

HR Heads-up

PERIODIC UPDATES ON IMPORTANT HR LEGAL ISSUES

DECEMBER 8, 2020

Can Employers Require Employees To Get A Covid-19 Vaccine?

In November 2020, the world received some long-awaited good news in the battle against the COVID-19 pandemic. Three of the groups working furiously to produce vaccines announced very promising results in their initial trials. The three groups have announced that their vaccines have produced an immune system response ranging from 70 to 95% of the individuals vaccinated so far. For employers, this brought a new question to mind: “May I require my employees to be immunized against COVID-19 as a condition of employment?” As explained below, there are both legal and policy questions that must be answered before employers can make that decision for their own employees.

Presently, there is no specific law or government agency guidance that definitively answers the question of whether an employer may require employees to receive a COVID-19 vaccine. It remains to be seen whether Wisconsin will pass legislation requiring or prohibiting mandatory vaccination for COVID-19. Wisconsin Health Services Secretary Andrea Palm stated on December 3, 2020 that the administration currently has no plans to mandate that employers require vaccinations for anyone in the state, including health care workers. A few days prior to that, Wisconsin’s Assembly Speaker Robin Vos announced that the Republicans’ package of COVID-Relief legislative proposals included specific provisions prohibiting employers from requiring their employees to receive COVID-19 vaccinations, and prohibiting the governor from issuing an order mandating vaccines for anyone.

Despite the uncertainty on these points, employers can look to previous interpretations of applicable or similar laws, as well as policy considerations, to gain an understanding of the issues and make tentative decisions about their own policies, with final decisions to be based on updated information and governmental guidance about the vaccine as it becomes available.

LEGAL ISSUES

In response to the 2009 H1N1 pandemic, the Equal Employment Opportunities Commission (“EEOC”) issued guidance in 2009, stating that employers may require workers to receive a flu vaccine, provided employers take care to provide reasonable accommodations to employees with disabilities that prevent them from receiving the vaccine. Reasonable accommodations are required under the Americans with Disabilities Act (ADA), and similar provisions under the Wisconsin Fair Employment Act (WFEA).

In addition, under Title VII and the WFEA, employers must provide reasonable accommodations to employees whose sincerely held religious beliefs prohibit them from receiving the vaccine.

In March 2020, the EEOC updated its guidance in response to the COVID-19 pandemic. The EEOC guidance includes a discussion of the concept of “direct threat” under the ADA:

A “direct threat” is “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” If an individual with a disability poses a direct threat despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA.

The EEOC guidance stated that based on the information from the CDC and public health authorities available in March 2020, the COVID-19 pandemic met the “direct threat” standard, based on community spread of the disease, and precautions and restrictions on public gatherings that were in place at that time.

In the case of an employee who is unable to receive a COVID-19 vaccine, that person could become infected, and in turn pass on COVID-19 to employees who took the vaccine, but were in the minority group that did not develop an immune response. This could mean that an employer may not be required to accommodate an unvaccinated employee by allowing the person to work without the vaccine, because the unvaccinated employee may pose a “direct threat” to other employees present in the workplace.

The EEOC guidance concludes by stating, “At such time as the CDC and state/local public health authorities revise their assessment of the spread and severity of COVID-19, that could affect whether a direct threat still exists.” In other words, employers must continue to monitor the guidance available from the EEOC, the CDC, and public health agencies on the question of “direct threat.” Additionally, before denying accommodations to employees based on “direct threat,” employers must explore whether any other reasonable accommodation could mitigate that “direct threat” without posing an undue hardship on the employer. This requires an individualized, fact-specific analysis.

Although the EEOC has acknowledged that Title VII and the ADA do not prohibit employers from requiring employees to receive a flu vaccine as long as reasonable accommodations are provided, it has not issued any guidance that is specific to a vaccine for COVID-19. In addition, after discussing the reasonable accommodation obligations, the EEOC went on to include the following recommendation in its guidance issued in 2009: “Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it.” It remains to be seen whether EEOC will update this guidance once COVID-19 vaccines become available to the general public, and employers seek further guidance on this important issue.

POLICY CONSIDERATIONS

Whether employers should require employees to take the vaccine also involves important policy considerations.

Political and social issues.

The COVID-19 pandemic has become a highly politicized issue, and a rallying cry for some individuals and

groups. Vaccines in general have become a social and political issue for a number of people, sometimes referred to as “anti-vaxxers.” Employers should consider the effect on their own workforce morale and atmosphere if they attempt to enforce a vaccine mandate. Additionally, at least at first, availability of the vaccine will be limited to certain categories of individuals. Employers might not immediately have the option to require vaccines of all employees.

Time and difficulty of administering requests for reasonable accommodation.

Employers will have to go through the reasonable accommodation process for each person who refuses the vaccine on medical or religious grounds. The reasonable accommodation process can be both time consuming and contentious, depending upon the number of employees claiming a right to reasonable accommodation.

Cost.

Employers who choose to require vaccines as a condition of employment will be required to pay for the cost of the vaccines. That will include the cost of receiving the vaccine itself, as well as paid time to receive the vaccine.

Legal claims.

As noted above, the process of responding to requests for reasonable accommodation under the ADA, WFEA and Title VII religious beliefs can be both time consuming and contentious. In addition, employers may create potential liability if they do not carefully observe the reasonable accommodation requirements of these laws.

This article does not explore issues of potential liability for adverse reactions to a vaccine required by an employer. The vaccine manufacturers have asked the FDA to approve the vaccines on an emergency use basis. At this time, none have been approved for any use other than trial studies. So far, no manufacturer has submitted a vaccine for review and approval through the normal FDA approval process. It would be prudent for employers to check with their worker’s compensation insurers on this issue as well.

CONCLUSION

In light of the unanswered legal questions on the issue of “direct threat” and the possible recommendation of the EEOC to encourage, rather than require, the COVID-19 vaccine, we are advising employers to become educated on these issues and be prepared to make a final decision about vaccinations as more information becomes available, including possible legislation. Boardman & Clark attorneys are prepared to discuss these issues with you.

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