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Mandating COVID-19 Vaccinations in the Workplace

By Nicholas J. Pappas and Celine Chan*

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With the COVID-19 vaccine now more readily accessible, and as states begin to lift restrictions on businesses that had been imposed in response to COVID-19, employers are assessing whether and how to implement vaccination policies in the workplace. Employers also are evaluating whether to mandate that employees be vaccinated before allowing a return to the workplace.

While federal law does not directly address whether employers may mandate COVID-19 vaccines, various federal statutes and regulatory guidelines will impact the contours of any vaccine policy, including Title VII of the Civil Rights Act of 1964 (“Title VII”) and the Americans with Disabilities Act (“ADA”). In addition, employers must contend with an ever-changing landscape of state and local rules.

In this article, we discuss applicable agency guidance, along with federal and state laws that employers should consider when enacting a COVID-19 vaccination policy. We also identify several practical issues that employers should consider in determining whether and how to mandate that employees be vaccinated before returning to the workplace.

Federal and State Guidance

On December 16, 2020, the U.S. Equal Employment Opportunity Commission (“EEOC”) issued guidance stating that inquiring about or requiring proof of an employee’s vaccine status “is not likely to elicit information about a disability,” and as such, is not a disability-related inquiry under the ADA. EEOC, [*What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*](#) (Dec. 16, 2020). The guidance further cautioned that subsequent follow-up questions from employers, including why an employee is not vaccinated, may elicit information about a disability and would be subject to ADA standards that they be “job-related and consistent with business necessity.”

The EEOC recommended that if an employer requires proof of vaccination, that they instruct employees not to provide any medical information along with the proof in order to avoid implicating the ADA. The EEOC guidance also states that the Genetic Information Nondiscrimination Act is not implicated by inquiring about or requiring proof of an employee’s vaccination status because such inquiries do not involve the use, acquisition, or distribution of genetic information.

Although the current EEOC guidelines permit employers to verify an employee’s vaccination status, federal law prohibits discrimination against employees who have not been vaccinated due to a sincerely held religious practice or because of a disability. Under Title VII, once an employer is on notice of an employee’s

*Associate Omar Abdel-Hamid assisted in the drafting of this article.

sincerely held religious belief, practice or observance that prevents the employee from receiving the COVID-19 vaccine, employers must provide a reasonable accommodation, unless doing so would impose an “undue hardship” on the employer. Courts interpreting “undue hardship” in this context note that employers can avoid liability where “the accommodation the employee seeks would pose more than a *de minimis* cost for an employer.” *New York v. U.S. Dep’t of Health & Hum. Servs.*, 414 F. Supp. 3d 475, 536 (S.D.N.Y. 2019); *see also Baker v. The Home Depot*, 445 F.3d 541, 548 (2d Cir. 2006). EEOC guidance provides that the factors relevant to assessing “undue hardship” include the type of workplace, the employee’s duties, identifiable cost and burden on the employer of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will need a particular accommodation. EEOC, [Questions and Answers: Religious Discrimination in the Workplace](#) (July 22, 2008).

The ADA also requires that employers grant a request for reasonable accommodation of an employee’s disability unless doing so would cause an undue hardship or pose a “direct threat.” The “undue hardship” standard under the ADA imposes a higher burden than the *de minimis* standard, and requires a showing of “significant difficulty or expense,” and “focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation.” EEOC, [Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA](#) (Oct. 17, 2002).

A “direct threat” is defined as “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.” 29 C.F.R. § 1630.2. In determining whether a direct threat exists, employers must evaluate the duration of the risk, the nature and severity of potential harm, and the likelihood and imminence of the potential harm. If a direct threat cannot be reduced, while the employer may exclude the employee from the workplace, the employer may not automatically terminate the employment of the employee.

States also have adopted, or are in the process of adopting, regulations that would expand protections for

employees who decline vaccinations on non-religious or medical grounds. To date, legislators in at least forty (40) states have introduced bills that would prohibit employers from requiring the COVID-19 vaccine, from inquiring about an individual’s vaccination status, or from taking adverse actions based on vaccination status. NASHP, [State Lawmakers Submit Bills to Ban Employer COVID-19 Vaccine Mandates](#) (May 6, 2021). Finally, in the context of unionized workplaces, employers must be mindful of collective bargaining agreements that may limit an employer’s ability to implement or enforce a mandatory vaccination program.

Practice Pointers

Employers who adopt any vaccination policy, whether mandatory or not, should seek to draft the policy in clear terms and distribute it to employees prior to implementation. The policy should ideally describe any exemptions, as permitted by federal, state or local law, including the process to secure an exemption or accommodation. Given the ever-changing landscape of federal and state employment laws and agency guidance, as well as applicable health and safety guidelines, employers should be aware that any recommendations with respect to vaccinations in the workplace may change, and thus employer should continue to monitor all applicable directives.

