and a communications plan



READ MORE

- Employers' Lawyers Blog
 - Post from 12/11/2020, [May Employers Mandate COVID-19 Vaccines?](#)
 - Post from 12/22/2020, [Update: EEOC Issues Employer Guidance on COVID-19 Vaccinations](#)
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THANK YOU – ANY QUESTIONS?



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