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Legal Issues Regarding COVID-19 Vaccine Mandates

As the COVID-19 vaccine becomes readily available, organizations will face the question of whether they will require staff/travelers to be vaccinated to return to office and/or return to international travel. This decision is one each organization will have to make based on its staff demographics, the availability of safe and effective vaccines, the type of work conducted by staff, staff concerns, and what is legally permissible in locations where it operates. These factors will need to be balanced against the organization's general duty to keep both its staff and the public safe. This document includes information about selected U.S. laws.

The intent of this document is to assist managers as they guide their organizations through this decision-making process. The general information in this document is not offered, and is not intended to be relied upon, as advice by our law firm. It is based on current U.S. laws and is provided to help organizations determine what may or may not be legally required of U.S. entities. As different countries have taken widely different approaches, readers are advised to consult a local attorney for advice applicable to specific situations before implementing any COVID-19 vaccine mandate.

Guidance for Determining COVID-19 Vaccine Mandates.

Is it legal for employers to require that their employees be vaccinated? In the United States, the answer is generally yes, with a few narrow exceptions and requirements, discussed below. Over 100 years ago, the Supreme Court declared that a government-enacted mandatory vaccine scheme is constitutional because the program had a real and substantial relation to the protection of the public health and safety.¹ This is still good law and employers can require the vaccine if an unvaccinated individual would expose others to a highly contagious and harmful virus on the worksite or while in the employee's official capacity. New guidance released in December 2020 from the U.S. Equal Employment Opportunity Commission ("EEOC") suggests that employers can require employees to receive the COVID-19 vaccine when it becomes readily available.² Furthermore, the EEOC released this guidance even while noting that COVID-19 vaccines may only be available to the public for the foreseeable future under the U.S. Food and Drug Administration's (FDA) Emergency Use Authorization ("EUA"). Organizations should assure that any mandated vaccine is licensed (even if EUA only) or registered by the appropriate government authority in the country where staff are from or located and/or by the World Health Organization.³

In many countries the decision to make vaccines mandatory is one that is made exclusively by government authorities – and in some countries, employers are prohibited from requiring employees to get the vaccine. Similarly, many countries do not permit employers to discipline or terminate employees if they violate an employer vaccine mandate – or even ask

¹ *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

² *Employment Opportunity Commission Guidance (released December 16, 2020): [EEOC Guidance](#)*

³ See guidance from the UN Medical Directors for UN personnel regarding the Covid-19 vaccine at www.un.org (link is external). See also WHO list of vaccines and their approval status at www.who.int (link is external)

for evidence of vaccination.⁴ It is important to monitor relevant local, state, and country laws when implementing a vaccine mandate.⁵

Any plan to require vaccinations must also take into account medical conditions which would make a vaccine contraindicated or potentially dangerous. The FDA has indicated that it may be unsafe for a person with severe allergies, for example, to receive some of the available COVID-19 vaccines. Similarly, these vaccines have limited data or research on safety in pregnant or breast-feeding women. Any mandatory vaccine program must provide for exceptions in such situations, even if the individual does not have a qualifying disability.

If the employer does not enact a mandatory COVID-19 vaccine program, the employer must assess how it will keep employees, vendors, clients, and patrons protected from COVID-19 in the workplace.

Duty of Care

What are the circumstances in which an employer should require the vaccine? An employer has a general duty to keep employees safe which may include taking steps to prevent employees from contracting or spreading COVID-19 in the workplace. The Occupational Safety and Health Act requires that employers ensure the workplace is “free from recognized hazards that are causing or likely to cause death or serious physical harm to employees.”⁶ Under state tort law, employers owe a duty of care to employees, vendors, and clients who enter the workplace or business. This duty is based on what is considered “reasonable” at any given time and can often be measured by the “community standard.” In practice, this means that organizations should (1) continually assess the steps taken by other similar organizations to keep their staff safe and (2) ensure that the actions they are implementing are at least as good as those taken by their peers. Organizations are expected to rely upon public health recommendations and make their best effort to obtain current public health advice appropriate to their locations.

US law permits employers to enact requirements so that an “individual shall not pose a direct threat to the health or safety of individuals in the workplace.”⁷ The recent EEOC guidance suggests that employers conduct an internal risk assessment considering four factors: *the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm.* Organizations should consider the severity of the pandemic in an area, what the individual will be doing, the likelihood of exposure to the virus on the worksite or while traveling, and the health and vulnerability of persons involved.

