

Can I Require My Employees to Get the COVID-19 Vaccine?

Labor & Employment Law Update

By Suzannah Wilson Overholt on November 12, 2020

With the prospect of an FDA approved COVID-19 vaccine on the horizon, employers are already wondering whether they will be able to require their employees to get the vaccine. Because the pandemic has caused changes in other workplace rules, the answer to this question is not clear.

The Americans with Disabilities Act (ADA) generally prohibits employers from mandating that employees receive any vaccinations unless they are job-related, consistent with business necessity, and no more intrusive than necessary. This is ordinarily a difficult standard to meet unless the employer is part of the health care field. However, due to the current circumstances of the COVID-19 pandemic and the fact that an individual with COVID-19 is considered to pose a direct threat to the health of others, the EEOC may allow mandatory COVID-19 vaccines in workplaces beyond health care. This conclusion is supported by the fact that the EEOC has already allowed employers to screen employees for COVID-19 on this same basis.

While employers may be *permitted* or able to require employees to get the vaccine, employers should carefully consider the potential legal and employee morale implications and complications. A Gallup poll recently showed just half of Americans would be willing to get a COVID-19 vaccine that the FDA approved, which is less than were willing to do so this past summer. These poll results indicate that a large number of employees will likely be reluctant to get the vaccine – at least initially. Therefore, enforcing a vaccine mandate, i.e. telling workers they have to have the vaccine or be fired, could be difficult if a large number of employees refuse to comply.

If the EEOC authorizes mandatory COVID-19 vaccines anywhere in the workplace, employers should likely assume that the same restrictions that apply to mandatory vaccines in the health care field now will apply to all workplaces. Currently, the EEOC requires health care employers to consider exemptions for employees who cannot receive vaccines for reasons related to disability, pregnancy, or religion. Employers analyze each request for exemption on a case-by-case basis, including reviewing the employee's job position as well as the employee's particular religious belief or medical documentation corroborating the disability at issue. For more about these exemptions and the analysis that

goes with them, see our previous blog on this topic, “Navigating the Legal Risks of a Mandatory Vaccine Program.”

As long as there continues to be widespread concern about the safety of a COVID-19 vaccine and no specific authorization from the EEOC to allow employers to mandate that employees have the vaccine, employers would be wise to continue to require masking, proper hygiene and social distancing. Employers may also stress the importance of getting a flu shot and encourage employees to get one by subsidizing the cost, allowing paid time off to get one, or offering flu shots at the workplace to reduce any inconvenience.

We will continue to monitor and report on guidance from the CDC, EEOC and other federal agencies for developments regarding the COVID-19 vaccine.

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