COVID-19: VACCINES FOR EVERYONE! WAIT, NOT SO FAST. CONSIDERATIONS FOR HEALTH CARE AND OTHER EMPLOYERS WHEN EVALUATING MANDATORY COVID-19 VACCINATION PROGRAMS

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Labor, Employment, and Workplace Safety Alert

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INTRODUCTION

Following earlier announcements as to the efficacy of vaccine trials by pharmaceutical companies Pfizer, Inc. (Pfizer) and Moderna, Inc. on November 20, 2020, Pfizer and BioNTech submitted applications for emergency use authorization to the U.S. Food and Drug Administration (FDA) for their COVID-19 vaccinations. Though questions remain regarding which Americans will have priority to the vaccine and how it will be distributed on a large scale, many experts believe that the first doses of these vaccinations may be administered before the end of 2020. Given the significant impact that COVID-19 has had on workplaces, employers may consider imposing mandatory COVID-19 vaccination programs depending on their respective industries, work environments, and cultures.

Employers in the health care industry are especially likely to consider implementing mandatory COVID-19 vaccination programs given their history with such programs, their employees' increased risk of COVID-19 exposure, and the potential severity of COVID-19 symptoms and related complications compared to other viruses (e.g., influenza). Moreover, given that health care employees are likely to be some of the first recipients of the COVID-19 vaccine, these employers should already be considering if and how they intend to handle any proposed vaccine mandate.

Notably, to date, no federal agency has issued any specific guidance regarding COVID-19 mandatory vaccination programs. Nonetheless, employers can still look to the existing legal landscape and related agency publications for guidance. COVID-19 and its vaccine, however, are very different from other viruses (e.g., influenza) and their corresponding vaccinations, and employers (regardless of industry) should consider these differences and corresponding impacts. For example, the COVID-19 vaccine is being developed at “warp speed.” This rapid development, as well as the politicization of COVID-19 and its vaccine, may give certain Americans pause about taking the vaccine, especially the first vaccine recipients. In fact, according to a recent Gallup poll, only about 50 percent of Americans would be willing to take a COVID-19 vaccination even after approved by the FDA. Thus, when compared to other vaccine mandates, employers may be faced with an uphill battle with any COVID-19 vaccination programs. Therefore, employers may consider getting a jump-start on any contemplated COVID-19 vaccination program, corresponding accommodations, and best practices.

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EXISTING LEGAL EXEMPTIONS TO MANDATORY VACCINATIONS

Religious Exemptions Under Title VII

First, like other mandatory vaccination programs, any COVID-19 program will have to allow for accommodations based upon religious beliefs. Though mandatory vaccination programs are designed to minimize risk to the employer, its employees, and potentially others (e.g., patients, customers), such programs can raise issues when employees refuse to participate because of their beliefs or status, including sincerely held religious beliefs. Under current agency guidelines and federal law, employers are generally permitted to implement mandatory vaccination so long as they provide accommodations for employees' religious beliefs.

Specifically, Title VII of the Civil Rights Act of 1964 (Title VII) requires employers to provide exemptions and accommodations for employees who raise objections to receiving employer-mandated vaccines based upon religious beliefs.[1] An employee can bring a failure to accommodate claim under Title VII by showing that he/she had a sincerely held religious belief conflicting with a workplace requirement, shared that belief with the employer, and was disciplined for failing to comply with the conflicting requirement. The employee must cooperate with the employer's reasonable inquiries or may not be entitled to an accommodation. Even if the employee provides such information, the employer may deny the accommodation request if it would pose an undue hardship in the circumstances, or the employer may impose other infection control measures (e.g., mask requirement) if not done for retaliatory or discriminatory reasons.

