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Opening the Doors: Return-to-Workplace Considerations During COVID-19

Part Eight: The COVID-19 Vaccine and the Workplace

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Employment

Whether a company is an essential business that has operated throughout the pandemic or is expecting to reopen in the coming months, a number of challenges must be addressed in order to provide a safe environment in which employees can work, while at the same time mitigating risk and restoring operations.

This eight-part series examines the most challenging issues faced by employers who are planning to reopen or continue productive operations:

1. Navigating the Legal Risk of Return (Part One)
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Legal and Practical Considerations

With a COVID-19 vaccine now on the horizon, employers are considering whether they can require employees to be immunized. Although mandating COVID-19 vaccination for employees will likely be permissible with some exceptions, employers will also need to grapple with a number of challenging issues, such as whether they *should* require the vaccination and what to do if employees refuse to be vaccinated. These questions and more are addressed below.

Can Employers Mandate That Employees Take the COVID-19 Vaccine?

Under federal law in the United States, it will likely be lawful for employers to mandate that employees take the COVID-19 vaccine as a condition of entering the workplace or as a condition of employment, with some exceptions. In 2009, the EEOC issued Pandemic Preparedness in the Workplace and the Americans with Disabilities Act guidance ("Pandemic Preparedness") in response to the spread of the H1N1 virus. The guidance, which was updated in March 2020 to

address its application to the current pandemic, suggests that mandatory *influenza* vaccines are permissible; though this guidance has not yet been updated to address workplace requirements for the COVID-19 vaccine, it is likely that the EEOC will permit employers to make COVID-19 vaccinations mandatory as well. However, the Pandemic Preparedness guidance also makes clear that the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII) may require employers to grant exemptions to any mandatory vaccine program based on disability or religious beliefs. Also, employers should note that the EEOC likely would not permit mandatory vaccines for employees who exclusively work from home.

In the UK and EU, employers have a duty to provide a safe place and system of work. Thus, in order to protect workers and facilitate a return to business as usual, it should be lawful to gather information on whether employees have been vaccinated (subject to usual privacy safeguards) and, in some business environments, insist that employees are vaccinated before returning to the workplace.

As a first step, UK and EU employers considering mandatory vaccine programs should consult the workforce on the proposed approach to vaccination, as both a compliance step (e.g., Health and Safety (Consultation with Employees) Regulations 1996) and a useful means of setting expectations in advance and socializing new procedures. Also, as in the U.S., employers may need to consider exemptions, such as where an employee objects on grounds of religious or philosophical beliefs. Thus, where employees object, employers are advised to inquire further and consider accommodations. Ultimately, however, in many instances, employers will be permitted to subject those who are unreasonably refusing lawful mandatory vaccine requirements to disciplinary action.

What Exemptions Will Likely Be Required if Employers Implement a Mandatory Vaccine Policy?

The ADA requires covered employers to provide a reasonable accommodation to an employee with a covered disability unless it would result in an undue hardship or a direct threat to the health and safety of others. Thus, an employee may be entitled to an exemption from a mandatory vaccination requirement if the employee has a disability that prevents taking the vaccine.

Similarly, Title VII requires covered employers to accommodate sincerely held religious beliefs, practices, or observances unless doing so would pose an undue hardship. An employer that receives notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from taking a vaccine will be required to consider whether it can provide a reasonable accommodation. Employers should note that the EEOC and courts interpret "religion" broadly to include not only traditional, organized religions, but also religious beliefs that are new, uncommon, not part of a formal church or sect, or only subscribed to by a small number of people.

It is not yet clear how the EEOC or courts will apply the undue hardship and direct threat analyses with regard to exemptions from mandatory COVID-19 vaccine requirements, including what impact, if any, an employer's industry or an employee's particular job requirements will have on the analysis. However, it is likely that continuing to require safety protocols such as face masks and social distancing in the workplace, and continuing to allow telework for many jobs, will be considered reasonable accommodations.

Are There Any State Laws That Address Mandatory COVID-19 Vaccines for Employees?