Exceptions to a Mandated Vaccine

Are there situations where an employer cannot require a vaccine? Yes. Employees have a right to refuse to receive the vaccine due to a disability⁸ and for religious reasons.⁹ Employers are required to find reasonable accommodations in the circumstances described in the following sections. Reasonable accommodations may include:

1. Allowing the employee to work remotely;
2. Minimizing or eliminating any required travel from the job position;
3. Providing a separate, close-door office; and/or

⁴ See Mayer Brown, *Covid-19 Employer Guidance on Vaccines* at www.mayerbrown.com (link is external).

⁵ Some U.S. states are considering, but are not expected to pass, laws prohibiting employers from requiring staff to be vaccinated. See *Bills to Block Mandatory Worker Vaccines Falter in the States*, at pewtrust.org (link is external)

⁶ 29 U.S.C 15, OCCUPATIONAL SAFETY AND HEALTH.

⁷ Americans with Disabilities Act of 1990, § 101(10), 102(b)(5)(A), 42 U.S.C.A. §§ 12111(10), 12112(b)(5)(A).

⁸ *Id.*

⁹ Civil Rights Act of 1964, §§ 701(j), 703(a)(1) as amended 42 U.S.C.A. §§ 2000e(j), 2000e-2(a)(1).

4. Enhanced COVID-19 protocols such as masks, physical distance, and other best practices when in common spaces or when the employee is near other people.

Disability and Medical Exception

If an employee requests a valid exemption from a vaccine requirement due to an existing, legally recognized disability, the employer is required to explore whether there is a reasonable way to accommodate this request. This process should include a flexible and interactive process to determine if there are reasonable ways to allow the employee to continue to work without obtaining a vaccine. During this process, employers are encouraged to take the following actions¹⁰:

1. Ask the employee to complete an accommodation request form; and
2. Determine possible options for accommodations given the nature of work, workplace, and employee's position.

It is important to make inquiries about an employee's disability voluntary, and to only require responses if the employee is requesting an accommodation or exception.¹¹ Employers should also be aware that it is unlawful to disclose that an employee is receiving a reasonable accommodation or has a disability or retaliate against an employee for requesting an accommodation.¹²

If the accommodations would provide an undue burden or hardship on the employer, the employer may exclude the employee from the workplace. This means organizations can generally exclude unvaccinated staff from the workplace if they pose a "direct threat" because they have determined that an unvaccinated individual will expose others to the virus at the worksite. Be aware, however, that the legal burden on the employers is significant and the employer must document that it worked with the employee to find a reasonable accommodation.¹³

Religious Exception

An employee may be entitled to refuse to receive a vaccine for sincerely held religious belief, practice, or observance.¹⁴ Employers should undergo similar procedures for finding accommodations if the employee is refusing to get vaccinated for either disability or religious reasons. The employer should assume that the employee's refusal to be vaccinated is based on a sincere religious belief; however, if the employer has an objective basis for questioning the religious nature or sincerity of the request, the employer may be justified in requesting supporting information. Mere distrust of a vaccine untethered to a religious belief would not constitute a religious exemption.

In all cases, employers should consider if the employee has any other rights under the EEO laws or other federal, state, and local authorities before considering termination.

Conclusion

To date, although there is no U.S. law which expressly allows employers to enact mandatory COVID-19 vaccine requirements or programs, there is ample regulatory guidance indicating that such a program will generally be permitted. Employer-mandated vaccine programs are likely to be legal so long as the employer complies with relevant state and federal law.

¹⁰ This list is not exhaustive. The employer may want to consult the Job Accommodation Network (JAN) website as a resource for different types of accommodations, www.askjan.org (link is external). JAN's materials specific to COVID-19 are at <https://askjan.org/topics/COVID-19.cfm> (link is external).

¹¹ *Americans with Disabilities Act of 1990* 42 USC §§ 12112(d).

¹² *Americans with Disabilities Act of 1990* 42 USC §§ 12203(a), 42 USC §§ 12112(d)(3)(B).

¹³ See *Ruggiero v. Mount Nittany Med. Ctr.*, 736 F. App'x 35 (3d Cir. 2018).

¹⁴ Civil Rights Act of 1964, §§ 701(j), 703(a)(1) as amended 42 U.S.C.A. §§ 2000e(j), 2000e-2(a)(1).