

Can Employers Require Employees to Get a Vaccine, Once Approved?

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During the recent vice presidential debate, Sen. Kamala Harris made it abundantly clear that she will only follow instructions from health experts on whether to take a coronavirus vaccine, not President Donald Trump. That is not surprising given the current political climate. Might her response be different, however, if her employer mandated that she receive a coronavirus vaccine in order to continue working at her job?

As employers struggle to make decisions on how best to keep their employees, patients and customers safe during the continuing pandemic, a question employers may be pondering now is, once a coronavirus vaccine is approved for safe distribution to the U.S. population, can or should the company mandate that all employees receive the vaccine? While the enforceability of such a mandate is not yet clear, given the unusual and deadly nature of the coronavirus, potential guidelines for employers are found in guidance published by the Equal Employment Opportunity Commission (EEOC) and existing federal and state cases related to previously developed vaccines.

While an employer is able to implement policies and requirements that it believes are necessary to keep its workplace safe, any requirement devised to require an employee

to be vaccinated against the coronavirus as a condition of employment, is not without limitation. Both the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII) provide potential roadblocks for any "across-the-board" mandate. For instance, if an employee has a medical reason or sincerely held religious belief that prevents him/her from receiving the coronavirus vaccine, an employer may be legally required to permit the employee to continue working without the need to be vaccinated, subject to reasonable accommodations.

Guidances from the EEOC are instructive on this point. In response to the H1 N1 (swine flu) pandemic in 2009, the EEOC published a "Pandemic Preparedness for the Workforce" guidance. The EEOC guidance provides that an employer may not compel an employee to submit to a mandatory vaccination "regardless of their medical conditions or their religious beliefs—even during a pandemic."

If an employee requests an exemption from an employer's directive to be vaccinated on medical grounds or due to religious beliefs, the EEOC counsels that an employer must engage in an interactive discussion with the employee and grant a reasonable accommodation unless it would result in undue hardship to the employer. The ADA defines "undue hardship" as "significant difficulty or

expense" incurred by the employer in providing an accommodation. In the era of the coronavirus, while the definition of "significant difficulty or expense" might be subject to debate, reasonable accommodations to an employee might include mandatory mask use, reassignment to a different position (physically away from patients, customers, or co-workers) or work from home if the job does not otherwise require the employee's physical presence in the workplace. Essentially the law requires that if an employer can achieve that same level of safety as the vaccine offers by providing an accommodation to those employees who request an exemption, the employer must do so, and cannot fire the employee for refusing to take the vaccine. Similarly, under Title VII, once an employee requests an exemption from vaccination because of the employee's sincerely held religious belief, practice or observance, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the operation of the employer's business, which is a lower standard than under the ADA).

If an individual with a disability poses a "direct threat" despite reasonable accommodations, however, he or she is not protected by the nondiscrimination provisions of the ADA. "Direct threat" is defined as "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." Based on guidance from the Centers for Disease Control and Prevention (CDC) and public health authorities as of March 2020, the EEOC publicly acknowledged that the coronavirus pandemic meets the "direct threat" standard. As such, the EEOC recognized that the scientific facts underlying risk of transmission of the coronavirus supported a finding that "a significant risk of substantial harm" would be posed by having someone with coronavirus, or symptoms of it, present in the workplace at the current time. In recognition of this, the EEOC afforded employers the ability to ask

employees if they are experiencing any symptoms associated with the coronavirus, monitor employees' temperatures and require employees to test negative for the coronavirus before reporting back to work. Whether the EEOC's finding of "direct threat" with respect to the coronavirus means the EEOC will, likewise, support an employer's mandated coronavirus vaccine policy remains to be seen, since as of yet the EEOC has not weighed in on those specifics.

If an employer decides to insist that its employees get the coronavirus vaccine when one is safely made available, are there any potential legal liabilities that an employer might encounter if the employee has an adverse reaction or resultant injury from the vaccine? The answer, in short, is yes. First and foremost, there is a potential for exposure and liability pursuant to workers' compensation laws. When the need to get a vaccine is essentially encouraged or made a requirement of an employee's employment and something bad happens as a result, state law decisions suggest that workers' compensation claims might be triggered. See e.g., *Colagreco v. Workers' Compensation Appeal Board*, 232 A.3d 971 (Pa. Cmwlth. 2020) (employee received workers' compensation benefits after she received a flu shot at work and within a day or two her arm was "almost paralyzed"); *Saintsing v. Steinbach*, 1 N.J. Super. 259, 260, affd, 2 N.J. 304 (1949) (an employee's claim was compensable under workers' compensation when the employee suffered a reaction which resulted in both temporary and partial permanent disability after receiving a smallpox vaccination offered by her employer).

The coronavirus pandemic has impacted millions of businesses and individuals throughout the country, with no clear end in sight. Couple this reality with the fact that potential coronavirus vaccines are now being developed under compressed time lines, with an overlay of contentious politics to boot, and is it any wonder that employers feel trepidation over what directives, or not, to impose upon their employees relative to a potential new vaccine. Undoubtedly,

employers will need to balance the risk to employees from the coronavirus vaccine against the risk that the coronavirus poses to employees, patients or customers, and the economic well-being of employers' businesses. Whether or not employers mandate or simply encourage their workers to get the coronavirus vaccine, once a safe and effective vaccine is rolled out to the public, employers must be mindful of the potential legal implications that are attendant to such a decision.



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