State vaccination requirements are not new, particularly in healthcare settings. According to the CDC, several states, including Alabama, Connecticut and New Hampshire, require health care workers to receive certain vaccinations, and employer requirements are common in this industry. Future state legislation may require certain workers, such as those who work in hospitals or are designated as essential workers, to take the COVID-19 vaccine.

Some states may go further. For example, the New York State Bar Association recently passed a resolution that urges New York to require the vaccination of all New York residents if scientists deem the levels of voluntary COVID-19 vaccinations insufficient to check the spread of COVID-19. The resolution includes additional steps that the bar association recommends that New York take before requiring the vaccine, such as making reasonable efforts to promote public acceptance, and includes an exception for medical reasons.

On the other hand, several states have announced plans to establish scientific review committees to advise on whether the state should endorse the vaccine. If a state does not provide such an endorsement, employers may be subject to risk by requiring the vaccine for employees in that state.

What Practical Issues Should Employers Consider?

Although permissible, employers will want to consider whether they should require a vaccine. If large segments of the workforce oppose or distrust the vaccine, a mandatory program may contribute to employee relations issues; if employers decide to broadly accommodate exemptions or grant exceptions, the exceptions may swallow the rule and a mandatory program may not have a significant impact on the safety of the workforce. Employers will also need to consider whether they would actually discipline or terminate employees who simply refuse to comply with a vaccine requirement, and if so, whether they may face risk of claims of wrongful termination. Employers will also want to plan for how to address employees who will not be vaccinated, such as whether there will be different safety requirements for those employees or if remote work will be mandated.

Finally, a vaccine would need to be widely available to the workforce in order to be required. In the first instance, the vaccine is expected to be made available under the emergency use authorization ("EUA") of the Food and Drug Administration rather than through traditional FDA approvals, meaning the vaccine remains in an investigational stage. Not only does this mean there may be risk for employers to require the vaccine, but it may not be widely available—the EUAs may limit the patient population to those with the highest need (e.g., medical workers, first responders, elderly patients). This, along with potential shortages in supply in the early months of the vaccine, would pose logistical challenges to a mandatory vaccine program in the short term.

Are There Restrictions on Asking Employees if They Have Been Vaccinated?

Although not directly addressed in current EEOC guidance, the guidance permitting employers to make certain medical inquiries and require medical tests in situations where there is a "direct threat" would likely be interpreted to permit U.S. employers to ask whether employees have been vaccinated. As explained above, employers in the UK and EU have a duty to provide a safe place and system of work, which likely gives employers the right to gather information on

whether employees have been vaccinated (subject to usual privacy safeguards) in order to protect workers and facilitate a return to business as usual.

How Should the Company Review and Grant Accommodation Requests?

As discussed above, U.S. employers must adhere to ADA and Title VII requirements to provide a reasonable accommodation, such as an exception to a mandatory vaccine requirement, in certain circumstances. Employers should prepare for the accommodation process by developing a procedure to receive requests for accommodations, review their merits, and undergo the required analysis to determine if an accommodation is appropriate. Employers will want to ensure they are handling all such requests consistently across the enterprise, particularly as they relate to religious exemptions.

Are There Special Considerations if an Employer's Workforce Is Unionized?

A mandatory vaccine program could trigger the employer's duty to bargain with the union. Thus, employers will need to carefully review applicable collective bargaining agreements to determine whether there is an obligation to bargain before implementing a vaccine requirement.

Could an Employer Provide a Voluntary Vaccine Program Instead?

Yes. The Pandemic Preparedness guidance suggests that encouraging, but not requiring, employees to get a vaccine may be more successful. Employers could provide on-site vaccinations, such as many do with respect to the flu vaccine, to make it easy and cost-free for employees. With the right communications and education plan, employers may find that a voluntary program is at least as effective as a mandatory program.

Final Considerations

Despite the number of unknowns surrounding the COVID-19 vaccine and lack of guidance thus far from government authorities, employers should start planning their proposed approach to the COVID-19 vaccination in the workplace. Any employer vaccine policy inherently involves a significant number of decisions and legal considerations, so starting the process early will be key to implementing an effective policy when the vaccine is made widely available.

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