

Can, and Should, Employers Require that Employees be Vaccinated for Covid-19?

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12.07.2020

As the U.S. Food and Drug Administration (FDA) prepares to authorize two COVID-19 vaccines for use, employers are asking if they can, and should, require that employees be vaccinated.

There are “guide posts” employers can look to for answers. Some employers have experience with vaccination policies. For years, health care, long-term care, and child care employers have mandated that all or some employees be vaccinated against the seasonal flu and other infectious diseases.

The U.S. Equal Employment Opportunity Commission (EEOC) and Occupational Safety and Health Administration (OSHA) weighed in with guidance on this question in 2009 during the H1N1 flu (commonly referred to as the “swine flu”) pandemic. The Americans with Disabilities Act (ADA) prohibits employers from requiring medical exams, including vaccinations, unless the exams are job related, consistent with business necessity, and no more intrusive than necessary. In a 2009 “technical assistance document,” the EEOC stated, “Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it.” But the thrust of the agency’s position was that as long as employers considered requests for reasonable accommodations for medical conditions or disabilities and sincerely held religious beliefs, requiring vaccination during a health emergency may meet the job related/consistent with business necessity/no more intrusive than necessary standard.

OSHA enforces the Occupational Safety and Health Act (OSH Act), which imposes a general duty on employers to provide workplaces that are free from known dangers. In a 2009 “standards interpretation,” OSHA took the position that an employer may require employees to take vaccines against the seasonal flu and H1N1 flu; provided, however, that an exemption was recognized for any employee who had “a reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death (such as serious reaction to the vaccine).”

The EEOC and OSHA have yet to issue guidance on a COVID-19 vaccine, but based on experience and guidance, employers should consider these factors in deciding whether to mandate vaccination:

Is the employer required and/or encouraged by federal, state, and/or local government agencies to vaccinate some or all of its workforce?

That may depend on whether the employer is a health care facility, a manufacturing plant at which employees work in close proximity, or a bar.

If not, is a mandatory vaccination policy necessary?

Some employers may be able to continue to reduce or eliminate the spread of the disease in the workforce by permitting remote work, physical distancing, face coverings, and other controls. Others may have some operations where there is a higher risk of spread, so a mandatory vaccine policy makes sense.

What to do if employees object to vaccination?

According to a recent Gallup survey, 42 percent of respondents said they would not get vaccinated, mostly due to the fast development timeline of the COVID-19 vaccines and a desire to wait to confirm that the vaccines are safe.

- As recognized in the EEOC's 2009 guidance, if employees object to vaccination due to a medical condition or disability, or due to a sincerely held religious belief, then under the ADA and Title VII of the Civil Rights Act of 1964, respectively, the employer must consider reasonable accommodations. However, according to the Centers for Disease Control and Prevention, valid medical reasons for not taking the flu vaccine are rare. Also, ethical or general concerns with vaccinations do not amount to a religious belief.
- As recognized in OSHA's 2009 guidance, employees who object for safety reasons may have protection under the OSH Act—Section 11(c) of the act generally prohibits retaliation against employees who raise workplace safety concerns.
- Employees who collectively object to vaccination may have protection under the National Labor Relations Act (NLRA)—Sections 7 and 8(a)(1) of the act generally prohibit taking adverse action against employees for collectively objecting to terms or conditions of employment.

What does the employer's worker's compensation carrier recommend?

If an employee who is required to vaccinate develops adverse reactions or side effects, he or she may have a worker's compensation claim.

As the FDA moves to authorize use of COVID-19 vaccines, employers should be on the lookout for new developments from government agencies. In addition, employers should prepare now for how to address vaccination as a matter of policy and how to respond to accommodation requests by employees seeking an exemption from any vaccination requirement.

If you have any questions or need more information regarding the impacts of COVID-19 on the workplace, please contact Nexsen Pruet's Employment and Labor Law group.