CLIENT ALERTS & INSIGHTS

Can Employers Mandate the COVID-19 Vaccine?

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Authors: Johanna Fabrizio Parker, Bradley Wenclewicz

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.

Pursuant to the ADA, covered employers can require vaccinations (which are considered "medical examinations" under the Act) if the vaccination is "job-related and consistent with business necessity" or is justified by a "direct threat" to the workplace. Although the EEOC has not yet directly addressed whether COVID-19 vaccinations can be required, it has determined that an individual infected with the COVID-19 virus is a direct threat to others and may be excluded from the workplace. Thus, employers are likely able to require the vaccine.

However, as is always the case when dealing with ADA issues, employers may have a duty to accommodate employees who refuse to be vaccinated. For some insight, the EEOC published an article in 2009 (updated March 21, 2020) in response to the H1N1 virus, titled "Pandemic Preparedness in the Workplace and the Americans with Disability Act," addressing the question: "May an employer covered by the ADA and Title VII…compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?" The Agency answered:

> No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the operation of the employer's business, which is a lower standard than under the ADA)

Disability Exemption: For the disability exemption to apply, the employee would need to notify the employer of the alleged disability that would prevent the employee from getting the COVID-19 vaccine and request an accommodation. Employers will then have an obligation to engage in an interactive process with the employee and determine if there are reasonable accommodations that can substitute for the vaccine requirement.

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.

Religious Exemption: 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.

Corey Clay at cclay@beneschlaw.com or 216.363.4158.

Johanna Fabrizio Parker at jparker@beneschlaw.com or 216.363.4585.

Brad Wenclewicz at bwenclewicz@beneschlaw.com or 216.363.6191.

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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.

