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Katharine Virginia Hartman
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COVID-19 VACCINE: CONSIDERATIONS FOR EMPLOYERS

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With a COVID-19 vaccine now a reality, and more widespread availability on the horizon, many employers are beginning to evaluate the implications for their workplace. Below are considerations for employers to keep in mind from the perspectives of employment law, employee safety and health, and labor-management relations.

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Media Contact

Peter Dunn
Director of Client Relations and Communications
Philadelphia, PA
pdunn@dilworthlaw.com

Who Will Get the Vaccine First? The CDC’s Advisory Committee on Immunization Practices (“Advisory Committee”) recommended that the nation’s 21 million health care workers be eligible before anyone else, along with three million mostly elderly people living in nursing homes and other long-term care facilities. The Advisory Committee has also recommended that the vaccine should next be made available to older Americans and “essential workers” – such as the approximately 87 million Americans who work in food and agriculture, manufacturing, law enforcement, education, transportation, corrections, emergency response and other front line sectors critical to the functioning of our economy. Reports show that essential workers are at increased risk of exposure to the virus because their jobs preclude them from working from home. Further, these workers are disproportionately Black and Hispanic, populations that have been hit especially hard by the virus. Individual states will ultimately decide the order in which vaccinations are made available and may decide to include employees in industries that have been particularly affected by the virus. Arkansas, for example, has proposed including workers in its large poultry industry, while Colorado wants to include ski industry workers who live in congregate housing.

Mandatory or Voluntary? Employers may mandate COVID-19 vaccines, subject to certain exceptions related to employee disabilities and religious beliefs. The Equal Employment Opportunity Commission (“EEOC”) recently stated that, while the COVID-19 vaccination itself is not a medical examination, pre-screening vaccination questions may implicate the Americans with Disabilities Act (“ADA”) as disability-related inquiries. Employers who require employees to receive the vaccination, and administer the vaccine directly, must show that these disability-related screening inquiries are “job-related and consistent with business necessity.” To meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions – and, therefore, does not receive a vaccination – will pose a direct threat to the health or safety of her or himself or others. There are two circumstances in which disability-related screening questions may be asked without needing to satisfy the “job-related and consistent with business necessity” requirement. First, if an employer has offered a vaccination to employees on a voluntary basis (i.e., employees choose whether to be vaccinated), the ADA requires that the employee’s decision to answer pre-screening, disability-related questions also must be voluntary. Second, if an employee receives an employer-required vaccination from a third party that does not have a contract with the employer, such as a pharmacy or other health care provider, the ADA “job-related and consistent with business necessity” restrictions on

disability-related inquiries would not apply to the pre-vaccination medical screening questions. Similarly, requesting an employee provide proof of a COVID-19 vaccination is not considered a disability-related inquiry. Should an employer mandate the COVID-19 vaccine, and an employee cannot get vaccinated because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to [exclude](#) the employee from the workplace. Employers who wish to encourage their employees to get vaccinated without having to deal with nearly inevitable accommodations issues may wish to help facilitate vaccinations but not require them. Note that restrictions imposed by the ADA and other federal anti-discrimination laws do not interfere with or prevent employers from following CDC or other federal, state, and local public health authorities' guidelines and suggestions.

Education. Employers who decide to offer a vaccination program themselves or through third parties are encouraged to detail the process for receiving the vaccination, including any paperwork. We have assisted organizations draft informative communications to employees explaining the risks and benefits of vaccination.

Minimizing Distractions. Due to political issues that relate to vaccination considerations, employees may perceive any employer action or inaction regarding vaccines as politicized. Employees' varied concerns might be eased by building a scientific, business, and humanitarian case for any course of action. Focusing on the safety of customers and coworkers – and avoiding political talking points and justifications – can help to legitimize an employer's plan in the eyes of employees and defend against novel legal challenges and claims. In unionized workplaces, an employer may have an opportunity to partner with the union to align on messages of safety and other shared areas of concern. Employers will do well to set a tone of apolitical safety and corporate responsibility.

Limiting Fraud. Separating bona fide medical and religious accommodations from opportunists and malingers is important to workforce planning and employee morale. This challenge presents itself whether a vaccine program is mandatory or voluntary. Employees may seek to avoid work either due to a mandate to take a vaccine perceived to be unsafe or being put to work in an environment with unvaccinated colleagues. Employers should anticipate an influx of accommodation requests and proactively train human resources staff to process accommodation requests involving vaccines or working around unvaccinated persons. Informed by existing disability accommodation and leave laws, employers can map out processes for detecting and deterring employee abuse and fraud associated with vaccine programs and, more broadly, returning employees to the workplace. As public health guidance is subject to change as the COVID-19 pandemic evolves, businesses should be aware that accommodation requests relating to COVID-19 and vaccines may also change.