As discussed in more detail below, any mandatory COVID-19 vaccination program will need to include reasonable accommodations for those who may opt out because of religious beliefs. In fact, employers may even start to notice an increase in these accommodation requests based upon general aversion or resistance to the vaccine that are not necessarily based upon religious beliefs (e.g., mistrust, emotional, or psychological beliefs). Anticipating this potential, employers should consider their response and how they may want to handle resistance that does not necessarily fall under a religious belief exemption.

Exemptions Under the Americans With Disabilities Act

In addition to religious beliefs, employers must also consider potential exemptions and accommodations for mandatory vaccination programs under the Americans with Disabilities Act (ADA). Under the ADA, employees may be entitled to an exemption from a mandatory vaccination requirement based on a disability that prevents safe vaccination. Employers subject to the ADA may be required to engage in a good-faith interactive process to determine if an individual seeking a vaccination exemption for health-related reasons has a qualifying disability and can alternatively be protected from exposure to COVID-19 in the workplace. Allowing an employee to opt out of the vaccine as an accommodation will likely depend on the availability of effective alternative means of infection control (e.g., wearing a mask or the use of other personal protective equipment (PPE)).

Similar to Title VII, under the ADA, an employer may refuse to provide a reasonable accommodation to a mandatory vaccination program if it can establish undue hardship. In doing so, the ADA requires employers to show that the accommodation would result in significant difficulty or expense. Undue hardship factors include (among others) the nature and cost of the accommodation needed, the financial resources of the facility making the reasonable accommodation, the number of persons employed at the facility, the effect on expenses and resources of the facility, the type of operation of the employer, and the impact of the accommodation on the operation of the facility.

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Again, employers may see an increase in requests for accommodations to a COVID-19 vaccination program under the ADA given the impact this vaccine may have on recipients' immune systems. Furthermore, given the rapid development of the vaccine, employees may have some concerns about the vaccine's potential side effects on an ADA-covered disability. Employers should be conscious of this legal landscape when considering a mandatory COVID-19 vaccination program and corresponding accommodations. Moreover, employers may need to consider how they may want to respond to resistance that is not necessarily covered under the ADA or Title VII. As discussed below, employers may need to be creative and flexible to address employees' concerns that may be specific to COVID-19.

Implications and Considerations Under State Laws

In addition to federal laws (and state laws that are analogous to Title VII and the ADA), a small number of states impose specific requirements regarding mandatory vaccination programs for employers in certain industries and those employing health care professionals. A larger number have either statutes or state court precedents specifically allowing employers to impose such mandates on their employees. Pursuant to such laws, a growing number of private employers have contractual provisions requiring employees to be vaccinated, and these have increasingly been held to be legally enforceable.

Some states require vaccinations for health care employees in varying contexts. For example: (1) New York requires most health care employees to be vaccinated against the flu or wear a mask in areas where patients or residents may be present and has imposed recordkeeping and reporting requirements on covered facilities and agencies; (2) Rhode Island requires all health care workers having direct patient contact, including volunteers, receive a free seasonal flu vaccine, unless the worker refuses or submits a medical exemption, and any unvaccinated health care workers must wear surgical face masks when dealing directly with patients during widespread flu periods or be subject to a monetary fine and professional sanctions; (3) California requires health care workers in general acute-care hospitals either to get an annual flu shot or sign a declination form;[2] and (4) Massachusetts requires licensed hospitals to vaccinate all employees against both pandemic and seasonal flu, with a potential declination for employees.[3]

In the absence of mandates, many states have laws encouraging health care facilities to adopt immunization policies or require certain vaccines to be available to health care professionals by their employers, usually at no cost to the employee. That said, some states prohibit employers from mandating vaccines for employees. For example, an Oregon statute bars vaccination mandates for employees, stating that “[a] worker shall not be required as a condition of work to be immunized under this section, unless such immunization is otherwise required by federal or state law, rule or regulation.”[4] Accordingly, before the COVID-19 vaccination is available, employers may want to start analyzing any requirements or exemptions pursuant to any state laws, especially if they operate in several different states.

