Navigating the Legal Risks of a Mandatory Vaccine Program for Employees

Labor & Employment Law Update

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Flu season is here and that likely means employers can hear sneezing and sniffling up and down the hallways at work. Sick employees are less productive and their absences can disrupt an employer's operations. Worse still, sick employees may come into work and spread an illness to coworkers, exacerbating the problem. According to the U.S. Center for Disease Control (CDC), recent studies show that flu vaccinations reduce the risk of flu by between 40 and 60 percent. Given this, employers may wish they could mandate that all employees receive a flu vaccination. But can they?

For those employers outside the health care field, the answer is probably not. The Americans with Disabilities Act (ADA) allows employers to submit their employees to certain health screenings and inquiries depending on what point in the stage of employment the screening or inquiry takes place. Per the federal regulations supplementing the ADA, employers are generally prohibited from asking any disability-related questions or requesting any medical exams before a conditional offer of employment is extended to the applicant. Once an offer of employment is made, an employer may require a medical examination if the same examination is used for all entering employees in that job category. If an employer uses certain criteria from these examinations to screen out employees, those criteria must be job-related and consistent with business necessity.

As for current employees, the ADA generally prohibits employers from mandating that employees receive any medical testing or vaccinations unless they are job-related, consistent with business necessity, and no more intrusive than necessary. This is a very difficult standard to meet unless the employer is part of the health care field or otherwise requires employees to regularly interact with immune-compromised clients, patients, or customers.

But there are several practices that employers can take to encourage employees to receive vaccines short of job-contingent mandates. Employees are more likely to get vaccinated if it is easy and affordable to do so. Employers may want to subsidize the cost of vaccines, allow paid time off to go get vaccines, or offer vaccines at the workplace to reduce any inconvenience.

As for employers in the health care field, courts have repeatedly upheld an employer's right to require that employees receive vaccinations if they work directly with patients – such as a nurse, doctor, or patient care assistant – or if they handle materials that could spread infection – such as a lab technician. The CDC recommends that these health care workers receive vaccinations for hepatitis B, flu, measles, mumps, rubella, chickenpox, tetanus, diphtheria, pertussis, and meningococcal diseases.

Mandating vaccines, even in the health care field, is not without legal risks of which employers should be aware. The U.S. Equal Employment Opportunity Commission takes the position that health care employers must consider exemptions for those employees who cannot receive vaccines for reasons related to disability, pregnancy, or religion. Employers should analyze each request for exemption on a case-by-case basis, including review of the employee's job position, as well as the employee's particular religious belief or medical documentation corroborating the disability at issue.

For employees who object to vaccines based on religious grounds, employers should first determine if the employee sincerely holds the religious belief. Courts do not overly scrutinize this question. While the belief cannot be social, political, or personal to qualify as a sincerely-held religious belief, courts cast a fairly wide net as to what religious-based beliefs will provide protection under Title VII. The religious belief may be newly adopted, inconsistently observed, not part of a formal church or sect's religious practice, or different from the commonly followed tenants of the individual's religion. As an example of the broad interpretation of sincerely-held religious beliefs, courts have determined that veganism may constitute a religion where an employee protests receiving a vaccine containing animal products, such as eggs.

For employees who seek an exemption from mandatory vaccines based on their disabilities, the employer may ask for medical documentation corroborating the disability. Some examples of disabilities that may preclude employees from receiving certain vaccinations include life-threatening allergies, diseases that compromise the employee's immune system, or – in the case of a recent Third Circuit Court of Appeals case – a severe and well-documented anxiety associated with the side effects of receiving vaccines.

Once an employer determines that an employee is objecting to a mandatory vaccine based on a sincerely-held religious belief or documented disability, the employer must determine whether allowing the employee an exemption from the vaccine creates an undue burden on the organization. For exemptions based on disabilities, the employer may also similarly consider if the exemption would create a direct threat to the employee, his or her coworkers, or the organization's patients. This inquiry is often directly related to the employee's position. While it may be feasible to exempt a hospital billing clerk from mandatory vaccines, the same is likely not true for a pediatric nurse working with young patients who are particularly vulnerable in the NICU.

The employer should also consider if there are alternatives that could sufficiently protect the employee and patients short of requiring the vaccine, whether it be requiring the employee to wear a mask or transferring the employee to a position with less patient contact. If the employer determines that exempting the employee will create an undue burden, it can require the vaccine as a condition of further employment, but this decision should be documented with a clear explanation as to why the vaccine is job-related, no more intrusive than necessary and consistent with business necessity. The employer must also monitor and ensure that it conducts the exemption consideration and decision process consistently for all employees.

The key to handling requests for exemptions is to ensure that the consideration focuses on the specific concerns of the particular employee and encompasses an open and back-and-forth dialogue with the employee. Sometimes learning more about the employee's specific concerns will lead to a solution. For example, an employee objecting to a vaccine on religious grounds because the vaccine contains animal cells may be willing to accept an alternative version of the vaccination that does not contain the offending material.