Mandatory COVID-19 Vaccination In Employment

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Practice Area: Labor and Employment

In recent weeks, the prospect of an approved, widely available COVID-19 vaccine has become much more tangible as several pharmaceutical companies have presented promising preliminary data regarding the effectiveness of their vaccine trials. The Food and Drug Administration (FDA) has received two applications for emergency use authorization within the last month with meetings scheduled to begin this week. On December 2, 2020, Britain authorized a COVID-19 vaccine for emergency use, making it the first western nation to do so.[1] In light of these developments, the CDC has indicated the possibility of one or more COVID-19 vaccines becoming available for public use before the end of 2020.[2]

While the vaccine will not be available generally for citizens until 2021, employers are beginning the planning process as to what the vaccine's availability will mean for them. With challenges for employers in maintaining an employee comfort level of safety at work and the continuing efforts to return employees to employment, the question has arisen "Can I require employees to receive the COVID-19 vaccine as a condition of employment?" At present, no law, regulation, or other guidance directly addresses whether employers may require their employees to get a COVID-19 vaccination. However, the concept of mandatory vaccination programs in employment is not an entirely novel issue. Many healthcare workers are currently required to receive certain vaccinations as a condition of their employment, and the Equal Employment Opportunity Commission (EEOC) and OSHA have addressed the issue of mandatory flu vaccination policies in the past.

The EEOC and OSHA have interpreted mandatory flu vaccinations previously as a permissible mandate by employers – with certain conditions. In response to the 2009 H1N1 "swine flu" pandemic, the EEOC's Pandemic Preparedness for the Workplace[3] guidance advised that absent a state or local law to the contrary, which currently does not exist in Wisconsin, employers may require employees to get vaccinated from the flu. That said, the EEOC emphasized that—even during a pandemic—employers are obligated to consider accommodation requests from employees whose disabilities or religious beliefs prevent them from getting a vaccination. The OSHA guidance similarly allows employers to mandate such vaccinations for employees but it provides an exception based on OSHA's whistleblower provisions for employees who refuse a flu vaccine 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) . . . "[4]

The EEOC updated its Pandemic Preparedness in the Workplace guidance on March 19, 2020 to address the COVID-19 pandemic. In doing so, it stated that employers "should follow guidance from the CDC as well as state/local public health authorities . . . [and] [t]he ADA and Rehabilitation Act do not interfere with employers following advice from the CDC on appropriate steps to take . . ." Notably, the CDC has issued guidance recommending influenza vaccination for critical industries during a pandemic.[5] It is likely that the EEOC will issue updated guidance to address the issue of COVID-19 vaccinations in the workplace in the near future. Additionally, there are currently discussions within state government concerning how to address this issue within the State law context. However, until some action is taken it appears that employers may require employees to receive vaccinations when available, subject to the restrictions identified by the EEOC and OSHA.

It is also important for employers who are subject to a collective bargaining agreement to evaluate any limitations before requiring vaccinations as a term of employment. While the National Labor Relations Board, through its General Counsel, has recognized a greater unilateral right in employers to institute safety programs in light of the pandemic, caution should be exercised in unilaterally implementing sweeping workplace policies.

Employers should consider carefully the value of a mandatory vaccination policy for their businesses and whether other alternatives, such as voluntary vaccination programs, remote work, physical distancing, and facial coverings can be similarly effective in maintaining a safe work environment. Also to be considered is the employee morale issue. A mandatory vaccination program might have significant ramifications on employee retention and recruitment.

If an employer intends to make COVID-19 vaccination of employees a requirement, then it should include the recognized EEOC protective provisions in its policy for those who have medical or religious objections to the vaccination. It is also prudent for employers to prepare and train their human resources personnel in fielding, responding to, and documenting requests for accommodations, as well as how best to engage in the interactive process with employees who request accommodations.

Given the fast-evolving nature of the situation, it is crucial for employers to monitor new laws and guidance from federal and state authorities so it can plan accordingly once a COVID-19 vaccine becomes generally available in the United States. Employers should weigh the legal exposure and other risks associated with any mandatory vaccination program, and assess whether the alternative of voluntary vaccination may be a better option based on the nature and needs of their businesses.

As employers evaluate their options, they are encouraged to contact their legal counsel and remain flexible in their approach as further guidance becomes available.

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[1] https://www.nytimes.com/interactive/2020/science/coronavirus-vaccine-tracker.html

[2] https://www.cdc.gov/coronavirus/2019-ncov/vaccines/8-things.html

[3] https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act

[4] https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09

[5] https://www.cdc.gov/flu/pandemic-resources/pdf/roadmap_panflu.pdf

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