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ALERTS

Employer Guidance Regarding Mandatory Vaccinations

August 30, 2021

Highlights

More employers either have or are considering mandating employee vaccinations for COVID-19

Employers must reasonably accommodate employees with disabilities or sincerely held religious beliefs that may limit their ability to receive a vaccine

When determining what to do regarding vaccination policies, employers should consider state laws and state executive orders

On Aug. 23, 2021, the Federal Drug Administration (FDA) granted full authorization to Pfizer's COVID-19 vaccine, now branded as Comirnaty, and it is expected that the Moderna and Johnson & Johnson vaccines will receive full authorization as well. This approval could help employers address one objection that some employees have raised about vaccine mandates.

President Biden followed up the FDA's announcement by requesting that employers begin mandating COVID-19 vaccinations for their employee populations.

Other federal agencies have weighed in on mandatory vaccine policies.

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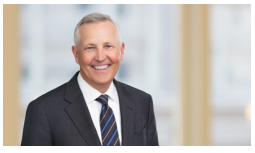

On Aug. 13, OSHA also issued non-binding guidance recommending that employers consider adopting mandatory COVID-19 vaccination policies. Although non-binding, this language underscores OSHA's support for properly drafted vaccination mandates, given the current pandemic situation.

Even before the FDA took this step, a number of large employers, including the Walt Disney Co., and Facebook, all announced either mandatory vaccination policies or that they are requiring employees to be vaccinated in order to return to their offices.

The Employer Guidance addresses the labor and employment considerations for employer mandatory vaccination policies, and is generally focused on non-healthcare employers given that some state and local jurisdictions have already mandated vaccines in the healthcare industry. Additionally, President Biden announced that nursing homes will be required to vaccinate their staff or risk losing Medicaid and Medicare funding in the near future.

Legal Considerations

At present, there is no federal employment law prohibiting private or public sector employers from implementing a policy requiring employees to receive a COVID-19 vaccination.

Title VII Considerations

Title VII prohibits discrimination based on religion and employers are required to reasonably accommodate employees that refuse vaccinations (not just a COVID-19 vaccination) due to sincerely held religious beliefs. The courts have also held, however, that employers are not required to accommodate personal lifestyle choices or preferences. Determining whether an objection to the COVID-19 vaccine is based on a sincerely held religious belief requires some caution and sensitivity. While employers are generally permitted to assess whether an employee has a sincerely held religious belief that requires accommodation, and what accommodation is needed, prior to the COVID-19 pandemic, the Equal Employment Opportunity Commission (EEOC) had recommended that employers assume a request for religious accommodation was legitimate.

Whether that position changes, given the pandemic, remains to be seen. In addition, it should be noted that the standard for reasonably accommodating an employee under Title VII is different than reasonably accommodating an employee with a disability under the Americans with Disabilities Act (ADA). Under Title VII, an employer is not required to reasonably accommodate an employee's sincerely held religious belief if it would impose more than a "de minimis" cost or burden on the business.

Americans with Disabilities Act (ADA)

Under guidance from the EEOC, asking employees whether they have been vaccinated or requiring proof of vaccination, is not a medical examination under the ADA (though vaccination status is considered confidential medical information). The ADA does not otherwise prohibit an

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employer from implementing a policy requiring employees to get vaccinated. However, the ADA does require that an employer reasonably accommodate an employee with a disability that prevents them from receiving a vaccination. The employer will need to work with the employee to determine the appropriate accommodation.

State Laws

Certain states have taken steps potentially limiting mandatory vaccination policies. Montana was the first state to prohibit discrimination by private employers based on an employee's vaccination status. Others have prohibited state and local government employers from implementing vaccine mandates. Finally, some states, either by legislation or executive order, have intended to ban or limit use of so-called "vaccine passports" establishing proof of vaccination status. Many of these limitations do not apply to private sector employers. Those that do may not survive judicial challenge, as demonstrated by a district court recently entering an injunction prohibiting Florida from enforcing its ban on "vaccine passports" against Norwegian Cruise Lines. Therefore, employers must evaluate state and local restrictions and work with counsel concerning the same in developing their vaccination program.

Most state anti-discrimination statutes governing religious and disability discrimination have been interpreted in a manner consistent with Title VII and the ADA. However, court or state agency decisions under these state anti-discrimination laws should also be reviewed.