AGENCY GUIDANCE

EEOC Guidance

Although the Equal Employment Opportunity Commission (EEOC) has not yet published guidance on whether employers are permitted to require employees to obtain a vaccine for COVID-19 before returning to work, the EEOC's prior guidance on vaccinations for the influenza virus is instructive. In March 2020, the EEOC published

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its “Pandemic Flu Pandemic Preparedness in the Workplace and the Americans with Disabilities Act Updated in Response to Covid-19 Pandemic – March 19, 2020,” which included guidance from 2009 related to the pandemic flu modified for COVID-19 (2020 Guidance).[5] In the 2020 Guidance, the EEOC noted that “[g]enerally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it.” Despite that statement, a mandatory vaccination program is not prohibited under federal employment laws, so long as employees are permitted to seek a valid disability-based or religious exemption under the ADA and Title VII as discussed above.

Within a separate part of the EEOC's guidance on the pandemic,[6] the agency provided information for employers surrounding the undue hardship inquiry under the ADA and how it is impacted by COVID-19. Specifically, the EEOC noted that under the ADA's undue hardship analysis, “the circumstances of the pandemic [are] relevant to whether a requested accommodation can be denied because it poses an undue hardship.” For purposes of a mandatory vaccination program, employers may rely on this guidance in addressing accommodation requests based on an employee's disability, especially in industries such as health care, where infection control is a necessity, or where employees must be physically present at a worksite, such as manufacturing and food production.

OSHA Guidance

The Occupational Safety and Health Administration (OSHA) has not issued specific COVID-19 vaccination guidance for employers; however, its previous deferential position on employer-mandated vaccinations may be instructive for COVID-19. Specifically, OSHA previously indicated that health care workers are at high risk for contracting influenza through their exposure to high-risk patients. The same risk of exposure to COVID-19 places health care workers at the top of the list of employees who may be required to receive a vaccine for COVID-19. It is expected that OSHA will issue updated guidance related to its COVID-19 vaccine position, which will likely affirm the agency's deferential position to employers.

National Labor Relations Act

Both unionized and nonunionized employers must also consider implications of the National Labor Relations Act (NLRA) with respect to any mandatory vaccination programs. The NLRA is a federal law recognizing private-sector employees' right to join or not join a union and protecting employees' right “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”[7] “Concerted activity” encompasses situations where an individual employee pursues or attempts to provoke or prepare for collective action. If employees collectively refuse to get a vaccine or otherwise challenge a mandatory vaccination program, such activity may qualify as “protected concerted activity” and subject the employer to potential liability if adverse employment actions are taken. Moreover, on a related note, unionized employers should also review their current collective bargaining agreements and should consider whether a vaccine program would be a mandatory subject of bargaining.

Workers' Compensation Laws

Finally, employers should be aware that, in certain situations, an employee's adverse medical reaction to an employer-mandated vaccine may trigger coverage under the various state workers' compensation regimes. There have been cases across different states where an employee's adverse reaction to a mandated vaccine was deemed a compensable injury for purposes of workers' compensation.[8] Employers considering such a mandatory

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vaccine should evaluate the potential implications of such adverse reactions, especially with a COVID-19 vaccine that will not have been time-tested when first available.

CONSIDERATIONS REGARDING MANDATORY COVID-19 VACCINATION PROGRAMS

Considering this current legal landscape and the unique issues presented by COVID-19, employers may want to start devising and pressure testing any COVID-19 mandatory vaccination program as soon as possible. In doing so, employers should keep in mind that there are still potential unknown variables related to this novel virus that could impact these programs and corresponding accommodations. Such variables include the rapid pace at which COVID-19 is spreading, the vaccine's rapid development, and the potential for misinformation and distrust by employees due to politicization of the virus and vaccine.

With these issues in mind, employers should evaluate their own industry, workplace environment, and culture in determining whether they would like to impose any type of COVID-19 vaccination program (whether mandatory or voluntary).

