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## *Preparing for COVID-19 Vaccines: Can U.S. Employers Require Vaccination?*

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With the first COVID-19 vaccinations occurring in the U.K. this week and the FDA presently considering emergency use authorization for the COVID-19 vaccines, U.S. employers are asking whether they can, or should, require their employees to receive a COVID-19 vaccination, once available. As it relates specifically to a COVID-19 vaccine, no governmental or regulatory body has yet issued guidance on the lawfulness of a mandatory COVID-19 vaccine, so a definitive answer is not currently possible. However, drawing on previous guidance, employers will likely be able to mandate that employees receive a vaccine, subject to some exceptions.

### **Agency Guidance Regarding Vaccinations**

The Equal Employment Opportunity Commission ("EEOC") and Occupational Safety and Health Administration ("OSHA") have issued guidance regarding influenza vaccination potentially applicable and instructive to COVID-19.

- In 2009, in response to the H1N1 "swine flu," the EEOC explained that while an employer may compel employees to take an influenza vaccine certain employees may be entitled to an exemption as a reasonable accommodation for an ADA disability or under Title VII for sincerely held religious beliefs. The EEOC concluded that ADA-covered employers should "consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it."<sup>1</sup>
- Also in 2009, OSHA stated that employers can require employees to be vaccinated for influenza.<sup>2</sup> However, OSHA warned that an employee with "a medical condition that creates a real danger of serious illness or death (such as serious reaction to the vaccine) may be protected under Section 11(c) of the Occupational Safety and Health Act of 1970. . . ."<sup>3</sup>

Against this backdrop, an employer's determination regarding vaccinations will be individualized, depending on the perceived benefits and drawbacks, as well as the type of workplace at issue. Employers may choose to encourage vaccination and continue to require other mitigating measures to protect its workforce (e.g., health screening, testing, social distancing, face coverings, occupancy restrictions, etc.) However, for certain employers and their respective workforces, other mitigating measures may be insufficient to safeguard the wellbeing of employees and/or patrons, therefore generally leaning in favor of required inoculation.<sup>4</sup> Employers that decide mandatory vaccination is necessary should be prepared to address a number of legal and practical considerations, including legal challenges under state and federal law, and concerted activity in response to a vaccine mandate.

We discuss these below.

### **Interactive Process and Reasonable Accommodation Considerations:**

Any required vaccination program will be subject to potential exclusions and accommodations under Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act ("ADA"), or applicable state law.

#### **1. Title VII – Religious Accommodation**

Title VII prohibits an employer from discriminating against any employee on the basis of a "sincere religious belief." In evaluating an employee's stated religious belief, the Third Circuit has held that mere medical opinions or general moral judgments about vaccines do not warrant protection under Title VII.<sup>5</sup>

If an employee cannot be vaccinated because of a sincerely held religious belief, an employer must engage in the interactive process to determine whether a suitable reasonable accommodation exists. Reasonable accommodations have been found to include:

- Allowing the individual to receive a pork-free (gelatin-free) vaccine;
- Granting the employee additional time to find a new position in the company (which does not require a vaccine);
- Wearing a mask during patient contact; and
- Telecommuting.

An employer need not accommodate an employee if doing so would create an "undue hardship," which would impose more than a *de minimis* cost on the employer.<sup>6</sup> Any such analysis will be fact intensive and dependent on information learned during the interactive process.

#### **2. ADA – Reasonable Accommodations for Disability**

Like Title VII, the ADA requires employers to provide a reasonable accommodation (that does not present an undue hardship) to any employee with a qualified disability. In the context of a mandatory vaccination policy, employees seeking relief from such a policy as an accommodation due to a disability have been met with mixed results that are fact-intensive. For example:

- In *Hustvet v. Allina Health Sys.*, 910 F.3d 399 (8th Cir. 2018), the plaintiff employee pleaded she could not receive a mandatory vaccine because of her disability—chemical sensitivities and allergies derived from an immune system disorder. The court held plaintiff was not disabled: she proffered only "garden-variety allergies," which did not rise to the level of substantially or materially limiting her ability to perform major life activities.
- On the other hand, in *Ruggiero v. Mount Nittany Med. Ctr.*, 736 F. App'x 35 (3d Cir. 2018), the court reversed the trial court's dismissal of the plaintiff's complaint where she pleaded she could not receive a vaccine because of severe anxiety over potential side effects and her physician found the risks of vaccination outweighed the benefits.

