

Article of Interest

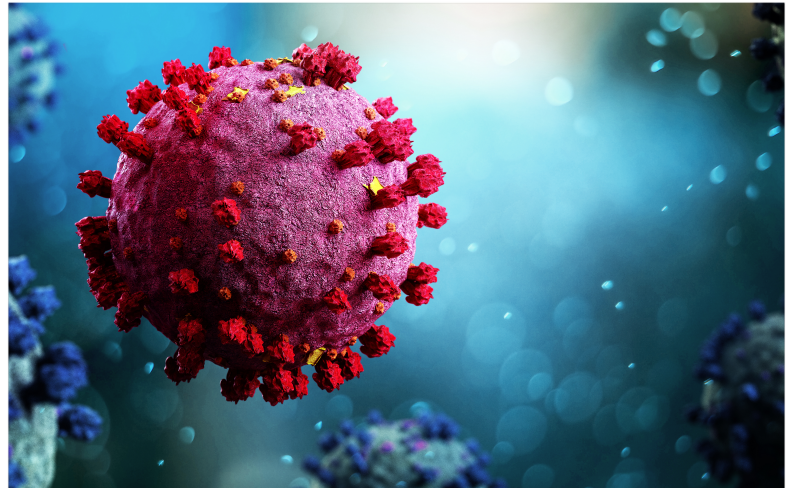
The COVID-19 Vaccine: Issues For Employers

By



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Almost since the beginning of the COVID-19 pandemic, the message has been that much, if not everything will return to normal (or some approximation of normal), when a vaccine becomes widely available. The vaccine is now here (although not yet “widely available”), and employers are now faced with a significant decision – whether to require employees to obtain the vaccine? And, while there have been a lot of knee-jerk reactions from employers as to what they will do, it is perhaps helpful to look at the issue in both legal and practical terms for employers to decide what is best for its workplace.

Employers May Require Their Employees to Be Vaccinated, With Some Caveats

The first question for employers is whether an employer could actually require that all of its...

employees obtain the vaccine. The short answer to this is “yes,” with some caveats. When the Equal Employment Opportunity Commission (EEOC) issued its guidance on the vaccine, while not saying it explicitly, it proceeded as if the ability to require the vaccine was a given. (What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, Technical Assistance Guidance and Answers, December 16, 2020, K.1 through K.9, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>). As such, unless some change, such as in the form of a court ruling or legislative pronouncement, occurs, employers can be confident that they are not running afoul of the law by the act of requiring the vaccine for its employees.

That is not to say, however, that there are not some obstacles to requiring the vaccine for one’s whole workforce. In this, several federal statutory schemes (and their corresponding state versions) do require employers to make exceptions to such a mandate under some circumstances.

The Americans with Disabilities Act

The first of these obstacles is the Americans with Disabilities Act, which, very simply, requires employers to make reasonable accommodations for employees who are “qualified persons with a disability,” so long as that accommodation that does not present an “undue burden” on the employer or a “direct threat” to the health and

safety of the employee or others. The ADA also constrains employers’ ability to make any medical inquiries of its employees or require any type of medical exam.

With respect to the latter, the EEOC has made clear that the vaccine and its administration do not constitute a medical examination and as such, its regulations with respect to that issue do not apply. The bigger issue with requiring the vaccine is whether an employer could still require it, even if an employee claims to have a medical issue that prevents them from receiving it.

The procedure an employer must follow when an employee asks to be exempt from receiving the vaccine because of an underlying medical condition is no different than any other request for accommodation. An employer must engage in the interactive process with the employee, may request medical documentation relative to the underlying medical condition, decide if the employee must be accommodated, and whether allowing the employee to continue to work without the vaccine would impose an undue burden on the employer or pose a direct threat to the health and safety of the employee or others. Potential accommodations would be allowing the employee to work from home, transfer to a position that does not require significant personal interaction, or requiring the employee to continue with mask-wearing and social distancing. Depending on the job, it may be that the employee may...

need to be terminated, but there is a lot of work for an employer to do before getting to that point.

Title VII

Title VII also provides some caveats for employers, specifically, its prohibition against discrimination on the basis of religion. If an employee claims to be unable to receive the vaccine because of a religious belief, again, the procedure is no different than if another employee made a similar accommodation request about something other than the vaccine. The employer must engage in the interactive process, may obtain limited information about the claimed sincerely held religious belief, and then, as with an accommodation request by one with a disability, determine whether allowing the employee to continue to work without the vaccine would impose a burden on the employer (for religious accommodation, it must only pose a *de minimis* burden) or pose a direct threat to the employee or others.

National Labor Relations Act

The National Labor Relations Act also imposes some constraints on requiring the vaccine, both in unionized and non-unionized workplaces. Section 7 of the Act protects both union and non-union employees who engage in “protected concerted activity.” Thus, to the extent that you have two or more employees who decide to band together and challenge the employer’s requirement or refuse to receive the vaccine because of health and safety concerns,

the employer may not retaliate against them for that activity. Additionally, requiring the vaccine would be a “term or condition” of employment, and as such, an employer in a unionized workplace must bargain with the union or unions before mandating the vaccine.

All in all, employers might find it beneficial to encourage and incentivize the vaccine rather than require it. A program of employee education, covering the benefits of the vaccine generally as well as for the specific workplace, may encourage employees who might otherwise not have bothered. Providing an incentive to employees to obtain the vaccine – whether in terms of a monetary incentive (although not so large as to render the decision involuntary) or paid time off to obtain both phases of the vaccine may also provide an impetus for a wider participation than you might already have. Several corporations, including Aldi, Trader Joe’s, Dollar General, and Instacart have already announced incentives to encourage their employees to obtain the vaccine.

While the vaccine is not widely available now, at some point it will be. Employers are well advised to develop their plan and policy for their specific workplaces as to whether the vaccine will be required. Your employees will have questions, and you should be prepared to provide the answers to those questions and address any criticism or backlash that you experience. As always, experienced...

employment law attorneys can be of a significant help in this.