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November 4, 2020

MAY EMPLOYERS MANDATE COVID-19 VACCINES?

The question of mandatory vaccinations has been raised for several years with regard to healthcare employers, but due to the highly contagious nature of COVID, the question now arises as to whether all employees may be required to get the COVID vaccine, assuming one is developed. Generally, employers may require that all employees take this vaccine due to the risk of contagion to other employees, customers, and other third parties. If an employee cannot take a vaccine due to bona fide medical or religious reasons, the employer has the right to require substantiation of those reasons and should then consider if other accommodations may be available. Especially in the first year of a COVID vaccine (which would optimistically occur during our second year of experience with the virus), we expect most employers will adopt policies similar to those used by healthcare providers mandating flu vaccines, where the standard accommodation is a face covering. However, changes in our knowledge of the virus, mutations in the virus itself, or the sensitivity or demands of a particular work environment may make this default accommodation unworkable. Should that occur, remember that under the Americans with Disabilities Act, “reasonable accommodation” does not require what is required under the FMLA – the employee does not have to be placed in a comparable position with no change in pay or schedule. If the difference in responsibilities, pay or schedule is significant, the employee may claim constructive discharge or retaliation, but the employer has more latitude to address accommodation than with the FMLA.

We are often asked “can the employee sue us” based on an employer’s exercise of employer rights, such as the mandatory vaccine. Such claims should be limited by application of the workers’ compensation exclusivity bar, or possible claims prosecuted by OSHA if the employer pursued vaccination in an unusual or unsafe way (and

irregular administration could conceivably lead to an employee's ability to bring claims outside of the workers' compensation system in some states which permit tort claims against employers for willful misconduct). As with any mandatory medical procedure, employers need to conduct due diligence regarding the vaccine provided and who will administer it. Also, it will be helpful for employers to roll out the vaccine as an opportunity for employee safety at work and away from work, in essence, to sell the need for the vaccine. [Please see our August coverage of mandatory flu vaccine issues for more.](#)

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