In doing so, employers should consider:

- If a mandatory vaccination program is appropriate or needed given the industry, workplace, or culture. Relevant inquiries to make this determination include:
  - Whether a vaccination program is truly necessary given other alternatives (e.g., remote working, social distancing, mask or PPE requirements, and imposing other Centers for Disease Control and Prevention (CDC) recommendations, if practical).
  - Can the program be limited to certain high-risk locales, departments, or worksites where alternative or other effective means of limiting transmission and infection of COVID-19 may not be possible or practical?
  - Could a voluntary vaccination program provide the same results?
  - Would a strategy that encourages, but does not require, participation work better given the workplace, industry, and culture?
- With any vaccination program, employers should also consider:
  - Engaging in an extensive education campaign regarding the efficacy and safety of the vaccine once FDA-approved;
  - Preparing to address religious or disability accommodation requests and specifically:
    - Keeping in mind how broadly these categories are construed and what type of evidence is required to support these requests;
    - Reviewing any existing (or creating as the case may be) exemption request forms for medical professionals, religious leaders, or the like; and

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    - Drawing upon any current policies, practices, and experiences related to such accommodation requests where possible.
- Preparing to address other potential objections or accommodation requests, including any that involve philosophical, personal, cultural, etc., objections or concerns;
- Evaluating the current cultural and political sentiment regarding vaccine development and considering creating additional exemptions or accommodations for genuine (albeit nonreligious) beliefs and concerns related to the vaccine;
- Developing and utilizing training and promotional activities to educate employees, create confidence in the efficacy of the vaccine, and encourage participation in the program;
- Preparing to engage in the interactive process for accommodations by considering which potential accommodations may be appropriate for a specific workplace, department, or position (e.g., increased use PPE, modification of duties, transfers to other positions or departments);
- Preparing to ensure that any exemption or accommodation procedures are standardized and provide flexibility to avoid any discrimination claims (e.g., ensuring that employees requesting accommodations have adequate time to collect and submit supporting documentation);
- Offering nondiscriminatory or nonretaliatory infection control alternatives to vaccinations, such as mask requirements;
- Covering any vaccine costs, if not fully health insurance funded, and making the vaccines available on-site during normal working hours;
- Imposing waiver or release requirements for those who refuse to get a COVID-19 vaccine;
- Imposing a reasonable vaccination deadline based upon CDC guidance (if and when available) and designating a well-trained employee to track/monitor compliance;
- Reviewing the workforce composition to determine if it includes any union members and any need to negotiate implementation of a mandatory vaccination program under the National Labor Relations Act and state workers' compensation laws, as well as any current employer insurance policies to contemplate any workers' compensation claim for potential adverse reactions to the vaccine; and
- Designating an employee or committee to monitor new laws, regulations, and guidance from federal and state authorities.

FOOTNOTES

[1] 42 U.S.C. § 2000e(j).

[2] Cal. Health & Safety Code § 1288.7(a).

[3] 105 Mass. Code Regs. § 130.325.

[4] OR. Rev. Stat. § 433.416(3) (2017).

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[5] EQUAL EMP. OPPORTUNITY COMM'N, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*.

[6] EQUAL EMP. OPPORTUNITY COMM'N, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws.*

[7] 29 U.S.C. § 157.

[8] E.I. DuPont de Nemours & Co. v. Faupel, 859 A.2d 1042, 1044 (Del. Super. Ct. 2004) (affirming workers' compensation award where employee suffered adverse reaction to a vaccine and "[t]he vaccination was funded by the employer, administered by its employees, and given at its facilities"); Maher v. Workers' Comp. Appeals Bd., 661 P.2d 1058, 1061 (1983) (collecting cases and noting that "vaccination or inoculation may properly be found to have arisen out of the employment where such treatment is submitted to *pursuant to the direction or for the benefit of the employer*") (emphasis in original).

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