CLIENT ALERTS & INSIGHTS

Can Employers Mandate the COVID-19 Vaccine? (Updated to incorporate EEOC guidance)

DECEMBER 17, 2020

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[Update: Since this article was originally published, the EEOC issued guidance on December 16, 2020 specific to the use of the COVID-19 vaccine in the workplace. The EEOC's guidance was consistent with our original article. However, we've updated our article to incorporate specific direction given by the EEOC on this topic.]

When the COVID-19 vaccination becomes readily available, can private employers require employees to take the vaccine? The short answer: Probably, provided employers are mindful that, depending on the work performed, exceptions and accommodations may be required.

EEOC Guidance

On December 16, 2020, the EEOC issued guidance on various issues raised by COVID-19 in the workplace. Key takeaways from the EEOC's guidance include:

The vaccination itself is not a medical examination. The EEOC's guidance regarding the COVID-19 vaccine states that the mere administration of a vaccination-standing alone-is not a medical examination under the ADA.

If conducted by the employer, pre-screening inquiries-which are recommended by the CDC-are likely disability-related inquiries under the Act. Although the administration of the vaccine is not a medical examination, the CDC's vaccine guidance states that health care providers should ask certain questions before administering a vaccine to ensure that there is no medical reason that would prevent the employee from receiving the vaccination. If conducted by the *employer* or a third party *contracted by the employer*, these pre-screening inquiries are likely disability-related inquiries under the Act. In order to make such inquiries, the employer would need to have a reasonable belief that an unvaccinated employee will pose a direct threat to the health or safety of themselves or others. However, if a third party that does not have a relationship with the employer (i.e., a pharmacy or the *employee's* health care provider) makes such screening questions, pre-screening questions are not a disability-related inquiry raising ADA issues.

The EEOC noted that if the employer offers the vaccine on a voluntary basis, the ADA requires the employee's decision to answer be voluntary as well. If the employee refuses to answer the questions, the employer can refuse to administer the vaccine but may not retaliate, intimidate, or threaten the employee for refusing to answer.

A request that an employee show proof of receipt of a COVID-19 vaccine is not a disability-related inquiry. The EEOC notes that there may be a number of reasons why employees choose not to get the COVID-19 vaccine, including reasons that are not disability-related. As such, the mere request

for proof of receipt of the vaccine does not implicate the ADA. The EEOC advises that if an employer wants to avoid raising an ADA issue, it may tell employees who receive the vaccine from a third party (like a pharmacy) to not provide any medical information as part of their proof.

A request that an employee explain *why* they did not receive the vaccine is a disability-related inquiry. However, asking that employees provide an explanation as to why they did not get the vaccine would be a disability-related inquiry as it may elicit information about the employee's health condition. Accordingly, such inquiries can only be made if the employer can show that an employee who declines to provide such an explanation is a direct threat to themselves or others.

Determining whether an unvaccinated employee is a direct threat in the workplace is a fact-specific question and may change depending on the working environment. The EEOC advises that employers should consider these four factors when determining if a direct threat exists because of the presence of an unvaccinated employee in the workplace:

- The duration of the risk;
- The nature and severity of the potential harm;
- The likelihood that the potential harm will occur; and
- The imminence of the potential harm.

The EEOC further noted that a finding of a direct threat would necessarily include the determination that an unvaccinated employee will expose others to the virus in the workplace. The EEOC did not take a position as to whether any specific worksites would meet the direct threat threshold. However, we believe that certain worksites-i.e., health care environments where employees directly interact with patients-are likely to meet the direct threat threshold.