Accordingly, as with Title VII, any accommodation analysis will be dependent on the specific circumstances and interactive process.

### 3. State Laws May Present Additional Obstacles for a Mandatory Vaccination Program

State laws are often more restrictive or apply different standards than their federal counterparts. Accordingly, an employer should know and consider such laws before the adoption of a mandatory vaccination policy and in evaluating any employee's stated objection to vaccination.<sup>7</sup>

### **National Labor Relations Board Considerations**

Employers should also consider the labor implications a mandatory vaccine policy creates. Could doing so trigger a union organizing drive, or, if already unionized, does an employer have a bargaining obligation? Where applicable, careful examination of the terms of a CBA is critical.<sup>8</sup> For example, a CBA may outline rights to implement reasonable health and safety work rules and policies only after first providing the union advance notice and an opportunity to bargain. Alternatively, it could require a presentation before a joint safety committee with union representation. Or, for that matter, be silent and require consideration of past practice. Regardless of the terms, advance planning is necessary to avoid any claim that sufficient notice to the union was not provided.

### **Practical Considerations**

In considering any mandatory vaccination policy, employers must also consider practicalities. First, the timing of availability of vaccines to employees will likely be dependent on a number of factors governed by state and local authorities. Second, certain vaccines presently pending before the FDA for emergency use authorization contemplate a two-dose regimen over several weeks. Meanwhile, recent FDA scientific analysis report some protection after one dose. Accordingly, employers will need to consider how they will manage the time period of the vaccination schedule or the potential risks where an employee receives a first vaccine dose but is then delayed from receiving or refuses a second dose. Last, employers should contemplate how they will respond to potential concerted activity by their employees, even in non-unionized settings, such as protesting a mandatory vaccine policy or interoffice communications regarding same.

### **Conclusion**

While a mandatory vaccination program is likely lawful, employers should proceed with caution. The introduction of COVID-19 vaccinations will likely be treated similarly but, at present, there is a dearth of regulatory and governmental guidance on the subject. We anticipate that the EEOC, OSHA, or other governmental entities will issue guidance on COVID-19 vaccinations. We will issue updates in response to pertinent developments.



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- <sup>1</sup> <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> at ¶ 13.
- <sup>2</sup> OSHA's position on mandatory flu shots for employees, November 9, 2009, <https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09>.
- <sup>3</sup> *Id.*
- <sup>4</sup> The permissibility of generally compelling COVID-19 vaccination is dependent on a determination that COVID-19 presents a "direct threat" under the ADA, permitting an employer to require a "medical examination." While unlikely in the short term, that determination could ultimately change, depending on the spread, severity, and risks of COVID-19 in a particular workplace.
- <sup>5</sup> *Fallon v. Mercy Catholic Med. Ctr. of Se. Pennsylvania*, 877 F.3d 487, 492 (3d Cir. 2017).
- <sup>6</sup> *Cloutier v. Costco Wholesale Corp.*, 390 F.3d 126, 134 (1st Cir. 2004). *See also Robinson v. Children's Hosp. Bos.*, No. CV 14-10263-DJC, 2016 WL 1337255 (D. Mass. Apr. 5, 2016) (granting summary judgment for the defendant hospital that had implemented a mandatory influenza vaccine policy: it would have created an undue burden to allow the plaintiff to work without vaccination—putting vulnerable patients at risk and/or requiring rearranging its workflow so that vulnerable patients would not be exposed to the plaintiff).
- <sup>7</sup> *See, e.g., Friedman v. S. Cal. Permanente Med. Grp.*, 102 Cal. App. 4th 39 (2002) (explaining that an employee is entitled to religious protection under California's Fair Employment and Housing Act if an objection to vaccination is rooted in "beliefs, observances, or practices" have 'a place of importance parallel to that of traditionally recognized religions'; veganism—and an objection to receipt of a vaccine grown in chicken eggs—was found not a religion that warrants an accommodation under FEHA).
- <sup>8</sup> At least one court has upheld a finding that an employer violated the relevant CBA by not bargaining over a vaccination policy before implementation. *See Virginia Mason Hosp. v. Washington State Nurses Ass'n*, 511 F.3d 908, 911 (9th Cir. 2007).

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