Client Alert: Winter is Coming – Workplace Vaccine Mandates

BY MARISSA • NOVEMBER 16, 2020

Under the Occupational Safety and Health Act (OSHA), employers have a general duty to provide a workplace free of recognized hazards. As cold weather returns, workplaces across the nation will face increased health risks this year given the resurging COVID-19 pandemic and annual flu season. OSHA permits employers to establish legitimate health and safety policies so long as they are job-related and consistent with business necessity.

In general, an employer may require that its employees get flu shots and may discipline an employee who refuses without cause. However, according to EEOC guidance, employees may be entitled to a medical exemption under the Americans with Disabilities Act (ADA) or a religious exemption under Title VII if the exemption does not pose an undue hardship to the employer. The standard for "undue hardship" under each law is different but, in both cases, considers both financial costs as well as cultural or operational costs such as whether the accommodation would fundamentally alter the nature of the business or compromise the integrity of a seniority system. Relevant factors in considering an "undue hardship" in the vaccination context would include, among other things, the risk to the public due to noncompliance, the availability of an alternate means of infection control such as personal protective equipment (PPE), and the number of employees who actually request an accommodation. Certain industries, like healthcare or childcare, may be more likely to find that a vaccine exemption request poses an undue hardship.

When an employee requests an exemption, both Title VII and the ADA require that an employer engage in the interactive process to determine effective accommodations. Possible accommodations include:

- Receiving an alternate formulation of the vaccine;
- Wearing additional PPE such as a face mask while on site;
- Moving the employee's workstation to a more isolated location;
- Working remotely;
- Taking a temporary leave of absence; or
- Temporarily reassigning the employee to a different, less public-facing position or facility. (Note that employers are not obligated to **create** a position to accommodate an employee.)

An employer implementing a vaccine mandate should make sure to have an objective written policy based on business necessity (i.e. actual job requirements) and apply the policy consistently. The mandate can be narrowly tailored to apply only to specific employees whose job duties involve interaction with the public rather than the employer's entire workforce. The employer should educate their employees on the benefits of vaccination and the process to request an accommodation. Importantly, if the employer requires proof of vaccination, they should be careful to safeguard the

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privacy of employees' medical information, including but not limited to keeping it separate from personnel files.

Ultimately, employers should base the decision to institute a mandatory flu vaccine policy on an evaluation of their industry, number of employees, and specific workplace situations (for example, the number of employees working fully remotely or interacting with the public). While no COVID-19 vaccine exists yet, the analysis for it will likely be similar and employers should consider the specific circumstances of their workplace and contact their employment attorney for guidance.

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