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Can an employer require COVID-19 vaccinations?

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Recent days have brought encouraging news about the development of COVID-19 vaccines. The prospect of vaccines being available in early 2021 has caused employers to begin considering whether they will require employees to obtain a COVID-19 vaccination as a condition of employment. Your employees may have very strong feelings on the subject of vaccinations. Some people may choose not to take a COVID-19 vaccine, so an employer-mandated vaccination requirement will likely encounter significant pushback. For employers, reaching a decision on a vaccine policy triggers practical and legal considerations.

Mandatory vaccination policies

As a general rule, an employer has the right to set reasonable health and safety policies for its workplace. This may include requiring employees to be vaccinated for the coronavirus. A mandatory vaccination policy can be particularly appropriate for healthcare employees, workers in nursing or assisted living facilities, or businesses whose employees have extensive face-to-face contact with the public, such as those in the retail and hospitality industries.

As the pandemic worsens, we may see COVID-19 requirements instituted by regulation or law for targeted industries, such as meat-packing facilities or food service. Notably, the Equal Employment Opportunity Commission has recognized the ability of companies during the pandemic to be more proactive regarding medical inquiries and testing in the workplace. However, when an employer requires its workforce to be vaccinated, the Americans with Disabilities Act (ADA) and Title VII's religious discrimination protections come into play.

An employer who adopts a COVID-19 vaccination requirement should anticipate some workers asking for an exception based on their medical conditions. For example, COVID-19 vaccines may pose adverse health effects for some people. A request for such an exception should be treated like any other request for accommodation under the ADA. As a starting point, the employer

should ask the employee to provide satisfactory medical confirmation that they have a medical condition that prevents them from taking a COVID-19 vaccine. If the employer receives medical confirmation, then it should engage in the interactive accommodation process required by the ADA. In a moment, we will discuss in greater detail what that process looks like in the context of COVID-19 vaccination requirements.

Other employees may ask for an exception to a vaccine requirement based on their religious beliefs. Title VII's religious protection requires employers to accommodate an employee's "sincerely held religious beliefs." This does not extend to philosophical or political beliefs, so an employer may inquire into the basis for an employee's opposition to a vaccination policy. For employees who request an exception based on their religious beliefs, the employer should engage in an interactive religious accommodation process required by Title VII.

The interactive accommodation process

Whether the request for an exception to an employer's mandatory COVID-19 vaccination policy arises from a medical concern or religious beliefs, deciding whether to approve an exception should be made on an individualized, employee-by-employee basis. "Interactive" means a two-way discussion with the employee to consider whether their request is reasonable, does not cause an undue hardship, and does not pose a direct threat to others. The employee is required to actively participate in good faith with this discussion.

Employers should first determine whether any law or regulation requires that employee to be vaccinated by virtue of the company's industry and/or their responsibilities. Ask the employee – and their healthcare provider – for suggestions on how the employer can accommodate their request and protect co-workers' and others' health. An employer is not required to always adopt the accommodation suggested by an employee. Discuss and consider whether you can accommodate an employee's refusal to be vaccinated against the COVID-19 virus for medical or religious reasons while maintaining the health of your workplace through other measures, such as:

- Using alternative vaccine formulas
- Increasing use of personal protective equipment, enforcement of social distancing requirements, and enhanced workplace hygiene protocols
- Having the employee work at a location that is more isolated from co-workers
- Reassigning the employee to a job requiring less interaction with the public and others
- Working remotely

- Providing a temporary leave of absence

Final thoughts

The decision to adopt a mandatory vaccination policy can be controversial and difficult. I wouldn't be surprised to see regulations or guidances from the federal government in the near future that specifically address how and when employers may adopt such a requirement. If an employer decides not to require vaccination, it may nonetheless educate its employees about the value of the vaccine and encourage vaccination. Likewise, an employer is free to facilitate the vaccination process for members of its workforce and their families.

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