

Considerations for retail employers before mandating the COVID-19 vaccine

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As 2020 came to a close, efforts to develop an effective COVID-19 vaccine produced two candidates with FDA approval. An effective vaccine brings with it questions about whether retail employers can mandate that employees must take a COVID-19 vaccine.

In short, yes — retail employers can legally require employees to take a COVID-19 vaccine as a condition of employment, subject to exceptions for disabilities, religious beliefs and any other local or state laws.¹

An employer can mandate the vaccine for its employees, but the EEOC's guidance muddies the analysis, and any decision to do so should be based on a careful risk and reward analysis.

The Equal Employment Opportunity Commission (EEOC) has stated in guidance that while a vaccine is not a medical exam under the Americans with Disabilities Act (ADA), any pre-vaccination medical screening is a medical exam under the ADA.

Since no vaccines are likely to be administered without medical screening, the EEOC's distinction between the vaccine and the pre-vaccine questions makes no difference. Thus, as a practical matter, vaccination must meet the EEOC's criteria for medical exams, which is that they only can be mandated if they are job-related and consistent with business necessity.² Such criteria can be met if an individual poses a direct threat to the health or safety of others in the workplace.

The EEOC previously took the blanket position that "an individual with [COVID-19] will pose a direct threat to the health of others," but in the vaccine-specific guidance, the EEOC backs off this position and requires an individualized assessment to determine whether an employee poses a direct threat that cannot be eliminated or reduced by reasonable accommodation.³

The EEOC does provide a carve out, though, in that the employer does not need to conduct this analysis if it mandates the vaccine, but has the vaccine administered by a third party with whom it does not have a contract. In sum, an employer can mandate the vaccine for its employees, but the EEOC's guidance muddies the

analysis, and any decision to do so should be based on a careful risk and reward analysis.

ADVERSE REACTIONS

Vaccines can cause adverse reactions of varying degrees of severity. Such adverse reactions may be covered by workers' compensation insurance where retail employers encourage or require employees to take the vaccine to improve workplace safety.⁴

However, this outcome is not a certainty and employers should be aware that the risk of negligence claims is real if workers' compensation offers no remedy.⁵ Also, employees may raise negligence claims in a number of ways that would not be covered by workers' compensation. For example, an employee could claim that the employer over-encouraged vaccination that was not effective, picked the wrong vaccine or discouraged vaccination and the employers' actions caused harm.

DISCRIMINATION

Retail employers must ensure that a COVID-19 vaccine mandate does not lead to unlawful discrimination. For example, a vaccine mandate must include an opportunity for an employee with a disability that interferes with vaccination to be reasonably accommodated. Similarly, any employee with a sincerely held religious belief, practice or observance that prevents the employee from taking the COVID-19 vaccine must be given an opportunity to seek accommodation.⁶

As stated above, the ADA does not permit mandatory vaccination of an individual who has raised a disability-based objection to vaccination, absent an individualized assessment and determination that the individual poses a direct threat to the health of others *and further*, the individual cannot be excluded from the workplace (and the employer cannot take other adverse action against the individual) "unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce the risk so the unvaccinated employee does not pose a direct threat."⁷

Likewise, with respect to religion, employers must accommodate employees who refuse the COVID-19 vaccine because of sincerely held religious practices or beliefs.⁸ Accordingly, retail employers

who institute a COVID-19 vaccine mandate will be required to reasonably accommodate employees with objections based upon qualifying disabilities and religious practices or beliefs, unless such accommodation poses an undue hardship.

Further, while not entirely clear, employees who object to taking the COVID-19 vaccine on political grounds may have a plausible basis for raising discrimination or retaliation claims under the laws of some states.⁹

PUBLIC AND HUMAN RELATIONS

Viewpoints on COVID-19 vaccination run the gamut. Retail employers who mandate vaccines as a condition of employment could face backlash from groups that oppose vaccines generally, and those that oppose vaccine mandates specifically.

Employees who object to taking the COVID-19 vaccine on political grounds may have a plausible basis for raising discrimination or retaliation claims under the laws of some states.

Those that do not mandate could face backlash from other constituencies, including customers who may believe that the company is not doing enough for its employees or for public health. These decisions can also have human resources complications.

Employees who refuse vaccination may face ostracism or criticism from fellow employees. If the refusal to vaccinate was based on an exercise of legally protected rights, negative or retaliatory treatment by coworkers could have legal consequences. Retailers should carefully consider these issues in advance and make sure they have a response plan in place if conflict arises.

THE NATIONAL LABOR RELATIONS ACT

Retail employers who are unionized will have to involve their employees' representative in vaccination mandate decisions. Retail employers who are not unionized should also be mindful that employees' refusal to take the COVID-19 vaccine may be protected by the National Labor Relations Act (NLRA).

Section 7 of the NLRA provides employees the right to engage in concerted activities for the purposes of mutual aid or protection. If employees collectively oppose a retail employer's mandatory vaccination program, such opposition may be protected by the NLRA as a "concerted activity" and the retail employer may be exposed to an NLRA violation if it clamps down on employee opposition.

