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The Coming Vaccines and the Coming Workplace Dilemmas with Mandatory Vaccinations

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On December 14, 2020, the first Americans began receiving the COVID-19 vaccine, and approximately 3 million doses will be distributed nationwide in the coming weeks. Most states, including Ohio, have designed a program for distribution of the vaccines in phases to different groups based on need and risk: hospitals; nursing homes; health care workers and first responders; and so forth. However, it is not yet known when the vaccines will be widely distributed and available for the general public, but it is not expected until at least early April 2021.

Yet even when available, not everyone is likely to be willing to get vaccinated. A recent Gallup Poll indicated that only 58% of Americans said they would get vaccinated against COVID. Another poll put that figure closer to 72%. Regardless, there appears to be a significant challenge ahead for achieving mass public compliance with vaccine recommendations. This raises the employer's dilemma – can employers require their employees get vaccinated, and even if they can, is it a good idea?

Disability and Religious Accommodations

It is fairly well-settled that employers can require that employees get vaccinated. Mandatory vaccinations in the workplace are not a new concept, particularly among **health care providers**. In practice, this means an employer could discipline or even terminate employees who refuse to get a vaccine, since their refusal will endanger customers and coworkers. However, vaccination requirements cannot override employers' obligation to provide reasonable accommodations for disabilities under the Americans with Disabilities Act (ADA) (and similar state laws) and for conflicts with sincerely held religious beliefs under Title VII.

Whether an employee who has a sensitivity to a vaccine is "disabled" for purposes of the ADA is currently unclear. There are court decisions that go both ways. Likewise, whether an employee has a "sincerely held religious belief" entitled to protection under Title VII is not always clear.

Personal, political, or ethical objections typically are not sufficient. So, for example, a personal anti-vaxxer belief usually will not be protected. But some jurisdictions interpret “religious belief” more broadly than others.

Because determining these threshold issues can be difficult, it makes sense for employers to assume the employee is “disabled” or does have a sincerely held religious belief that is in conflict with a mandatory vaccine, and focus instead on determining whether an accommodation is available. Under both the ADA and Title VII, the employer must consider the issues on an individualized basis, and provide a reasonable accommodation if one can be identified that does not result in an undue hardship. The standard for what is deemed an “undue hardship” is different for ADA issues than it is for religious accommodation issues under Title VII.

Under the ADA, an “undue hardship” presents a “significant difficulty or expense” for the employer. This is a high standard and can be difficult to establish. For religious accommodations, an undue hardship is one that results in more than a *de minimis* cost to the operation of the employer’s business. This is not a high bar, and can include consideration of harm to the employer, its employees, and third parties (such as patients or residents at health care facilities).

If an accommodation is required, solutions in some cases could be relatively easy: having the employee work from home, imposing enhanced mask requirements, creating barriers or separation from co-workers, and the like. But in other cases, a solution (accommodation) may be difficult or impossible. The Equal Employment Opportunity Commission (EEOC) acknowledges that mandatory vaccines are not *per se* unlawful. However, the EEOC currently still suggests that “employers should consider simply *encouraging* employees to get the vaccine rather than *requiring* them to take it.” The EEOC may issue additional guidance on this as the vaccine rolls out.

Wage and Hour Issues

Who pays for the mandatory vaccine? The costs of the initial rounds of the vaccine will be free, paid for by the federal government. A fee, however, will most likely be charged by a provider for “administering” the vaccine. The CARES Act requires that an employer’s non-grandfathered group health plan cover both the cost and administration of the vaccine at no charge to plan participants. Accordingly, to the extent that an employee participates in the employer’s group health plan, the employer’s group health plan will cover both the cost (if any) and the administration of the vaccine. For those employees who are not covered by the employer’s group health plan, an employer may not be legally obligated to pay for any associated costs, but it may make sense for an employer to do so. Federal wage-hour laws require employers to reimburse employees for business-related expenses incurred on the employer’s behalf to the extent failing to do so cuts into the employee’s minimum wage. Considerations of fairness would militate in favor of covering any associated costs, and this also will help ensure wage-hour compliance. Note that state or local laws may also impose obligations for employers to pay.

Is the time employees spend getting a required vaccine compensable time? There is no definitive guidance on this from the EEOC or U.S. Department of Labor yet. If mandatory vaccination is deemed the equivalent of a medical test, or if the employer requires that the test be obtained during normal working hours, then the time spent getting the vaccine probably is hours worked (and so compensable time). If instead, the employer allows the employee ample time and does not dictate how or when to obtain the

vaccine, the time may well not be deemed compensable hours worked. Of course, if an employer merely *encourages* voluntary vaccination, then time spent getting vaccinated is unlikely to be compensable time.

Employee Privacy

Another question might be what proof of the vaccination can an employer require? While there is no guidance yet from the EEOC on this question, it is likely permissible to request the employee to provide documentation from the source of the vaccination, showing the date of the test. The documentation should be retained as a confidential medical record, and an employee's status of being vaccinated or not should not be disclosed and should be treated as protected by privacy requirements.

Conclusion

Ultimately, the case for mandatory vaccines may depend on what type of work is at issue, so employers should determine whether a vaccine is job-related and consistent with business necessity. For example, an environment where employees work in a busy store or crowded office or with high-risk populations may be candidates for mandatory vaccines. If employees work mostly by themselves, a vaccine may not be as important to the workplace. Employers should also consider their workplace culture, potential employee backlash, labor relations, and any unionization concerns. Contact your Vorys lawyer to discuss mandatory vaccine considerations for your workplace.

Vorys COVID-19 Task Force

Vorys attorneys and professionals are counseling our clients in the myriad issues related to the coronavirus (COVID-19) outbreak. We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at vorys.com/coronavirus.