

Insights

Mandating COVID-19 Vaccinations: Employers Wrestle with Whether They Can and Should

December 18, 2020

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U.S. employers are increasingly considering whether they can and should mandate that their employees receive a COVID-19 vaccination. To be sure, these are two very different issues. One is a legal question and the other a business decision that considers the additional issues of employee morale, staffing considerations, and workplace culture.

The legal question of whether an employer can require its employees to receive a COVID-19 vaccination is complex. The short answer is that private employers can mandate COVID-19 vaccinations by their employees, with some caveats. One such caveat that employers must consider is the obligation under Title VII of the Civil Rights Act to provide religious accommodations to those with sincerely held religious beliefs that prevent them from receiving the COVID-19 vaccine. Another caveat employers face is the obligation under the Americans with Disabilities Act (ADA) to accommodate employees with disabilities. For instance, an employee may claim that he or she is unable to receive the COVID-19 vaccine because of an underlying medical condition that constitutes a disability. Under both the religious and disability-based exceptions, the employer would not be required to provide reasonable accommodations to the employee if it would create an undue hardship or burden on the employer.

In addition to these exceptions that private employers must consider, public employers may face additional challenges to mandating COVID-19 vaccinations for their employees. These include both challenges under the First and Fourteenth Amendments to the Constitution. Specifically, public employees may try to argue that their rights to free exercise of religion and personal liberties make mandatory vaccination policies unconstitutional.

Public employers may be able to overcome these challenges given the interest in reducing the spread and exposure to COVID-10, a communicable disease.

It is also important for employers with any union employees to review their current collective bargaining agreements. Mandatory vaccinations may be prohibited under such agreements, or perhaps there would be an obligation to bargain with the union on the issue.

What is clear is that employers need to start planning now for how they intend to handle the issue of mandatory COVID-19 vaccinations. Does the employer plan to say nothing to its employees about vaccinations, plan to strongly encourage its employees, or plan to require vaccinations? This analysis and the outcome of the decision-making process may be very different depending on the industry. For example, healthcare facilities, restaurants, salons, and other workplaces in which there is significant interaction with others may reach different conclusions than those where employees are more isolated. The U.S. Equal Employment Opportunity Commission (EEOC) has suggested that employers rely on guidance from the U.S. Centers for Disease Control and the Occupational Safety and Health Administration when determining whether

they can effectively accommodate employees who refuse to be vaccinated, in a manner that would not create an undue hardship for the employer.

Many employers are indicating that they will not mandate COVID-19 vaccinations for several reasons. One reason is that employers understand that some of their employees may have concerns about the safety of the rapidly-developed vaccines. In addition, employers are concerned about employee morale if vaccinations are mandated, and even fear losing employees and experiencing critical staffing shortages if mandatory vaccination policies are enacted. Some employers are also concerned about the potential liability if they mandate COVID-19 vaccinations and then employees experience serious side effects. Such claims would likely fall under employers' workers compensation insurance, although some states are considering modifying current legislation to protect employers from even workers compensation claims on this basis. Many of the employers who do not plan to mandate COVID-19 vaccinations among their workforces do plan to strongly encourage vaccinations and are doing so by providing trusted resources to educate employees.

Employers who plan to administer COVID-19 vaccinations themselves or contract with third parties to administer them have additional legal considerations, some of which were highlighted by the EEOC in its recent guidance on issues related to COVID-19 vaccinations. The new guidance is found in Section K of the EEOC's guidance on COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, which can be accessed **HERE**. While administering the vaccine is not in and of itself considered a medical examination such that additional issues arise under the ADA, issues can arise if employers mandate vaccinations, administer them, and ask screening questions, which questions could reveal a disability. In those situations, the employer would need to be able to show that the screening questions are job related and consistent with business necessity and that if an employee refuses to answer the questions he or she will pose a direct threat to the health or safety of herself, himself, or others. The EEOC has already declared that the COVID-19 pandemic is considered a direct threat, and while this declaration may make it easier for employers to take steps towards mandatory vaccination, it is critical that employers first complete any necessary individualized inquiry as to an employee's requests for accommodation and the potential harm to others if a non-vaccinated employee is permitted in the workplace.

This is certainly a story that will continue to unfold over the coming weeks and months, just like much else relating to COVID-19 has continued to evolve. Employees should not expect employers' safety protocols, such as social distancing, wearing of masks, and increased disinfection practices to go away any time soon, even as COVID-19 vaccines are introduced. All signs point to the fact that it will be many months before the American public at large can expect to have access to a vaccine. We can also expect both employees' and employers' views concerning COVID-19 vaccines to evolve over time as we learn more about the vaccines being offered and wrestle with the question of not only whether employers can legally require employees to be vaccinated, but also whether they should.

If you have questions about planning your entity's approach to COVID-19 vaccinations with your employees, and the full scope of the various legal and business considerations involved, please reach out to **Amy J. Adolay** or any other member of Krieg DeVault LLP's **Labor and Employment Team**.

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