An employer mandating vaccines as a pre-requisite to returning to the workplace should ensure that it is prepared to make reasonable accommodations for employees who object to the vaccine because of a disability or a sincerely held religious practice or belief. If an employer concludes that it cannot provide an accommodation proposed by an employee whether due to undue hardship or because the accommodation would require elimination of an essential job function, the employer should consider whether remote work would be feasible for the employee at least on a temporary basis. If remote work is not feasible, and no other alternatives exist, the employer may theoretically terminate employment of an individual who refuses vaccination.

However, employers should consult with counsel before making such termination decisions, as taking any adverse actions against employees who object to

vaccines on grounds protected by federal and state laws may be challenged by employees claiming that the employer's justifications for their actions are false, and, therefore are pretexts for unlawful discrimination. Although not directly addressed by current EEOC guidance, employers also should consider providing reasonable accommodations, or exemptions from any vaccine mandate, to employees who are pregnant or breastfeeding. Current CDC guidance provides that the vaccine is safe for those who are pregnant or breastfeeding, but the CDC acknowledges the data is limited. CDC, [COVID-19 Vaccines While Pregnant or Breastfeeding](#) (May 14, 2021).

Employers who make COVID-19 vaccines mandatory for employees returning to work also should keep in mind several other legal and practical considerations. For example, pursuant to the Occupational Safety and Health Administration ("OSHA") COVID-19 guidance issued on April 20, 2021, if an employer requires employees to get a COVID-19 vaccine as a condition of employment, any adverse reactions to the vaccine is considered "work-related" and the employer is obligated to record and track such reactions among its employees. OSHA, [Frequently Asked Questions](#) (last accessed May 20, 2021).

Employers also may be required to provide employees with paid leave to obtain a vaccination and recover from the associated side effects. See, e.g., N.Y. Lab. Law § 196-C (providing New York employees with up to four (4) hours of paid leave per COVID-19 vaccine injection, unless a greater number of hours is required under a collectively bargained agreement).

Employers also should be aware of the potential risks associated with mandating vaccines that have not yet been granted full authorization by the U.S. Food and Drug Administration ("FDA"). Under FDA regulations governing medical products approved under an Emergency Use Authorization ("EUA"), such as the COVID-19 vaccines, individuals must be informed "of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks." 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III). At least one court is currently considering whether an

employer's mandatory COVID-19 vaccination policy was unlawful in light of the individuals' right to refuse a product approved under an EUA. *Legaretta v. Macias*, 2021 WL 833390, at *1 (D.N.M. Mar. 4, 2021).

Employers should continue to monitor evolving agency guidance regarding social distancing, masking, and other infection control measures. On May 13, 2021, the CDC's updated guidance provided that fully vaccinated individuals no longer needed to wear a mask or socially distance in most settings unless otherwise required by federal, state, or local regulations. CDC, [Guidance for Fully Vaccinated People](#), (May 13, 2021).

At the same time, OSHA's guidance to employers, last updated on January 29, 2021, still recommends that employers not distinguish between workers who are vaccinated and unvaccinated. On May 20, 2021, however, OSHA issued a statement that, in light of the CDC's most recently updated recommendations, OSHA would review and update its guidance. OSHA, [Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace](#), (last accessed May 20, 2021). Employers should continue to be mindful of state or local rules that still mandate masking and physical distancing at the workplace regardless of vaccination status.

Finally, employers should consider whether state and local guidance regulates their ability to inquire about a customer, client, or other non-employee's vaccination status. Although the governors of two states – Florida and Texas – have issued executive orders preventing businesses from requiring proof of an individual's vaccination status as a condition of obtaining services or entering an establishment, other states, such as New York, are encouraging the use of so-called "vaccine passports" to allow businesses to verify a customer's vaccination status. An employer who requires proof of vaccination for its customers or clients also should consider what accommodations it will offer to those who refuse the vaccine on medical or religious grounds.

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If you have questions concerning the contents of this issue, or would like more information about Weil's Employment Litigation and Executive Compensation & Benefits practices, please speak to your regular contact at Weil, or to the editors or practice group members listed below:

Practice Group Members:

Gary D. Friedman
Practice Group Leader
New York
+1 212 310 8963
gary.friedman@weil.com

Frankfurt
Stephan Grauke
+49 69 21659 651
stephan.grauke@weil.com

London
Ivor Gwilliams
+44 20 7903 1423
ivor.gwilliams@weil.com

Miami
Edward Soto
+1 305 577 3177
edward.soto@weil.com

New York
Sarah Downie
+1 212 310 8030
sarah.downie@weil.com
Steven M. Margolis
+1 212 310 8124
steven.margolis@weil.com

Michael Nissan
+1 212 310 8169
michael.nissan@weil.com
Nicholas J. Pappas
+1 212 310 8669
nicholas.pappas@weil.com

Amy M. Rubin
+1 212 310 8691
amy.rubin@weil.com

Paul J. Wessel
+1 212 310 8720
paul.wessel@weil.com

Silicon Valley
David Singh
+1 650 802 3010
david.singh@weil.com

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