

COVID-19/CORONAVIRUS – EMPLOYER CONCERNS AND QUESTIONS DECEMBER 17, 2020 UPDATE

CAN AN EMPLOYER REQUIRE COVID-19 VACCINATIONS? SHOULD YOU?

In yet another example of the fluid nature of things related to COVID-19, on December 16, 2020, the EEOC updated its extensive technical assistance regarding COVID-19 and the ADA and other equal employment opportunity (EEO) laws. The full guidance can be found here, and it provides a variety of good information as it has been updated throughout the year:

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

The latest update provides specific information regarding vaccinations in Section K. Employers considering whether to require or encourage vaccinations when they become available should review it carefully. As it appropriately notes, and as we continue to advise, remember that all EEO laws at the federal, state, and local level need to be kept in mind and met even under the new fact situations employers have faced and will continue to face.

Many are appropriately grateful and hopeful with the news of different COVID-19 vaccinations being distributed. But as with much in life, patience is both a virtue and, in this area, a necessity.

Because of the complexities of the different laws, the unique fact situations applicable to different employers and employees, and the ever-changing nature of all things related to COVID-19, we encourage you to continually reassess and review the most recent legal and public health updates as you make any employment decisions.

Can you require vaccinations?

Once *full* FDA approval of a COVID-19 vaccine occurs, many employers likely will be able to mandate that employees get vaccinated if it is job-related and a business necessity. Any such requirement must provide for exceptions, the two main examples being accommodating disabilities or sincerely held religious beliefs. Notably, secular or medical beliefs about vaccines are NOT something an employer needs to accommodate.

Currently, vaccinations are being distributed under an Emergency Use Authorization (EUA) from the Food and Drug Administration (FDA). Given that the FDA's current authorization requires recipients of the vaccine to have the option to accept or refuse the vaccine (because of the uncertainty of all the benefits and risks as continued study occurs), employers cannot yet mandate vaccinations.

Full FDA approval of one or more different COVID-19 vaccinations is expected to occur at some point. When that does happen, employers likely could choose to require that employees get a vaccine.

If an employer chooses to require vaccinations, it must be prepared to receive and address requests for exemptions from the requirement. This Update cannot answer every question concerning possible accommodation exceptions to any vaccination mandate. But in evaluating whether to require vaccinations, and in implementing such a requirement, employers still remain obligated to address accommodation requests made for those asserting they have a disability or a sincerely held religious belief.

As with any disability claim and accommodation request, an employer will need to follow its obligations to engage in the interactive process and evaluate the specific accommodation request on a case-by-case basis, keeping in mind that specific facts in each case will need to be evaluated. As many employers already know, the interactive process and meeting your obligations under the ADA is not a quick or simple process. Each situation will have to be evaluated to consider whether providing a requested accommodation of being exempt from getting vaccinated creates an "undue burden" on the employer, or if the accommodation poses a "direct threat" to the health and safety of others.

Another likely source of potential accommodation requests seeking an exemption from a mandatory vaccination policy will be employees who may claim a sincerely held religious exemption. While it is somewhat lesser known, Title VII of the 1964 Civil Rights Act grants protections to employees relating to sincerely held religious beliefs and practices. Such requests are less frequently sought or required, but past litigation and disputes regarding other vaccines (such as healthcare providers requiring flu vaccinations) have shown that some employees might seek such an exemption.

Fortunately, most courts concluded that non-religious objections to vaccinations, such as concern that too much is unknown or a general ambivalence as to safety, is not sufficient to qualify for protection as a religious exemption. Even where a sincerely held religious exemption might exist, an employer need not accommodate such a request if doing so would impose an "undue hardship" on the employer. As with disability accommodation requests, each fact situation is often unique and requires evaluation. Of benefit to employers, establishing an "undue hardship" is easier than establishing that a particular accommodation is an "undue burden" in the disability arena. Given the dangers from the spread of COVID-19, it is likely that employers will be able to show that the increased risk of transmitting the disease by not being vaccinated will pose an "undue hardship." Meaning that any religious objections to requiring a vaccination will likely not succeed.

