

Can Contractors Mandate Employees to Provide Proof of Vaccination Against COVID-19?

According to Kevin O'Connor, partner and co-chair of the labor and employment practice, and Lauren Rayner Davis, associate for Peckar & Abramson, PC, a construction firm, as well as employers in any industry, may require employees to obtain COVID-19 vaccinations as a term and condition of employment under federal law, but not without limitation. The lawfulness of a mandatory vaccination policy currently varies widely under state and local law.

Put simply, based on guidance issued from federal regulatory agencies, an employer may mandate that their employees be vaccinated against COVID-19 as long as the employer engages in an interactive process with employees in order to determine whether they may be exempted from the requirement as a result of a disability or a sincerely held religious belief. If an employee presents verification of his or her need to be exempted from vaccination, the employee at issue may be offered reasonable accommodation by the employer, such as the ability to work from home.

But what if the employee seeking an accommodation is a foreman who must be physically present at a jobsite on a daily basis and comes into contact with multiple workers during the course of his or her job? If no reasonable accommodation is possible in light of the employee's job duties and responsibilities, the present federal guidance indicates that it would be lawful for the employer to exclude the employee from the jobsite.

Such circumstances do not necessarily mean that this particular employee may be terminated, as it is also necessary to determine whether the employee must be afforded any other rights under other federal, state and local laws, as well as any applicable provisions of collective bargaining agreements to which the employee may be subject.

The constantly evolving landscape of state and local vaccine laws highlights the importance of carefully engaging in the interactive process with each employee who objects to receiving the vaccine. Analysis of state and local law is therefore vital when firms are deciding whether to require vaccinations, as nearly all states and the District of Columbia have some form of presently pending or recently enacted legislation related to allowing or prohibiting employer-mandated COVID-19 vaccinations.

the word "pandemic" is making its way into contract language going forward—as noted by David Toney, construction team leader for Adams and Reese LLP. "Although most delays arising out of or related to COVID-19 were arguably covered by excusable delay clauses initially, many clients realized a surprising gap both within those clauses and in their contracts—there was no mention of a pandemic. While there is no way to predict the next force majeure event, it is especially prudent to fill the gap by giving mention to pandemics due to the tremendous impacts of COVID-19," Toney says.

"Our clients have used force majeure clauses and defended against force majeure-based claims in response to the COVID-19 crisis. As with most disputes, the results depend on the specific facts, the contract language and the skill of the attorneys who have to combine the two. It takes more than putting COVID-19 and force majeure in the same sentence to have a successful claim," says Jeffrey Hamera, partner and vice chair of Duane Morris LLP's construction group.

RESOLVING CONTRACT DISPUTES

When disputes do arise, careful consideration should be taken on how it will be resolved. Standard American Institute of Architects (AIA) contracts stipulate that mediation is a prerequisite to binding dispute resolution such as arbitration. This can help stave off costly litigation provided there is meticulous documentation and a willingness from all parties involved to correspond with each other.

"Communicate, communicate, communicate. Attempt negotiated settlements early, based upon a well-documented position of written and timely notices, as well as cost and time support. Settlement discussions should be elevated