



Can U.S. Employers Require Employees To Receive COVID-19 Vaccinations?

Peter Gillespie
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Based on welcome recent news surrounding plans to distribute a successful COVID-19 vaccine in the coming months, many employers are beginning to consider whether mandatory vaccinations can be incorporated into existing strategies to protect the workforce. The short answer to this is that employers can require their employees to receive a vaccine. As an example, an annual seasonal flu shot can be required by certain employers, such as those in the health care industry. Indeed, there may be state laws requiring vaccinations, especially under laws applicable to healthcare providers, drug and alcohol treatment centers, or homeless shelters. Nevertheless, employers should be cautious about requiring vaccinations, as there are many possible complications and variables that would need to be considered carefully.

Generally speaking, because none of the current vaccines have been formally approved, agencies, such as the Occupational Safety and Health Administration (OSHA), the Equal Employment Opportunity Commission (EEOC), and the National Labor Relations Board (NLRB) have not had a chance to provide direct guidance. The positions that these agencies may take could depend on whether available vaccines have been approved as safe and effective, or whether they have been given emergency use approval.

At a minimum, however, employers can expect that OSHA would require employers to provide information to employees about the benefits of a vaccine, if the employer were to require employee vaccinations. Depending

Attorneys

Peter J. Gillespie

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on the circumstances, OSHA may provide “whistleblower” type protections to employees who refuse vaccines based on having expressed safety-related concerns. Similarly, the NLRB might protect employees (even in a non-union setting) who engaged in “protected concerted activities” regarding an employer’s vaccination program. Given the numerous reports in the news relating to safety concerns and possible public distrust, employers should anticipate some resistance to vaccination requirements and, if such concerns arise, will need to consider whether employees who object are engaged in protected conduct. In a unionized workforce, vaccination programs may be considered a mandatory subject of bargaining under the National Labor Relations Act.

We anticipate that the EEOC would expect that employers consider possible reasonable accommodations for employees under the ADA, as well as possible religious objections under Title VII. If an employee requests an accommodation, the employer must determine whether the accommodation is a reasonable one and whether it imposes an undue burden.

Because the timeline for vaccines to become readily available remains unclear, we expect that firmer guidance on vaccination programs will be forthcoming soon, which may include details relating to liability protections available to employers that offer or require vaccines. Because we can expect that employers may face accommodation requests or pushback about safety concerns, employers should begin planning now. At a minimum, employers should begin identifying legal standards, job duties or responsibilities that might require a mandatory vaccination requirement. Also, based on the number of exceptions that may come into play, unless employees are legally required to have been vaccinated, in many cases it may be preferable to simply encourage all employees to be vaccinated and to facilitate employee vaccinations. We will continue to monitor these issues and provide updated information, when available.