

Outside Counsel

Employee Vaccination Requirements: Give It a Shot

Mandatory vaccination is a controversial issue. In the absence of a government mandate requiring COVID-19 vaccination, employers will be faced with a decision: Could they, and should they, impose a COVID-19 vaccination mandate on their employees?

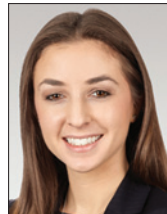
On Dec. 11, 2020, the U.S. Food and Drug Administration issued emergency use authorization for the first COVID-19 vaccine. Millions of Americans are expected to be vaccinated in the coming weeks. With distribution of a COVID-19 vaccine underway, employers should consider whether they will require their employees to get vaccinated for COVID-19.

Mandatory vaccination is not a novel concept. In New York, for example, there are immunization requirements for students entering and attending school, and for health care personnel working in certain health care and residential facilities and agencies. Notably, last month the New York State Bar Association passed a resolution asking the state to consider implementing a state-wide COVID-19 vaccine mandate, and, on Dec. 4, 2020, a bill was introduced in the New York State Legislature to permit the Department of Health to generally make the COVID-19 vaccine mandatory. (It is unlikely, in our view, that there will be any federal legislation requiring vaccination.)

Still, mandatory vaccination is a controversial issue. In the absence of a government mandate requiring COVID-19 vaccination, employers will be faced with a decision: Could they, and should



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they, impose a COVID-19 vaccination mandate on their employees?

Guidance issued by the U.S. Occupational Safety and Health Administration (OSHA) and the U.S. Equal Employment Opportunity Commission (EEOC) in 2009 in response to the H1N1 virus regarding an employer-mandated flu vaccine provides a useful framework for analyzing whether an employer-mandated COVID-19 vaccine would be lawful.

According to OSHA's 2009 interpretation letter, employers can require employees to take a flu vaccine, but an employee who refuses because of a reasonable belief that they have 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 (OSH Act), suggesting that such refusal may constitute protected activity to form the basis of a whistleblower complaint.

Separate and apart from OSHA's interpretation letter, the EEOC's 2009 guidance, "Pandemic Preparedness in the Workplace and the Americans with Disabilities Act," which was updated in March 2020 to respond to the COVID-19 pandemic, suggests that employers may generally require vaccination, so long as employers consider the need for any accommodations based on an employee's disability and religion.

The American with Disabilities Act (ADA) requires covered employers to provide a reasonable accommodation to qualified individuals with a disability, and Title VII of the Civil Rights Act of 1964 (Title VII) requires covered employers to reasonably accommodate qualified individuals' sincerely held religious beliefs. Under the ADA, employees may be excused from a mandatory vaccination if they have a disability that prevents them from taking the vaccine. Under Title VII, employees may be excused from a mandatory vaccination if taking the vaccine would violate their sincerely held religious beliefs, practices, or observances.

After receiving a request for an accommodation based on an employee's claimed disability or sincerely held religious belief, an employer should engage in an interactive dialogue with

the employee to explore reasonable accommodations on a case-by-case basis. Failing to reasonably accommodate a qualified individual, as well as taking an adverse employment action against an individual on the basis of their disability or religious beliefs, runs the risk of a discrimination claim. For example, in *Edwards v. Elmhurst Hosp. Ctr.*, a health care worker brought an action against his employer, a hospital center, for, among other things, religious discrimination under Title VII, alleging that his employer discriminated against him because of his religion when it informed him that he was required to take the H1N1 vaccine, and that failure to take the vaccine would result in disciplinary action. No. 11 CV 4693 RRM LB, 2013 WL 839535, (E.D.N.Y. Feb. 15, 2013), *report and recommendation adopted*, No. 11-CV-4693 RRM LB, 2013 WL 828667 (E.D.N.Y. March 6, 2013). The health care worker objected to the vaccine on the basis that his religious beliefs as a Jehovah's Witness prevented him from taking the vaccine. Although the court ultimately dismissed the action, the court found that the health care worker had adequately alleged that he had a bona fide religious belief which conflicted with an employment requirement and that he informed his employer of this belief. *Id.* at *4. *Edwards* serves as a cautionary tale to employers, and a reminder to engage in an interactive dialogue with an employee who requests an accommodation. While the health care worker did not specifically identify his employer's failure to engage in an interactive process in his complaint, we suspect that the failure to engage in an interactive process is ultimately what drove the lawsuit.

Importantly, employers do not need to provide a reasonable accommodation that would cause an "undue hardship"

within the meaning of the ADA and Title VII. We believe it is likely that permitting an employee to avoid vaccination and potentially endanger co-workers or other stakeholders satisfies the undue hardship standard. Notably, the EEOC has taken the position that COVID-19 is a "direct threat" to health or safety in the workplace, meaning employers generally have greater flexibility under the anti-discrimination laws to mandate additional safety precautions. Moreover, some commentators have suggested that OSHA may rely on Section 5(a)(1) of the OSH Act (the General Duty Clause) to issue citations to employers that fail to require vaccinated workforces. The argument is that, by failing to require a COVID-19 vaccine, the employer did not take a feasible step to eliminate or mitigate a workplace hazard (i.e., COVID-19). These considerations strengthen employers' arguments that broadly mandating vaccinations is a lawful employment practice.

Employers should also consider attendant legal issues, such as compensation for the cost of a vaccine, as well as the time spent taking the vaccine, potential workers' compensation claims in the event an employer-mandated vaccine results in complications, privacy and confidentiality issues relating to employee medical information, and the right of employees to organize based on safety and health concerns under the National Labor Relations Act. Moreover, employers of unionized workforces should consider avoiding unilateral vaccine requirements or other alleged failures to collectively bargain, notwithstanding arguments that employers may have the right to unilaterally impose workplace safety obligations.

Additionally, employers should consider whether a mandatory vaccination program is warranted given their



Photo: Frank Augstein/AP

A nurse prepares a shot of the Pfizer-BioNTech COVID-19 vaccine at Guy's Hospital in London on Dec. 8, 2020.

specific industry, office setup, and other alternatives (such as face coverings, physical distancing, modifications of duties, transfers to other work areas, telework, etc.), as well as whether such a program is consistent with company culture.

Employers are encouraged to make decisions regarding COVID-19 vaccination (mandatory or voluntary) in consultation with employment counsel. Employers are reminded that even if a vaccine is required, it is not a substitute for compliance with all other appropriate and applicable COVID-19 safety protocols. Finally, companies must continue to monitor and seek guidance with respect to developments at the federal, state, and local levels, given the fast-changing and dynamic nature of the pandemic response.

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