NLRA and Bargaining-Related Considerations

There is some uncertainty under the National Labor Relations Act (NLRA), given that its previous general counsel had issued non-binding guidance that employers might unilaterally implement changes in terms and conditions of employment in response to an emergency related to the COVID-19 pandemic. The NLRB has previously ruled mandatory vaccination or infection control policies that result in changes to employees' terms and conditions of employment are a mandatory subject of bargaining. Therefore, absent a specific grant of authority under a collective bargaining agreement or a union waiver of the right to bargain, a unionized employer should consider giving its union notice and an opportunity to bargain over a mandatory vaccination program. If bargaining is required, the decision cannot be implemented until either an agreement or impasse is reached.

Moreover, even if the employer has the contractual right to implement a mandatory vaccination program (or the union has waived its right to bargain over that decision), bargaining may still be required over the effects of that decision, such as a deadline for employee vaccines or the disciplinary consequences for those who refuse.

As a practical matter, collaborating with the employees' bargaining representative concerning such a program or policy may be necessary to "sell" the policy to employees, given that some, but not all, unions have come out in favor of vaccination mandates. Unionized employers should consider reviewing their applicable collective bargaining agreements to confirm their ability to unilaterally implement such a mandate, or discuss the issue with the employees' collective bargaining representative.

Non-union employers must also consider that the NLRA protects employees' rights to engage in protected concerted activity regardless of whether a union is present. In the vaccination context, this might include a group protest or walkout over a mandatory vaccination program. Generally speaking, under the NLRA, it is unlawful to discipline or discharge employees engaged in protected concerted activity. Therefore, employers should consider consulting labor counsel in the event of concerted employee activity protesting a mandatory vaccination policy.

Wage and Hour Considerations

The COVID-19 vaccine is currently being provided to the public free of charge. However, an employer may be required to compensate an employee for time spent obtaining a vaccination, such as those employers covered by the new OSHA COVID-19 Emergency Temporary Standard governing the health care industry. The issue of whether time spent getting vaccinated is compensable is a fact-intensive inquiry that may also require an analysis of state wage-hour laws, in addition to federal laws.

Additional Considerations

Many employers have hesitated implementing mandatory vaccination policies. Instead, employers have relied upon educating their employees on the well-established data supporting the safety and effectiveness of the vaccines and are encouraging and/or incentivizing employees to get vaccinated. Given the high levels of misinformation concerning the vaccines, as well as a rise in vaccine hesitancy and/or active resistance to the COVID-19 vaccines, employers must carefully consider the potential impact of such a policy, particularly given the current challenges some employers are having in obtaining adequate staffing.

As an example, it was reported that when Houston Methodist implemented its mandatory vaccination program for its healthcare workers – a program upheld by a federal district court – over 150 employees resigned or were terminated. Consideration should also be given to the various stakeholders – employees, vendors, customers, and of course, the employer's operations.

Checklist for Creating Mandatory Vaccine Policy

In deciding whether to adopt a mandatory vaccine program, an employer might consider the following issues, in addition to reviewing the legal considerations with counsel:

- Why is the policy being implemented? Will it improve or hurt operations? Will it provide for a safer workplace? Should it be implemented across the board, or only at certain work locations or within certain classifications of employees? If so, what is the justification for differentiating between work locations, or groups of employees?
- What is the current vaccination status of your employee population? Has a voluntary program been effective, and how have employees reacted to your efforts to educate and encourage vaccination? Have you attempted to incentive your workforce to get vaccinated prior to moving to a

mandatory vaccination policy?

- What is the likely reception by employees, customers, visitors, vendors and the public? How will you address potential objections to the policy among any of these stakeholders?

- What is your understanding of federal, state and local legal restrictions (or requirements) that impact your implementations of a mandatory vaccination policy? It's important that employers stay up to date, as state and local government policies and reactions, in particular, have been rapidly evolving, and this will only continue given the continued spread of COVID-19 variants, as well as the politicization of the COVID-19 vaccines and vaccine mandates.

- Develop a written policy. Such a policy should be reviewed by in-house or external counsel, as well as human resources and communications professionals. The policy must be clear so that it is understood by all employees, and detail the requirements of the policy, the consequences for not complying, and the process for requesting accommodations/exceptions to the policy. In advance of implementation, employers should also have a well-defined decision tree for assessing requested accommodations.

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