Business Leaders Rolling Up Sleeves. Unlike annual flu vaccine programs of the past, employees may be skeptical (for various reasons) of any COVID-19 vaccine offered by an employer. Business leaders should consider bold demonstrations of personal commitment to any mandatory or voluntary vaccine program, as a way to build employee trust and compliance. A picture or video clip of a business leader rolling up his/her sleeve to get a vaccine may be worth thousands of words. To have the assurance of business leaders participating in the program may put employees at ease, increase voluntary compliance, and reduce objections and disputes.

Potential for Tort or Workers' Compensation Claims. Employers may face claims of negligence sounding in tort when they decide not to institute vaccination programs; however, a plaintiff's ability to identify a relevant duty and to demonstrate an employer's breach of that duty would likely prove difficult. Whether workers' compensation laws apply to harm and side effects allegedly caused by COVID-19 vaccinations will vary case-by-case and state-by-state. State systems could cover injuries suffered as a result of employees' reactions to such vaccinations, particularly where employers mandated or strongly encouraged that employees receive those vaccinations. Employers should consider the industries in which their employees work when analyzing this issue, as employees in higher risk jobs may have stronger arguments for compensability.

The Occupational Safety and Health Act ("OSHA"). Historically, the Occupational Safety and Health Administration has not mandated employee vaccinations, but has indicated that employers can do so. The whistleblower provision at Section 11(c) of OSHA may afford protections to an employee who refuses to be vaccinated under an employer vaccination program because of the reasonable belief that a medical condition may cause a reaction to the vaccine resulting in serious injury or death. Separately, employees may allege that employers without vaccination programs have failed to provide safe and healthy work environments, as required by OSHA's general duty clause at Section 5(a)(1).

Watch for Protected Concerted Activity. Both union and non-union employers should be mindful of Section 7 of the National Labor Relations Act, which protects employees' rights to join together to advance their interests as employees and makes it unlawful for an employer to interfere with or restrain employees in the exercise of those rights. If employees join together to protest an employer's COVID-19 vaccine program (or lack of a program) and the employer takes adverse action against those employees as a result, it could lead to unfair labor practice charges being filed against the employer with the National Labor Relations Board.

What Does the Collective Bargaining Agreement Say? Unionized employers should examine their collective bargaining agreements to determine the extent of their duty to bargain with the union over vaccine programs. Employers may need to consider whether their management rights clauses should be renegotiated with this in mind. But, even if the CBA gives the employer the right to

unilaterally institute such programs, employers may still want to consider at least consulting with the union when developing such programs in order to foster goodwill with the union and to increase employee buy-in.

Mandatory Vaccination Programs Could Provide Unions with New Organizing

Opportunities. Non-union employers should consider how instituting a COVID-19 vaccine program might affect their union avoidance strategy. When employees feel as though their employer is not listening to their concerns or adequately communicating with them, they are more likely to turn to labor unions for help. Employers should therefore ask themselves:

- Could the positions that the employer takes regarding a COVID-19 vaccine program change employees' views on the potential benefits of bringing in a union and/or give union organizers more ammunition in their efforts to organize employees?
- To what extent is the employer going to consider employee concerns about efficacy, side effects, and/or general fears about or aversions to vaccines, and how is the employer going to communicate with employees about those concerns?
- How is the employer going to balance the concerns of employees who resist the vaccine against employees who want all employees in the organization to get vaccinated?
- Should the employer consider alternatives, such as the option to choose to wear a face covering or work from home?

Will Certain States Mandate Vaccination? There is a possibility that one or more Governors could issue Executive Orders mandating vaccination and, if they do, any such Executive Orders would also likely contain various carve-outs to protect citizens who have disabling conditions that would make vaccination medically inadvisable or who have sincerely held religious beliefs against vaccination. The issuance of such Executive Orders will likely be met with lawsuits challenging their legality. What will the Supreme Court say? In 1905, the Court upheld a mandatory vaccination law. What will this Supreme Court do and what should employers do while they wait?

For more information on this alert or if you wish to discuss the issues that relate to incentivizing employees to receive the vaccination, please contact the [Marjorie Obod](#), [Jennifer Snyder](#), [Katharine Hartman](#), [Stephanie Vogel](#) or [Matthew Whitehorn](#).