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Employer COVID-19 Vaccination Policies

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Attorney Q&A with Charlie Plumb

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.

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In this LINC Q&A video, McAfee & Taft labor and employment lawyer **Charlie Plumb** discusses the practical and legal considerations for employers as they contemplate vaccine policies for their workplaces.

Transcript

Q: Can employers require employees to obtain a COVID-19 vaccination as a condition of employment?

A: Well, the short answer is yes and there are a number of things that are coming into play right now that are causing employers to consider whether to have that sort of requirement applied to their workplace. Number one, we're seeing a significant spike in infections and hospitalization. So more and more of our employees and their family members are at risk. And number two, we are hearing a lot of the good news about development of effective vaccines. And in fact, they may be available in early 2021 to our workforce. So, those two things are coming into play. Keep in mind that generally an employer has the right and ability to apply and enforce policies and procedures relating to maintaining their workplace in a safe manner. And that includes the right to require in reasonable ways, vaccination of its workforce, as a condition of employment. And another couple of things that have happened recently in the context of this pandemic that I think also communicates to employers their ability to have a vaccination requirement for their workforce. So there are two things. Number one, the EEOC explicitly recognizing that the COVID-19 pandemic constitutes under the Americans with Disabilities Act, a direct threat standard, it meets that standard. And number two, in a number of its guidances, the EEOC recognizing and advising employers they can be more proactive when it comes to making medical inquiries of its workforce and in fact testing employees. So I think the answer to that question is generally, yes, we will have the right as employers to have reasonable vaccination requirements of our workforce.

Q: Are there any businesses or industries that should seriously consider implementing a vaccination mandate?

A: I wouldn't be surprised if in the future, federal or state laws may require specific industries or businesses to have a COVID-19 vaccination requirement for its employees. Things like healthcare workers, people who work in nursing facilities or assisted living facilities, meat packing, food processing. We shouldn't be shocked if some laws or regulations are issued in the near future making vaccination a requirement. So that's one thing we're gonna want to keep our eyes on. I think otherwise, employers who are wrestling around with this issue of whether or not to require vaccination should look at what sort of services, what sort of interaction their workforce has with the public. I think if you're an employer that has a lot of interaction with the public, like retail, hospitality industry, you know, you're more likely to have some risks and may want to consider it more than others. than employers that work in that kind of a confined or a bubble like environment. I also think as time goes by and we're dealing with perhaps increased infection rates and increased hospitalization, if you're seeing as an employer a spike in your own infection rates and your workforce, or their family members, that may trigger this consideration of whether or not to require vaccination.

Q: Do employees have the right to request an exception to a vaccination mandate?

A: Well, those employers who decide to require vaccination of employees as a condition of employment, you're going to need to expect some pushback, some opposition because we're already seeing in social media and otherwise that a lot of people are going to resist your requirement to take the vaccine. So first of all, expect to get that kind of a reaction if and when you decide to require vaccinations of your workforce. Now let's talk about the legal aspect. Under the Americans With Disabilities Act, an employee with a medical condition that perhaps could be impaired or put them at risk for the vaccine, they have the right to ask for an exception the vaccination required. Another issue that you may run into if you require your employees to be vaccinated is title seven and the protection against religious discrimination. So you may also see people or have employees who say they want to have an exception. They don't want to have to get vaccinated based on their sincerely held religious beliefs. Something to really focus on, title seven only protects sincerely held religious beliefs. It does not apply to philosophical or perhaps political opposition to vaccination.

Q: If an exception is requested for medical or religious reasons, what obligations does an employer have to accommodate that request?

A: Well like any other requests for accommodation under either the Americans with Disabilities Act for a medical condition, or title seven for a religious accommodation request, you as an employer have to engage in the interactive process, which is really a two way discussion between you and the employee who's asking for an exception from your vaccination requirement. And they have to cooperate in that, that's not elective. They have to discuss this with you and work through this with you. You know, as a starting point under the ADA, if an employee is requesting an exception from the vaccination requirement because of a medical condition, you as the employer are absolutely entitled to obtaining satisfactory medical confirmation from that employee that in fact the vaccination does pose some health risks to that employee. Likewise, if you have an employee who is asking for an exception from your vaccination requirement based on religious beliefs, you're entitled to inquire really to satisfy yourself that it is a sincerely held religious belief, and it's not simply a philosophical or political stance or take.

Q: If an exception is granted, what can employers do to protect the overall health and safety of the workplace?

A: If you determine that an employee who has asked for an exception from your vaccination requirement, you've determined they have a bonafide medical reason or religious reason to grant that exception. There are some other steps you should consider to, again, protect that not only that employee who's asked for the exception, but the rest of your workforce, their family members and perhaps others. Consider perhaps, you know, upping or increasing your use and availability of personal protective equipment, making more robust and enforcing more your social distancing requirements and any sort of hygiene protocol you have in place at work. You should also consider perhaps assigning that person maybe to, who's not going to get the vaccine, to a physical location where they're more separated or isolated from coworkers or the public. That could include maybe changing their hours at work to accomplish the same thing. Some other key considerations would be to change their job assignment, put them in a role that where they'll have less interaction with employee, coworkers, or the public, or consider perhaps allowing them to work remotely if they're not going to get a vaccine, if that's feasible and reasonable. And finally, you know, if none of these options are available, consider whether giving them a temporary leave of absence is an option. All those things, that once you find someone who has asked for an exception, due to medical reasons or religious reasons from your vaccination requirement, if you're considering granting that exception, those are some other considerations to take into account to protect not just that employee, but your coworkers and others.

Q: If an employer requires its employees to be vaccinated, are they obligated to facilitate and pay for the shots to be administered?

A: Well, as we're making this recording, we're in the process of seeing some of the vaccines going through the approval process. Once vaccines are approved, employers are required to pay for the cost of that vaccination of their employees with no cost sharing at all. In other words, the employer will bear the cost of that. And that's to facilitate and encourage widespread vaccination as we battle through this pandemic.

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LINC Q&A

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Featured



Charles S. Plumb

(918) 574-3003

charlie.plumb@mcafeetaft.com

Featured Practice

Labor and Employment

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