



The Covid-19 Vaccine At Work: Legal Considerations

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Over the past 12 months, COVID-19 has changed so much about how the world operates. During that time, people and businesses have worked to adapt to the “new normal”: wearing masks, social distancing, installing plexi-glass and other barriers, sanitizing hands and surfaces and more. Researchers and scientists have raced to develop a vaccine that promises to provide some protection. Finally, as 2020 finally came to a close, the first doses of the COVID-19 vaccines started to roll out to the American public.

With the vaccine increasingly available, and a promised 300 million doses available in the United States by this summer, we all now must adapt to a new, new normal—a world in which there is a vaccine available to mitigate the worst risks of this pandemic.

The development of the vaccine, however, is not a panacea and does not ensure that the population all gets vaccinated. Many are unable, ambivalent, or reluctant to get vaccinated, for a variety of reasons that are beyond the scope of this article. Given this, many employers are grappling with the question of how to address the COVID-19 vaccine at work. Should employers require that employees get vaccinated, and can they do so? Should they just incentivize employees to get it? Or strongly encourage it? Or none of the above? What factors and legal issues should be considered? Do employers have an obligation to their workforce, customers or third parties to ensure their workplace is as safe from COVID-19 as possible? These are questions on the minds of nearly all employers as we plunge into 2021.

As an initial matter, there is some precedent for these questions. Employers have addressed similar questions with regard to the flu vaccine over the years, and in particular during the swine flu seasons of 2009, and another record flu year of 2018. The Equal Employment Opportunity Commission (EEOC) has long addressed these issues of mandatory vaccines, throughout its various guidances. The EEOC has held that employers generally may require employees to receive vaccinations as a required term and condition of employment. This is not a blanket allowance, and is subject to certain exceptions for employee disabilities and religious objections to vaccines, and also subject to any applicable state or local laws, or industry requirements. For instance, the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act

of 1964 (Title VII) provide the main source of requirements that an employer accommodate an employee's disability or sincerely held religious beliefs, respectively, which prevent the employee from being vaccinated.

One industry requirement that often comes into play in the construction arena is found in any applicable Collective Bargaining Agreement (CBA). Any employer seeking to impose a mandatory vaccine upon its construction workers must ensure there is no prohibition on such in any governing CBA. As CBA become subject to renegotiation and renewal, mandatory vaccines may well become a hot topic subject to negotiation.

Another factor that employers in the construction industry would do well to consider is the National Labor Relations Act (NLRA). Indeed, the NLRA most likely requires employers to bargain over any vaccine programs affecting unionized workers. Moreover, the NLRA prevents employers from infringing upon "protected concerted activity." In theory, organizing to oppose a mandatory vaccine program could include such concerted

activity. Thus, construction industry employers should be mindful of the requirements and limitations imposed by the NLRA when considering a vaccination policy.

Workers compensation laws also come into play when considering the potential for mandatory vaccine programs. Some states' workers compensation laws, such as New Jersey, have legislated a rebuttable presumption that an employee who contracts COVID-19, did so while at work. This enables employees to obtain workers' compensation benefits for having contracted COVID-19, unless the employer successfully rebuts the presumption and demonstrates that the employee likely contracted it somewhere other than work. Likewise, if an employee has an adverse reaction to the vaccine, and the vaccine was mandated by the employer, this scenario too could give rise to a workers' compensation claim.

The Occupational Safety and Health Act (OSH Act) is another law that may come into play for construction employers when

considering a vaccine COVID-19 program for workplaces. Under the OSH Act, employers can be liable for failure to provide a safe workplace. Prior guidance from OSHA regarding the flu vaccine suggests that it would support a mandatory vaccine program at work, in order to ensure a safe workplace, however subject to certain limitations.

The above list of factors to consider is illustrative but not necessarily inclusive. If employers are inclined to mandate or even incentivize vaccines for their employees, they should work closely with their legal team to ensure that the program complies with applicable laws and regulations.

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