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The COVID-19 Vaccine Is Coming: Can Employers Require Employees to Get Vaccinated?

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With FDA approval of a COVID-19 vaccine possibly coming this week, employers are wondering whether they can require their employees to get vaccinated as a condition of employment. For many employers, the answer is yes, subject to a few exceptions.

As a general matter, employers are free to set the terms and conditions of employment, including requiring employees to be vaccinated against contagious illnesses. However, employers cannot require employees who qualify for medical or religious exemptions to get vaccinated as a condition of employment. The Americans with Disabilities Act requires employers to make reasonable accommodations to employees with disabilities. If an employee claims to have a disability that prevents vaccination, the employer typically should engage in the interactive process to determine whether a reasonable accommodation is possible or there is an undue hardship. In addition, employers should be aware that the Occupational Safety and Health Administration has stated with respect to other vaccines that “an employee who refuses vaccination because of a reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death (such as serious reaction to the vaccine) may be protected under Section 11(c) of the Occupational Safety and Health Act of 1970 pertaining to whistle blower rights.” Put simply, if an employee objects to vaccination due to a medical condition or disability, the employer should address that objection individually with the employee.

In addition, Title VII of the Civil Rights Act requires that employers accommodate their employees’ religious beliefs, including beliefs about vaccines. The “religious belief”—defined to include non-religious beliefs about morality and ethics—must be sincerely held but is unlikely to include mere personal objections to vaccines. If an employer has reason to doubt the employee’s belief, it is advisable to consult counsel. The EEOC encourages employers to give employees the benefit of the doubt when a religious belief is asserted.

If an employee qualifies for a medical or religious exemption, the next step is to explore possible reasonable accommodations, such as continued use of face masks, remote working, or reassignment to a position with less customer or co-worker interaction.

Oregon Healthcare Employers

Somewhat counterintuitively, Oregon law prohibits healthcare employers and nursing homes from requiring that their employees get vaccinated. Due to a quirky, 30-year-old law, while these employers must make vaccinations available to their employees, they cannot make vaccinations a condition of employment, “unless such immunization is otherwise required by federal or state law, rule or regulation.” While we are not aware of any current federal vaccination requirements, it is possible that the arrival of a potential COVID-19 vaccine could shake things up.

What About COVID-19?

Despite the positive news of a pending COVID-19 vaccine, employers and employees alike may be hesitant to be vaccinated. For example, employees may be concerned about potential unknown interactions between the vaccine and certain medical conditions. In these situations, employers may consider allowing a “medical” exemption for employees who have safety concerns about the COVID-19 vaccine. As with any other medical exemption, the employer should engage in the interactive process to find other reasonable accommodations.

The bottom line is, employers (with the exception of healthcare providers in Oregon) have long been able to require vaccines as a condition of employment, so long as they make appropriate disability and religious accommodations. COVID-19 does not change this basic rule. It is possible that once a vaccine is available, the EEOC or OSHA will issue COVID-19 vaccine guidance, which may change this analysis.

Employers who are considering implementing a mandatory vaccination policy should consult with counsel. In addition, employers with unionized workforces should review their collective bargaining agreement, and evaluate whether vaccine requirements are a necessary subject for bargaining.

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