


CAN AN EMPLOYER REQUIRE ITS EMPLOYEES TO TAKE A COVID-19 VACCINE?

Throughout 2020, the COVID-19 novel coronavirus has created a multitude of changes within the way employers have treated their employees. Various governmental agencies have issued guidance and interpretations relating to previously existing laws and with new legislation passed this year. As the pandemic has evolved, so has this guidance. One of the next areas for continued evolution of these legal issues will likely relate to the approval of a COVID-19 vaccine.

News reports of a potential vaccine against COVID-19 provides encouragement for the control and possible end of the current pandemic. If employers are able to require all of its employees to be inoculated against this virus, it will provide obvious relief to the health and safety concerns of its workforce. However, there are legal questions related to whether an employer may mandate that all of its employees take an offered vaccine.

Generally, an employer can require its employees to take appropriate action to maintain a safe work space. A fully vaccinated workforce may help provide that safety. However, there are certain restrictions to the situations where employers can require medical tests and vaccinations. Under the Americans with Disabilities Act (the “ADA”), an employer may require medical testing and other invasive procedures if job related and consistent with business necessity. Under the current pandemic, the Equal Employment Opportunity Commission (the “EEOC”) has confirmed that taking temperatures and receiving additional medical information from employees returning to onsite work met this standard. If the EEOC applies a similar standard for review, the EEOC may allow a requirement for a COVID-19 vaccination as a condition to a return to the workplace. The EEOC has so far avoided giving a direct answer to this question. In the EEOC’s Pandemic Preparedness guidelines, and while specifically addressing the influenza vaccine, the EEOC states that “generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it. ***As of the date this document is being issued, there is no vaccine available for COVID-19.***” As a result, the final legal guidelines for a mandatory COVID-19 vaccine have yet to be established.

However, it is also anticipated that the EEOC will require that employers comply with other legal requirements with respect to any mandated vaccine, including the ADA and Title VII of the Civil Rights Act of 1964 (“Title VII”). The EEOC has confirmed that under the ADA an employee with underlying medical conditions should be entitled to an exemption from mandatory vaccination for valid and supported medical reasons. These may include severe, life-threatening allergies to the vaccine or any ingredient in the vaccine. Title VII also provides employees with an exception to a mandatory vaccination based upon sincerely held religious beliefs. In each instance, when these objections are raised, the employer should engage in a discussion with the employee to understand the objection, to determinate if an arrangement



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can be reached to satisfy the safety concerns being addressed, and confirm a modification would allow the employee to perform the employee's job requirements. Depending on the circumstances and the work requirements, these accommodations could include a requirement of the employee to continue working with a mask or allowing the employee to continue a remote work environment.


Under the ADA, a reasonable accommodation is required unless it would create an undue hardship to the employer, generally meaning a significant difficulty or expense. The standard for providing a change of employment condition to meet a religious exception is much less. Under Title VII, an employer may deny a requested reasonable accommodation of an employee's sincerely held religious beliefs or practices if the requested accommodation will impose more than a *de minimis* cost or burden on business operations.

In addition to ADA medical or Title VII religious raised concerns, an employee may advocate a concern that a vaccine may not have met all appropriate medical testing standards, or raise a general objection to vaccinations (an "anti-vaxxer"). Provided that a vaccine has met the approval of the Federal Drug Administration (the "FDA"), the employer should have a reasonable basis to rely on the medically determined safety of an approved vaccine. Further, Courts have confirmed that social, political or economic philosophies are not protected under Title VII.

Key Considerations and Action Items

Assuming that no other governmental guideline or court decision has been issued which would guide the action, if an employer makes the determination to require COVID-19 vaccinations as a condition to continued or new employment, the employer should develop policies and procedures to fully communicate and educate its employees. The following are considerations and action items for the employer to follow when establishing these policies:


- If not currently provided, an update to the Employee Policy Manual should be made to confirm the obligation of each employee to use all reasonable steps to keep other employees safe. This may currently include Center for Disease Control (the "CDC") protocols for hand washing and certain safe distancing requirements. Even with a fully inoculated workforce, until medical experts provide otherwise, these protocols should be maintained. Amended language may confirm the action of the employer to require vaccinations to further the safety of its employees. Any vaccination communication should not guarantee its effectiveness, but should only confirm the medically provided information regarding the vaccine.



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- Decisions should be made to confirm if the full workforce will have mandatory COVID-19 vaccine requirements, or if only a portion of the employees will have this requirement. If only a portion of the workforce will have a mandatory vaccination, care should be made to review and modify, if necessary, job descriptions to support the need for vaccinations (e.g., travel requirements, direct interaction with customers, etc.). Unless there is a legitimate reason to not impose the requirement for all employees, conservatively all employees should be treated the same.
- The employer's human resources department needs to be fully engaged and educated regarding these issues. As appropriate, individuals or groups within the HR Department should be designated as the vaccination response team to ensure that a consistent and well informed response is provided to all employee questions. Specifically, the HR Department needs to understand how to receive and respond to any employee objections on the basis of ADA medical issues, Title VII religion concerns or for any other reasons.
- Communication with the employer's employee medical health insurance provider should occur to confirm whether the vaccination will be covered and confirm if the employee will have responsibility for any portion of the cost. The employer may very well want to favorably consider covering the entire cost of the vaccination. With the vaccination, the productivity of the company should improve, and without cost being an obstacle, the employer may avoid certain employee's resistance.
- For employers under a collective bargaining agreement, care should be made to understand the terms of such agreement to ensure that a mandatory vaccine requirement does not create a violation.
- Lastly, the company needs a consistent approach to deal with employees who refuse the vaccine (without a legal basis for the refusal). If such refusal will result in termination of employment, such termination action should be consistently applied. The company may choose to create a specific severance policy for terminated employees (conditioned upon the employee's execution of a release and waiver of claims), but severance would not be required.

As employers continue to work through this pandemic environment, they are looking for positive occurrences to bolster work productivity and results. The release of an approved vaccine may assist this effort. But any action to mandate vaccinations by its employees should be approached with caution and only after appropriate legal review and analysis.

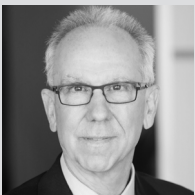


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This is an area of continuing development and change. As potential vaccines get closer to approval, or following approval, the EEOC or other governmental agencies may adopt modified guidelines relating to employer mandated vaccines. As a result, constant review and updates to these issues must be made prior to implementing any action.

Prudent employers should begin planning now for the eventual approval of a COVID-19 vaccine. The critical considerations will include: (i) unless legally prohibited, will the employer require mandatory vaccines for all employees; (ii) with a mandatory vaccine policy, is the employer's internal HR Department prepared for the roll-out; and (iii) what will be the consequence for employees who refuse the offered vaccine. Engagement with the employer's legal team is critical when reviewing these issues.

This summary presents a general overview of certain legal issues. It is not intended to be received as legal advice from Spencer Fane LLP or any of the attorneys identified below. Also, this is a novel and constantly developing area of law. From time to time, Spencer Fane LLP may update the information and analysis provided in this summary. Should you desire to obtain specific legal advice, please consult your legal counsel or feel free to contact one of the attorneys below so that an appropriate attorney-client engagement may result, and all necessary information can be gathered to make a formal legal evaluation in a confidential and privileged context.



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