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May Employers Require Mandatory COVID-19 Vaccinations?

We anticipate the Equal Opportunity Commission (“EEOC”) and/or Occupational Safety and Health Administration (“OSHA”) will issue specific guidance on whether employers may require applicants and employees to receive the COVID-19 vaccine, particularly as the vaccine starts to be distributed and becomes more widely available. Moreover, local and state legislative bodies may adopt laws that require the vaccine for individuals who work in the healthcare field. To date, however, no specific law or guidance has been enacted on the issue.

Although we do not yet have any specific laws or guidance directly on point, guidance relevant to other vaccines is helpful. Based on other laws and guidance, employers, particularly those in the healthcare industry, should be able to require applicants for patient-facing roles be vaccinated as a condition of employment, provided employers also consider and evaluate the need to accommodate individuals who request exemptions due to religious beliefs or disability needs. Current employees also may be required to be vaccinated, again, as long as the employer considers the need potentially to except individuals due to their disabilities or sincerely held religious beliefs. Where such exceptions are requested, they should be evaluated on a case-by-case basis under the applicable legal standard to determine whether the requested accommodation should be granted.

Below is a brief summary of agency guidance and federal case law that presently exist on mandatory vaccine requirements for applicants and employees. Please note this client alert does not address any specific state or local law, and employers also may need to consider any applicable collective bargaining agreements.

Summary of Relevant Legal Authorities and Agency Guidance on Requiring Vaccinations Generally

The Americans with Disabilities Act (“ADA”), which covers employers with 15 or more employees, prohibits covered employers from “discriminat[ing] against a qualified individual on the basis of disability

in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment,” and this prohibition includes medical examinations and inquiries. 42 U.S.C. § 12112(a) & (d)(1).

However, not all medical examinations and inquiries are prohibited; whether they are permissible, and the scope of the inquiry or exam varies depending on the stage of employment. See *id.* §§ 12112(d)(2)-(4). The EEOC has issued [guidance](#) on when applicants and employees may be asked medical inquiries or be required to undergo medical examinations.

Applicants for Employment

EEOC guidance makes clear that employers may ask disability-related questions or require a medical examination of applicants, but only after extending the candidate a conditional offer of employment. After the employer extends a job offer, it may ask the individual disability-related questions or require a medical examination as long as it does so for all entering employees in the same job category. If an employer withdraws the job offer based on medical information (i.e., screens out the candidate because of a disability), it must show the reason for doing so was job-related and consistent with business necessity.

A healthcare employee who has contact with patients is in a position where such an inquiry had been held to be job-related and consistent with business necessity. See *Hustvet v. Allina Health Sys.*, 910 F.3d 399 (8th Cir. 2018) (inquiry about immunizations and requirement to receive vaccinations as condition of employment at healthcare facility as an independent living skills specialist did not violate ADA); *Cf.*, *EEOC v. Mission Hosp., Inc.*, 2017 WL 33927832017 (W.D.N.C. 2017) (“A jury could reasonably find that strictly-enforced exemption procedures to vaccination requirements protected the hospital patients. If the hospital’s other health care staff or patients suffered hospital-borne infectious disease, such an infection would increase costs to the hospital.”). It may be more difficult to meet this standard where the individual in a business-type role, unless the employee interfaces with patients in the performance of their job responsibilities.

Current Employees

The EEOC’s current guidance on an employer’s ability to ask medical inquiries or to exclude employees from the workplace for reasons related to COVID-19 may be found [here](#). That guidance makes clear the ADA prohibits disability-related inquiries or medical examinations of current employees unless they are job-related and consistent with business necessity. Generally, a disability-related inquiry or medical examination of a current employee (as opposed to a job applicant) will be job-related and consistent

with business necessity where the employer has a reasonable belief, based on objective evidence, that:

- An employee's ability to perform essential job functions will be impaired by a medical condition; or
- An employee will pose a direct threat due to a medical condition.

The current EEOC COVID-19 guidance notes that 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, they are not protected by the nondiscrimination provisions of the ADA. Assessments of whether an employee poses a direct threat in the workplace must be based on objective, factual information, "not on subjective perceptions . . . [or] irrational fears" about a specific disability or disabilities. The EEOC's guidance identifies four factors to consider when determining whether an employee poses a direct threat: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that potential harm will occur; and (4) the imminence of the potential harm.

