What Employers Need To Know About Mandatory Vaccine Policies And What To Do With Employees Who Refuse To Be Vaccinated

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What The State Has Said. Two months ago, in March 2021, the State of New Jersey adopted Equal Employment Opportunity Commission guidance providing that employers can require their employees to receive a COVID-19 vaccination before they are permitted to return to work. Now, as more Americans receive vaccinations and employees begin to trickle back into offices throughout the summer, employers need to start thinking about best practices for implementing this guidance, as well as some of the exceptions that came with it.

What Employers Need To Know. The short of it is that employers can require employees to receive a COVID-19 vaccine before physically returning to work, subject to three exceptions: (1) if the employee has a disability; (2) if their doctor has advised them not to receive the vaccine while they are pregnant or breastfeeding; or (3) if the employee has a sincerely held religious belief that prevents them from receiving a vaccine.

Needless to say, the devil is in the details. Employers are permitted to request medical documentation to confirm a disability or to confirm that an employee's medical provider instructed them not to take a COVID-19 vaccine for a legitimate medical reason. However, employers must ensure that all information about an employee's disability is kept confidential and must maintain all information about employee illness as a confidential medical record.

As for religious exemptions, an employer **may not question the validity of the belief unless the employer has an objective basis for doing so.** Even then, the guidance in most, if not all states that permit a religious exemption, is clear that this inquiry must be limited into the facts and circumstances supporting the employee's request. States clearly have been discouraging employers from questioning such beliefs, and employers should generally think twice before doing so.

What To Do With An Employee Who Meets One Of The Three Exemptions. What happens if an employee meets one of the three exemptions? In such cases, the employer must provide a reasonable accommodation from any mandatory vaccine policy, “unless doing so would impose an undue burden on their operations.” What constitutes a reasonable accommodation? For employees who can work remotely, a reasonable accommodation can be as simple as allowing the employee to continue remote work. For employees who are required to be present on the job site, the issue is more complicated, and may require providing the employee with personal protective equipment that sufficiently mitigates the employee's risk of COVID-19 transmission and exposure, and maintaining appropriate distance between the unvaccinated employee and other employees.

The guidance makes clear that reasonable accommodations must be based on "safety," and designed to limit the risk of transmission to other employees and to the public as much as possible. Such decisions must be based on "objective, scientific evidence," and "not on unfounded assumptions or stereotypes." Generally, an employer's best practice is to follow CDC guidance regarding proper precautions for decreasing the risk of transmission.

Collective Bargaining Agreements. Collective bargaining agreements add a further wrinkle to the equation. The terms of an existing collective bargaining agreement may permit the employer to develop and implement mandatory vaccine protocols unilaterally, or it may require the employer to bargain with a union before implementing any such protocols. Furthermore, most employers will be obliged to engage in bargaining regarding the effects of instituting mandatory vaccination rules. Employers are strongly encouraged to review the terms of their collective bargaining agreement before instituting any such protocols.

What If An Employer Cannot Provide A Reasonable Accommodation Due To The Nature Of The Employee's Work? If the employer cannot provide a reasonable accommodation that would mitigate the risk of COVID-19 transmission to its employees and customers, then it can enforce its policy of excluding unvaccinated employees from the physical workplace, even if they meet one of the three exceptions above. Two points of caution, however. First, it is very difficult for employers to meet the "undue burden" test that would exempt them from providing a reasonable accommodation. In New Jersey, for example, the standard is governed by the State's Law Against Discrimination, which can be quite complicated and generally gives employees the benefit of the doubt. This is similar in most states with an anti-discrimination statute that prohibits discrimination on the basis of disability or religion. In the context of COVID-19, an employer probably can meet this burden by demonstrating that there is no safe way for the employee to perform the employee's duties that sufficiently mitigates the risk of transmission and exposure. Second, an employer cannot automatically discipline an employee who cannot get vaccinated. There is a complex tapestry of federal and state laws, including the Americans with Disabilities Act, that may protect employees in such instances. An employer may be liable in a civil suit if it pursues improper disciplinary measures.

Employers Beware: Courts Are Tending To Side With Employees. Across the country, courts have tended to take an exceedingly liberal approach in classifying COVID-19 as a “disability,” and have generally sided with employees who either seek accommodations or claim that they were improperly terminated with regard to COVID-19.

In one eye-opening case out of the Federal Court for the Southern District of New York, *Velez v. Girraphic LLC,* the plaintiff employee became sick with a “respiratory illness” in the winter of 2020, before the State and City of New York had declared states of emergency. The plaintiff took time off from work, warned his co-workers about the seriousness of COVID-19, and was later terminated from his employment. Although he never explicitly requested a reasonable accommodation, he later argued that his request for medical leave should be considered as such. The plaintiff sued his employer on several state law causes of action, as well as the New York City Human Rights Law.

The employer moved for dismissal, arguing that COVID-19 should not be considered a disability, that the plaintiff's accommodation claims should fail because the virus was not a concern in New York City at that time, and that the employee was terminated for performance-related reasons.

The court denied the employer's motion for dismissal, holding that COVID-19 falls within the definition of “disability” as defined by the New York City Human Rights Law. Also, the court clearly did not believe that the issue of whether there was a state of emergency in effect at the time should have any bearing on the plaintiff's claims.

There are several points of which employers should take stock. First, COVID-19 will almost certainly be treated as a “disability” under various state and federal disability laws. Second, courts will take a liberal, employee-friendly view of what amounts to a request for reasonable accommodation with regard to COVID-19. Finally, even as states begin to end the continued state of emergency that has persisted since March of 2020, this does not mean that COVID-19 will begin to

be treated as an ordinary illness. On the contrary, if courts follow the Southern District of New York's approach -- one of the most influential District Courts in the country -- then the issue of whether a state of emergency persists will have no influence on an employee's COVID-19-related accommodation claims.

Takeaways. As employees begin to return to work this summer, and life returns to something close to normal, employers will be forced to reckon with instituting appropriate vaccination policies. In doing so, private sector employers should know that they are generally free to mandate that their employees be vaccinated before returning to work. Even so, employers who craft such policies should be sure to consult any applicable collective bargaining agreements, provide language in their vaccination policies regarding appropriate documentation and document retention for employees who claim a medical exemption, and work to create policies tailored to the nature of their workforce. It is inevitable that certain employees will refuse to be vaccinated based on one of the three exemptions noted above. In such cases, employers should request appropriate documentation, if applicable, maintain the confidentiality of those records, and engage in a process to create a reasonable accommodation for such employees. If such an accommodation is completely unfeasible because there is no way for an unvaccinated employee to safely perform his or her job duties, the employer can exclude the employee from the workplace, but should remain wary of disciplining any such employees, which may expose the employer to liability. Finally, employers should not fall into the trap of becoming less vigilant with regard to their policies if and when their state ends its declared state of emergency. COVID-19, and the complex workplace it has created, will be with all of us for a little while longer.