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The Adoption of a COVID-19 Vaccination Policy in the Workplace

It was not long after the first pharmaceutical company announced a successful Phase 3 trial of a COVID-19 vaccine that questions began to be asked by employers about whether, and under what circumstances, an employer could mandate that employees receive a COVID-19 vaccine as a condition of employment.

While it is presently legal for an employer to require, in certain circumstances, that employees be vaccinated against a pandemic-related virus, it may not always be advisable in every instance. The regulatory guidance currently recommends instituting *voluntary* vaccination policies. Given the legal risks that could come from a mandatory program, prudence may in fact dictate that a voluntary program be used. Each employer should weigh all of the considerations mentioned below to determine which policy is a good fit for its business. Because of the thicket of legal issues that arise from a mandatory vaccination policy, including the potential for legal claims, this alert is intended to generally address some of the issues that could arise from the implementation of such a policy.

The Americans with Disabilities Act (“ADA”) generally prohibits employers from mandating that employees receive any vaccinations unless they are job-related, consistent with business necessity, and no more intrusive than necessary. In those circumstances, employers are permitted to require that employees be vaccinated against a pandemic-related disease as a term and condition of employment unless an employee is subject to an exemption arising from a medical condition, disability, and/or a sincerely held religious belief, practice, or observance.

Over the years, several federal agencies have weighed in with guidance in this area. In November 2009, the Occupational Safety and Health Administration (OSHA) took the position¹ that an employer may require vaccinations, such as the seasonal influenza vaccine, as a term and condition of employment. Such a requirement is not without limitations, however, and OSHA emphasized that employees “need to be properly informed of the benefits of vaccinations.” OSHA also advised 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 serious reaction to the vaccine) may be protected under Section 11(c) of the [Act] pertaining to whistle blower rights.”

In March 2020, the EEOC issued COVID-19 guidance² explicitly addressing the issue of whether employers covered by the ADA and Title VII of the Civil Rights Act of 1964 (“Title VII”) can compel all employees to take the seasonal influenza vaccine while specifically noting that a COVID-19 vaccine did not yet exist. The

¹ See OSHA’s position on mandatory flu shots for employees (Nov. 9, 2009), <https://www.osha.gov/laws-regs/standard-interpretations/2009-11-09>.

² EEOC, Pandemic Preparedness in the Workplace and the Americans with Disabilities Act (Mar. 21, 2020), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>.



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EEOC explained that an employee may be entitled to an exemption from a mandatory vaccination under the ADA based on a disability that prevents the employee from taking the vaccine. Granting such an exemption constitutes a “reasonable accommodation” under the ADA and an employer is legally required to grant it unless it would result in undue hardship to the employer. The ADA defines “undue hardship” as “significant difficulty or expense” incurred by the employer in providing an accommodation.

Prior to the emergence of COVID-19 earlier this year, the Equal Employment Opportunity Commission (“EEOC”) was quite active in suing to protect employee rights under such exemptions. Mandatory vaccination programs have also been the source of civil claims by employees suing their employers for an alleged failure to accommodate religious beliefs or alleged failure to accommodate medical conditions. Many of these suits arose in the health care field, where mandatory vaccination programs are prevalent.

Employers must be cognizant of the fact that employer-mandated vaccinations may be a controversial issue amongst employees. The adoption of a mandatory vaccination program could be the source of morale problems as well as disciplinary issues. That is particularly true now given some recent polling showing a reluctance of some employees to receiving a COVID vaccine, once available. Employers should carefully consider legal issues that could arise before instituting such a policy, including: (1) employee attempts to organize under the National Labor Relations Act (“NLRA”); (2) violation of privacy claims; and (3) other legal claims, including, for example, claims that (a) an employee had an adverse reaction to the vaccine, or (b) an employer failed to reasonably accommodate an employee seeking to be excused from a vaccine requirement due to a disability or for religious reasons.

While ordinarily it may prove difficult for an employer to satisfy the ADA’s requirements for mandating a vaccine, the existence of the pandemic may very well result in the EEOC allowing mandatory COVID-19 vaccine programs in workplaces even beyond healthcare, in circumstances that might not have been permitted before. Only time will tell whether the EEOC will issue further guidance in this regard, and how this will develop. However, it is fully expected that the EEOC will require the same exemptions outlined above to be strictly adhered to.

Employers are recommended to consult with qualified counsel knowledgeable in this area before adopting a vaccination policy in the workplace.

The information provided in this Client Alert does not, nor is it intended to, constitute legal advice. Readers should not take or refrain from taking any action based on any information contained in this Client Alert without first seeking legal advice.

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