While the direct-threat defense is generally fact intensive and difficult for an employer to establish, the EEOC has stated that if the Centers for Disease Control and Prevention ("CDC") or state or local health authorities determine that a pandemic influenza is significantly more severe than influenza that is not at the level of a pandemic, it could pose a direct threat. The EEOC has further stated that the assessment by the CDC or public health authorities of the existence of a pandemic would provide the objective evidence needed for a disability-related inquiry or medical examination. The EEOC also has noted that, during a pandemic, employers should rely on the latest CDC and state or local public health assessments.

While the EEOC recognizes that public health recommendations may change during a crisis and differ between states, employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for the location, and to make reasonable assessments of conditions in the workplace based on this information. The EEOC guidance notes that "[b]ased on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard." At such time as the CDC and state/local public health authorities revise their assessment of the spread and severity of COVID-19, that may affect whether a direct threat still exists.

The EEOC has stated that when a pandemic becomes severe, the inquiries an employer may make of an employee, even if disability-related, are justified by a reasonable belief based on objective evidence that the severe form of pandemic poses a direct threat. However, the EEOC has expressly stated that an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 ("Title VII") may not

compel all its employees to receive the influenza vaccine irrespective of their medical conditions or their religious beliefs during a pandemic. It has further stated that an employee may be entitled to an exemption from an employer's mandatory vaccination requirement based on an ADA disability that prevents the employee from receiving the vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense).

Similarly, under Title VII, once an employer receives notice that an employee's sincerely held religious belief, practice or observance prevents them from taking the influenza vaccine, 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). This is why the EEOC has stated in its pandemic guidance that "[g]enerally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it. As of the date [the EEOC issued its COVID-19 guidance], there [was] no vaccine available for COVID-19."

Note, however, that the EEOC's pandemic guidance does not specifically address healthcare employers, and the case law generally would support requiring healthcare employees who provide direct patient care to get vaccinated for influenza, which by analogy, and given the severity of the current pandemic, may be applied to the COVID-19 vaccination.

Like the EEOC, OSHA has not yet provided guidance on a future COVID-19 vaccine, but, in its [2009 letter of interpretation](#), OSHA noted employers may require employees to receive a seasonal flu vaccine, subject to certain exceptions. OSHA also stated it expects facilities providing healthcare services to perform a risk assessment of their workplace, and it encourages healthcare employers to offer both the seasonal and H1N1 vaccines. If OSHA stays consistent with its past letter of interpretation regarding such vaccinations, it may require employers to inform their employees of the benefits of the vaccinations. Similar to the ADA, if employers decide to require vaccinations and employees subsequently refuse the vaccine due to a reasonable belief that they have a medical condition creating a real danger of serious illness or death (for example, a serious reaction to the vaccine), employees may be protected from an adverse action through the anti-retaliation protections of Section 11(c) of the Occupational Safety and Health Act of 1970.

Labor Considerations

Employers who have a unionized workforce must consider whether they may be required to collectively bargain over making COVID-19 vaccinations mandatory before doing so. Such employers will need to review their labor contracts to determine if those contract terms preclude them from making vaccinations mandatory or if such agreements give management the right to require the vaccine without first bargaining over it.

Adverse Responses to the Vaccine

Workers' compensation claims may follow from side effects allegedly caused by COVID-19 vaccinations if employers mandate vaccines or even if they simply encourage them. Whether, and if so, the extent of, workers compensation benefits will be available will vary depending on the applicable state law and the individual circumstances involved. Industries like healthcare, where employees are in higher risk, will have stronger arguments that workers' compensation laws cover injuries or illness caused by the vaccine.

Current View

Many employers, particularly healthcare entities, are grappling with the issue of whether to mandate or simply encourage their workforce to receive the vaccine for COVID-19. The general position to date seems to be that many will encourage, rather than require the vaccine. That, however, may change with new agency guidance we can expect in the near future, or as some states adopt legislation that may require certain healthcare workers to be vaccinated.

If we can provide any additional information on requiring vaccinations for your organization's workforce, please contact your Kutak Rock attorney or any of the attorneys in the [Employment Law Group](#) or [OSHA Compliance & Defense Practice](#), and we would be happy to discuss this with you.