ALTERNATIVES

The government may mandate vaccination, particularly if voluntary vaccination does not achieve the levels necessary for herd immunity, though such a mandate will most certainly face constitutional challenges, especially if it does not provide an exception for disability or religious beliefs.¹⁰

A government COVID-19 vaccine mandate that does not provide an exception for religious beliefs has been considered by some jurisdictions.¹¹ A government mandate would give retail employers certainty regarding the best course of action and substantially limit legal risk.

Retail employers who are unionized will have to involve their employees' representative in vaccination mandate decisions.

Even if the government does not mandate vaccination, employers may be able to obtain high levels of workforce vaccination without imposing their own mandate. Steps to consider include on-site vaccination clinics, incentives and paid time off to get the COVID-19 vaccine.¹²

Retail employers face difficult decisions regarding how to approach employee vaccination. Workplace safety must be weighed against legal risks, while also considering possible customer reaction.

Planning is made more difficult by how quickly the landscape is changing with new vaccine approval, new known side effects and a workforce and public weary of COVID. Careful planning with regular review and revision of those plans is required.

Notes

¹ Certain employers, such as those in high-risk industries like health care, routinely require certain vaccines as a condition of employment. See, e.g., CDC, Influenza Vaccination Information for Health Care Workers, <http://bit.ly/3prcC35> (last reviewed Nov. 23, 2020) (noting that some employers, including hospitals, have required staff to get flu or hepatitis B vaccines to enhance patient and staff safety). Also, some vaccines are required as a matter of state law for teachers, childcare providers and others and are required as a matter of federal immigration law for certain immigrants.

² EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, <http://bit.ly/3j9kVy8> (last updated Dec. 16, 2020) (hereinafter EEOC COVID Guidance) (likewise, employers are permitted to test/screen employees for COVID-19 as such is job-related and consistent with business necessity).

³ *Id.* at Section H, K.

⁴ See, e.g., *E.I. Dupont De Nemours & Co. v. Faupel*, 859 A.2d 1042, 1053-54 (Del. Super. Ct.), *aff'd sub nom. E. I. Dupont Denemours & Co. v. Faupel*, 860 A.2d 810 (Del. 2004) (adverse reaction from the flu vaccine was compensable under the Delaware Workers' Compensation Act where it was administered by the employer); *Maher v. Workers' Comp. Appeals Bd.*, 33 Cal. 3d 729, 735 (1983) (it is well settled in California that

“where an employee submits to ... a vaccination at the direction of the employer ... any injury resulting from an adverse reaction is compensable” under the California Workers’ Compensation Act) (emphasis in the original); see also *Payne v. Galen Hosp. Corp.*, 28 S.W.3d 15, 20-21 (Tex. 2000) (adverse reaction caused by employer-provided medication was compensable under the Texas Workers’ Compensation Act).

⁵ Typically, retail employers would not face negligence claims if an adverse reaction was covered by workers’ compensation insurance, because, in most cases, workers’ compensation insurance would be the exclusive remedy for the employee who suffered the adverse vaccine reaction. See, e.g., Tex. Labor Code Ann. § 408.001(a) (Texas); N.Y. Workers’ Comp. Law § 11 (New York); Ariz. Rev. Stat. Ann. § 23-1022(A) (Arizona); Colo. Rev. Stat. Ann. § 8-41-104 (Colorado).

⁶ A belief in the inefficacy of the COVID-19 vaccine, or that the vaccine does more harm than good, will likely not be afforded protection under Title VII. See *Fallon v. Mercy Catholic Med. Ctr. of Se. Penn.*, 877 F.3d 487, 492 (3d Cir. 2017) (deeming such beliefs to be medical beliefs, not religious beliefs). However, the basis of a practice or belief that precludes one from taking the COVID-19 vaccine need not actually be religious to be afforded protection under Title VII, but can be moral or ethical so long as one’s belief is “sincerely held with the strength of traditional religious views.” See 29 C.F.R. § 1605.1.

⁷ EEOC COVID Guidance, at Section K.5.

⁸ *Id.* at Section K.6.

⁹ States, cities and territories that may afford employees such protections on the basis of political beliefs or affiliation include California, Colorado, Connecticut, the District of Columbia and Puerto Rico.

¹⁰ Additionally, government-mandated vaccinations may be challenged on Fourth Amendment grounds (the right against unreasonable searches and seizures) and Fourteenth Amendment grounds (the right against deprivation of life, liberty or property without due processes). But see *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905) (the Fourteenth Amendment did not invalidate a state law that provided for a \$5.00 fine for individuals who refused to get a mandatory smallpox vaccine).

¹¹ See New York State Bar Association, Report of the New York State Bar Association’s Health Law Section Task Force on COVID-19, p. 65 (May 13, 2020).

¹² To protect against discrimination claims, retail employers should be prepared to offer employees with qualifying disabilities or religious beliefs (and, in some states, possibly political beliefs) equivalent benefits.

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