

Employment Law Business Guide

Practical Insights for Human Resources, Managers & Business Owners

Should Employers Mandate COVID-19 or Flu Vaccines?

By Laura McKelligott Kahl on December 9, 2020

With the availability of COVID-19 vaccines on the horizon, employers are wondering whether they can or should require employees to receive a vaccine. After all, there could be significant benefits for the operations of many businesses if employees are vaccinated against COVID-19.

There are no federal or state laws which prohibit an employer from mandating that employees receive vaccinations, including influenza or pandemic influenza vaccines. However, while employers may mandate influenza vaccines under certain circumstances, there are two primary exceptions to this principle that have been identified by the federal Equal Employment Opportunity Commission (“EEOC”): (1) when an employee has a qualifying disability under the Americans with Disabilities Act (“ADA”) that prevents the employee from being vaccinated; and (2) when an employee has a sincere religious belief that prevents the employee from being vaccinated.

Under both the ADA and Title VII of the Civil Rights Act of 1964, an employee with an underlying medical condition or a sincerely held religious belief that prevents the employee from receiving the vaccine, is entitled to an exemption from the vaccine mandate as a reasonable accommodation, barring an undue hardship to the employer. If an employee requests an exemption, the employer must engage in an interactive process to determine whether the exemption is a reasonable accommodation, and if not, whether there are other reasonable accommodations that could be made. Measures such as job transfers, permitting the employee to use paid time off to search for a new job, assisting the employee with a job search, or imposing additional infection control measures such as wearing a mask at all times are examples of other measures that might be reasonable accommodations, depending on the

circumstances. Ultimately, the EEOC recommends that employers simply encourage rather than mandate that employees receive an influenza vaccine.

New Hampshire and Massachusetts state laws also address vaccine requirements for certain industries. For example, both states require certain healthcare employers to ensure that consenting employees receive influenza vaccinations. Additionally, in Massachusetts, certain healthcare employers must ensure that employees receive a pandemic or novel influenza vaccine unless they decline it. Earlier this year, the Massachusetts Department of Public Health issued Executive Orders related to COVID-19 that require certain health care employers to ensure that all personnel are vaccinated against the influenza virus by December 31, 2020, unless such administration is medically contraindicated, or vaccination is against the individual's religious beliefs. The Executive Orders provide that personnel may not decline the vaccine for other reasons.

Should a COVID-19 vaccine become widely available, employers evaluating whether to mandate that employees receive either a COVID-19 vaccine or an influenza vaccine should carefully consider a number of issues, including the following:

- Whether employees will routinely be in contact with individuals who are at high risk of developing severe illness if they contract influenza or COVID-19, or individuals who are likely to be infected with influenza or COVID-19.
- The number of employees who are likely to request exemptions from a mandate.
- Whether there are accommodations other than an exemption from the mandate that would be reasonable accommodations.
- The administrative burden and cost of enforcing the mandate and addressing exemption requests.
- Employee fear of the vaccine and resistance to the mandate.
- The current polarized political climate which may lead to certain employees being more willing or more resistant to receive the vaccine based on their personal or political views.
- Potential adverse effects of a new vaccine which could lead to workers' compensation claims or litigation.
- Potential OSHA whistleblower protections for employees who refuse to receive the vaccine.

- Issues with concerted activity related to the vaccine mandate and, for employers with unionized employees, compliance with the collective bargaining agreement.

Employers will also need to take into consideration any federal or state guidance related to the COVID-19 vaccine that may be issued in the future. Because the issues surrounding COVID-19 or influenza vaccines are complex, employers should consult with experienced employment counsel when deciding whether to implement a vaccine mandate.

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