Six months into the COVID-19 pandemic in the United States, everyone is looking for hopeful signs that life can return to “normal” on any level. Encouraging news reports indicate that the race to develop a COVID vaccine is progressing, with hopes that one will receive approval and become commercially available by early in 2021.

With a vaccine comes some difficult questions for employers. Can employers mandate a vaccine as a condition of employment? Even if they can do so legally, should they?

**Can employers mandate a vaccine? Probably, but with exceptions.**

Private employers likely have the legal right to require employees to obtain a COVID vaccine as a condition of employment. For years, many employers in high-risk workplaces (e.g., hospitals and nursing homes) have required their employees to obtain an annual flu vaccine. This does not pose problems in the ordinary course. Given the estimated 180,000 Americans (and counting) who have died from COVID, it seems unlikely that lawmakers will enact legislation that would preclude employers...
generally from mandating a COVID vaccine.

With that said, employers may also have a legal duty under the Americans with Disabilities Act to allow certain employees to opt out of the vaccine. For example, given the speed with which the vaccine candidates are moving through clinical trials, employees in high-risk categories may receive advice from their health care providers not to receive the vaccine at least initially until the complications are better understood. Alternatively, perhaps young, healthy employees who are at relatively low risk from COVID may obtain notes indicating that the vaccine is not necessary for their own health.

If employees request an accommodation from an employer’s COVID vaccine mandate, the employer will need to determine whether the accommodation is a reasonable one and whether it imposes an undue burden on operations and on the health and safety of coworkers. As with all ADA accommodation requests, employers will need to carefully consider the facts on a case-by-case basis.

Additionally, employees may object to the vaccine on religious grounds. Again, employers must balance employees’ right to be free from religious discrimination against the burden that the accommodation would create in the workplace. (Note that the Supreme Court has stated that employers have less obligation to accommodate employees’ religious objections than their medical needs. In religious discrimination cases, the employer can deny the request if it imposes more than a minimal burden on the business.)

**Should employers mandate a vaccine? It depends.**

As the legal rules above suggest, implementing a mandatory vaccine program will likely require employers to devote considerable time and energy to the program. In addition to dealing with accommodation requests, employers will need to decide questions such as:

- Who pays for the vaccine? (Many employers and insurers subsidize employee flu shots and provide them on-site to minimize the burden on employees. However, it remains to be seen how expensive a COVID vaccine will be and whether the government will issue any rules on how it is allocated in the early going.)

- How should employees prove they received the vaccine?

- Assuming the vaccine eventually wears off, how frequently will employees be required to get the vaccine?

- Do remote-work employees need to get vaccinated?

In addition, employers who mandate a vaccine will need to consider the potential liability that arises from doing so. What happens if an employee has a severe reaction to the vaccine and then argues that he would not have gotten the vaccine except that his employer required it? Could the employer be held liable because of the mandatory vaccine policy? It’s difficult to say right now, but employers cannot simply ignore this possibility.
Ultimately, this will likely involve risk balancing. For employers that cannot effectively socially distance and those who work with high-risk populations, a mandate probably makes sense to minimize the risk of a COVID outbreak. (For example, imagine a nursing home not requiring a vaccine and then experiencing a spread of COVID through its elderly population. Hindsight being 20/20, it would be easy to say that the employer should have mandated a COVID vaccine.) For other employers, the risks may outweigh the benefits, especially in the first few months after a vaccine is released.

**Stay tuned**

For now, the questions remain hypothetical. Until a vaccine is made available and we have more information about its efficacy and risk factors, it is difficult to answer these questions in a vacuum. Nevertheless, employers ought to start thinking about their proposed approach to COVID vaccinations so that they are ready to implement a plan when the time comes (hopefully in the not-too-distant future).

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