Should you require vaccinations?

Whether it is legal to require a vaccine (when one can do so and subject to potential exceptions) is one thing. Whether to do so is another. In assessing whether to require vaccinations, we recommend employers keep in mind and evaluate other questions and issues, including the following:

- **Employee Morale** – A mandatory vaccination policy will likely impact employee retention, recruitment, and morale. As some employers and organizations have seen with other requirements such as masks, there is a risk that some employees will refuse and potentially quit if they are required to get a vaccine. Each employer will need to assess its particular staffing and replacement needs and include these considerations as it balances and decides whether mandating vaccinations is worthwhile when accounting for the practical effect of implementing such a mandate in its particular work environment.
- **Enforcement** – If a mandatory vaccination policy is enacted, how will it be enforced? As discussed above, a refusal to be vaccinated does not automatically mean an employer can or should terminate the employee. There may be other options required or available beyond moving right to termination. Each employer’s needs and work environment will differ, but each employer needs to think through its “or else” options if an employee refuses the required vaccination.
- **Union Employees** – If your organization is a party to a collective bargaining agreement, you’ll need to closely review and assess that agreement and your obligations under it as you consider whether to enact or how you’ll be able to enforce and implement a vaccination policy.
- **Limited Application of the Mandate** – In evaluating whether to mandate a vaccination, you should consider whether it should be limited to higher-risk situations or categories of employees depending on their specific work requirements and risks. As a practical matter, the availability of a vaccine will create challenges as to when you can mandate it and who you might mandate get a vaccine.
- **Adverse Reactions to the Vaccine** – Another concern to keep in mind is your obligation under workers compensation laws if you mandate a vaccine and an employee has an adverse reaction to the vaccine. While likely few employees will have an adverse reaction, you’ll need to assess what your workers’ compensation obligations might be in such a situation, and evaluate what leave, paid or unpaid, might be appropriate for those who have an adverse reaction.
- **Potential risks for pregnant employees, those breastfeeding, and those trying to conceive** – Because of the rapid development and on-going approval of COVID-19 vaccinations, employers should consider the potential risks that employees who are pregnant, breastfeeding, or trying to conceive might raise or

have. Those concerns may lessen somewhat as the FDA moves toward full approval of vaccines, but concerns among these employees have been, and likely will continue to be, raised.

Our employment team is ready to assist you with any questions you may have about an employer's obligation arising under the FFCRA, ADA, FMLA, or other laws. Please remember that COVID-19's impact on your obligations as an employer and your relationship with your employees does not alter existing obligations under other laws.

GENERAL REMINDERS

The COVID-19/Coronavirus pandemic is fluid. Guidance is changing often as developments occur. We strongly recommend monitoring of credible information sources such as the:

Centers for Disease Control

<https://www.cdc.gov/coronavirus/2019-ncov/index.html>

Minnesota Department of Health

<https://www.health.state.mn.us/diseases/coronavirus/index.html>

OTHER EMPLOYMENT GUIDANCE AND CONCERNS

For related guidance and questions about other employment topics related to COVID-19, please see Lind, Jensen, Sullivan, & Peterson's earlier updates and guidance:

<http://www.lindjensen.com/category/covid-19/>

WORKERS' COMPENSATION CONCERNS

For related guidance and questions about workers' compensation concerns related to COVID-19, please see Lind, Jensen, Sullivan & Peterson's separate guidance:

<http://www.lindjensen.com/covid-19-and-workers-compensation-in-minnesota/>

If you have any employment or other questions regarding the ongoing COVID-19 pandemic as it relates to your employees, please do not hesitate to contact our employment team at Lind, Jensen, Sullivan & Peterson by email or phone (612) 333-3637.

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