

Employers should prepare for COVID-19 vaccine in the workplace

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On December 11, 2020, the United States Food and Drug Administration (FDA) issued its first emergency use authorization (EUA) for the COVID-19 vaccine, which allows Pfizer-BioNTech, the manufacturer of the vaccine, to distribute the vaccine throughout the United States. This encouraging step for the United States in its fight against COVID-19 also raises several important questions for employers as the vaccine becomes more broadly available.

While we wait for both full FDA approval and the United States Equal Employment Opportunity Commission's (EEOC) anticipated employer guidance on the vaccine, we recommend that employers prepare now to address the legal issues that arise when the vaccine is accessible to the American workforce.

May Employers Mandate the COVID-19 Vaccine as a Condition of Employment?

Even though the EEOC has not yet issued formal guidance, the EEOC has stated that an employee who has COVID-19 or symptoms of COVID-19 poses a “direct threat” to the health and safety of



the workplace. This means that a person with COVID-19 or symptoms of COVID-19 poses a significant risk of substantial harm to himself or others. The EEOC continues to use this standard to allow employers to exclude employees who have contracted COVID-19 or who are showing symptoms of COVID-19 from the workplace.

Until the FDA fully approves the COVID-19 vaccine, and the EEOC issues formal guidance regarding the vaccine in the workplace, employers should strongly encourage, rather than require, their employees to take the COVID-19 vaccine. After full FDA approval and guidance from the EEOC, we expect employers will be able to mandate that their employees take the COVID-19 vaccine as a condition of employment, subject to possible exceptions under the Americans with Disabilities Act and Title VII. In fact, mandatory flu vaccines are already common in the health care field, and many health care employers require their employees to take the flu shot each year or forfeit employment.

What Happens When An Employee Refuses the COVID-19 Vaccine?

If an employer requires the COVID-19 vaccine for all its employees, there are situations in which an employee’s refusal will require additional analysis to determine if the employee should be exempted from the mandate, including (1) where the refusing employee is a qualified individual with a disability, as defined by the Americans with Disabilities Act (ADA), (2) where the employee’s refusal is due to their sincerely held

religious belief, and (3) where the refusing individual is subject to a collective bargaining agreement.

First, qualified employees under the ADA whose disability puts them at higher risk for an adverse reaction to the vaccine may be able to refuse the COVID-19 vaccine as a reasonable accommodation. If an employee requests a reasonable accommodation in the form of refusing to take the COVID-19 vaccine, the ADA requires an employer engage in the interactive process with the employee to determine if the requested accommodation is reasonable and/or creates undue hardship on the employer. Because the EEOC has made clear that COVID-19 meets its “direct threat” standard, it is possible that, even with a qualified disability under the ADA, an employee cannot safely perform his or her job without the COVID-19 vaccine. Thus, COVID-19’s classification as a “direct threat” will unquestionably impact the interactive process for reasonable accommodations.

Next, under Title VII of the Civil Rights Act of 1964, which protects employees from religious discrimination, an employee may refuse to take the COVID-19 vaccine based on a sincerely held religious belief. The sincerely held belief must be religious, rather than political or philosophical. An employer who receives a request from an employee to refuse the vaccine based on religious reasons has the right to inquire further to determine whether the belief is truly a sincerely held religious belief. Even where an employee refuses a vaccine based on a sincerely held religious belief, courts recognize that an employer may lawfully refuse such an accommodation where it would cause the employer an undue hardship. For example, courts have held that the spread of influenza, which could be caused by an employee’s failure to take the flu shot, constitutes a safety risk to a health care employer’s workforce and patients, thus posing an “undue hardship” on the health care employer. As a result of this reasoning, employers in fields where transmission of COVID-19 is highly likely may

be able to terminate an employee for refusing to take the COVID-19 vaccine, even if the refusal is based in a sincerely held religious belief.

Lastly, if an employee is a party to a collective bargaining agreement, the employer should negotiate the mandatory vaccination provision with the employee's union. Incorporation of the employer's vaccination policy into the CBA will help ensure compliance and could avoid disputes.

May an Employer Terminate an Employee Who Refuses the Vaccine?

In order to terminate an employee who refuses the COVID-19 vaccine, an employer must have a uniformly applied policy regarding its mandate of the COVID-19 vaccine as a condition of employment. Thus, under a uniformly applied policy, employers may lawfully terminate an employee who has not requested a reasonable accommodation on the basis of a disability, refused on the basis of a sincerely held religious belief or who is not subject to a collective bargaining agreement for refusing the COVID-19 vaccine. But as discussed above, even termination of an employee who requests accommodation because of a disability or religious belief may be lawful depending on the circumstances. Employers should remember the importance of individually analyzing each situation.

Who Pays for a Mandated COVID-19 Vaccine?

If an employer mandates that its employees take the COVID-19 vaccine as a condition of employment, it is a best practice, and in the employer's best interest, for the employer to pay the cost of the vaccine.

As always, it is imperative that employers uniformly apply policies to all employees. This information is subject to change based on further guidance regarding the COVID-19 vaccine in the workplace. Employers should consult with their employment counsel for additional guidance on addressing

concerns about the COVID-19 vaccine in the workplace. Phillips Murrah's labor and employment attorneys continue to monitor developments to provide up-to-date advice to our clients.

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