

Can employers make it mandatory for workers to get a COVID-19 vaccine?

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December 4, 2020 12:19 pm

The wait for coronavirus vaccines is slowly coming to an end, with both Pfizer and Moderna announcing in recent weeks that their vaccines could soon be ready for distribution in the United States.

The FDA is set to meet to discuss Pfizer's emergency use authorization request on December 10. Moderna's vaccine is scheduled to be reviewed the following week, reports The Hill.

But once the vaccines are approved for use, could employers make it mandatory for their staff to get vaccinated against the novel virus?

The Washington Post reports that labor lawyers have noticed an uptick in questions from their clients about the legal and practical issues associated with mandating vaccinations for a workforce returning to the office after months of remote work.

Brett Coburn, a labor and employment partner at Alston & Bird, said, "You're going to have a lot more people who are lacking comfort about safety," pointing to the accelerated development timeline of the COVID-19 vaccines. "Add on top of that the political issues that have unfortunately taken over. If someone's not willing to wear a mask, do you think they're going to put a shot in their body?"

The U.S. Equal Employment Opportunity Commission (EEOC) and the Centers for Disease Control and Prevention (CDC) have yet to issue specific guidance for employers. In a statement, EEOC spokeswoman Christine Nazer said that the agency “is actively evaluating how a potential vaccine would interact with employers’ obligations under the Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, and the other laws the Commission enforces.”

Though some employees are already required to get vaccinated for certain illnesses, like healthcare workers getting a yearly flu shot as part of their employment, the COVID-19 vaccines will, at first, most likely become available under an emergency use authorization and not a full FDA licensure. Sharon Perley Masling, a partner at Morgan Lewis, said “to the best of my knowledge, the issue of whether an employer can require a vaccine that is still under an emergency use authorization hasn’t arose before.”

Employment lawyers believe that once the coronavirus vaccines are fully approved by the federal government, employers will be able to approach COVID-19 vaccinations in a similar fashion to flu inoculations.

In order to mandate COVID-19 vaccinations for their staff, under the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964, employers would need to provide reasonable accommodations for people with qualified disabilities or religious objections to the vaccine.

Some large companies are already preparing to not only encourage COVID-19 vaccines for their employees, but are working to facilitate the vaccination process. Ford announced that it will make the vaccine available to employees on a voluntary basis and has ordered a dozen specialty freezers capable of storing Pfizer’s coronavirus vaccine, which requires ultralow temperatures.

Others are planning to offer incentives to their employees to encourage them to get vaccinated, from wellness programs that will offer rewards for vaccinated employees to discounts on health insurance premiums. “Most large wellness programs have those mechanisms already in place, so you’re really just piggybacking and adding a COVID vaccine to that list,” said employment lawyer David Barron.

A global survey conducted by the O’Neill Institute for National and Global Health Law at Georgetown Law school found that, if recommended by their employer, 61.4 percent of employees would likely get a COVID-19 vaccine.

A CDC panel issued recommendations this week that healthcare workers and nursing home staff and residents should be at the front of the line when the first coronavirus vaccines become available.

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