Even if an unvaccinated employee is a direct threat in the workplace, an employer must provide a reasonable accommodation if one exists. An employer's analysis does not end once it determines that an unvaccinated employee is a direct threat in the workplace. An employer must still engage in the interactive process with the employee to determine if there are any reasonable accommodations that could eliminate the direct threat. Whether an accommodation is "reasonable" will depend on the type of work performed. Health care employers, for example, can likely take the position that no accommodation is reasonable for employees who are involved in direct patient care - that is, that an unvaccinated employee is a direct threat to patients in the workplace. Employers outside health care, on the other hand, will need to consider if there are accommodations that can reasonably improve workplace safety, including requiring an unvaccinated employee to wear a mask or telework (effectively requiring the employee to continue with COVID-19 restrictions post-COVID).

Requested accommodations can be denied if they would present an "undue hardship" to the employer. Whether accommodations are an "undue hardship" is a fact-specific analysis. It is evident from courts that have analyzed the issue that work environment, and the employee's personal medical history, play a role in the accommodation process. Health care employers will have a stronger justification for a no-exception vaccination policy. For other employers, it will be best to try to work with the employee in accommodating their request.

Employers must also make reasonable accommodations for sincerely held religious beliefs. Mandating vaccines can also raise Title VII issues. Under Title VII, an employee who has a "sincerely held religious belief" may be exempt from a mandatory vaccination requirement. Whether an employee has a "sincerely held religious belief" is a challenging question that can lead to varying outcomes in court. Employees need not necessarily ascribe their reasoning to a traditionally accepted religion to be found to have a sincere religious belief. As an example, one federal court declined to dismiss a case finding that "it is plausible that Plaintiff could subscribe to veganism with a sincerity" leading the employee to refuse a vaccination due to the production process including the use of animal by-products. However, even if an employee has a "sincerely held religious belief," an employer's obligation is to make *reasonable* accommodations. Thus, as with a disability-related accommodation, employers should take any religious exemption request seriously and engage in an interactive process with the objecting employee to determine if a reasonable accommodate can be met. Practically, employers should avoid debating if the employee's purported conviction is a "sincerely held religious belief," and focus, to the extent possible, if an accommodation is reasonable. (We do, however, recommend that employers have employees certify their asserted religious objection in writing at the time it is expressed.)

Practical Considerations

Regardless of whether or not employers *can* require vaccinations, employers must weigh practical considerations to determine if vaccinations *should* be required versus encouraged. First, it may be difficult for employees to get access to the vaccine. According to Dr. Anthony Fauci, the general population should be able to get the vaccine by April - June of 2021. Requiring vaccinations prior to these dates could lead to discrimination issues - particularly if some subset of employees are able to access the vaccine before others. Second, we have seen objections to vaccines that do not necessarily fall into a religious or medical exemption. Rather, they reflect the current political discussion in the country. If an employer institutes a "required vaccine" policy, that employer must be prepared to address what happens to employees who refuse for unprotected reasons. (And we will be watching whether we see "discharge in violation of public policy" claims asserted in cases where employees are terminated for refusal.) Third, if an employer requires vaccination, any resulting injury or medical complication could result in workers' compensation liability. Fourth, in a union environment, employers may be required to bargain over a mandatory vaccination policy. And, even in a nonunion setting, the National Labor Relations Act ("NLRA") allows employees to engage in "concerted activity" for the "mutual aid and protection." Employees may engage in such "concerted activity" to object to a vaccination policy.

On the other hand, certain employers will need to consider the Occupational Safety and Health Act's (OSHA) requirement that employers provide a safe and healthy workplace environment. Employees working in high-risk environments could allege that employers are putting them at risk by not requiring a vaccine or addressing it properly. Although OSHA does not, at this point, require employers to offer the vaccine, employer should be prepared and monitor OSHA guidelines and regulations.

Employers who are considering mandatory vaccination for COVID-19 should be prepared for the legal landscape discussed above. For many employers, strongly encouraging vaccination may be the approach that best balances legal and practical concerns. Those that do require vaccinations

should stay abreast of the ever-changing legal and scientific landscape and be prepared to adjust their approach accordingly.

If you have any questions, we encourage you to reach out to your Benesch contact or one of the attorneys below to discuss.

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Please note that this information is current as of the date of this client bulletin, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by CDC and local officials.

