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EMPLOYER NEWSLETTER

VACCINES IN THE WORKPLACE – FREQUENTLY ASKED QUESTIONS

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Below are answers to the most frequent questions that we have received from employers about the COVID-19 vaccine:

FAQ #1: Can we require our employees to be vaccinated for COVID-19?

Answer: Yes – but understand the applicable laws and the proper analysis. Under the Americans with Disabilities Act (ADA), an employer may conduct “medical examinations” on, and ask medical-related questions of, employees and prospective employees – but only if such inquiries are “job-related and consistent with business necessity.” In guidance published in December 2020 and updated in May 2021, the Equal Employment Opportunity Commission (EEOC) stated that asking employees whether they have been vaccinated, or requiring proof of vaccination, in light of the worldwide COVID-19 pandemic is not prohibited under the ADA.

FAQ #2: Are there exceptions to the general rule that we can require the vaccine?

Answer. Yes. Under the ADA and Title VII of the Civil Rights Act of 1964, employers are required to provide “reasonable accommodations” to employees who are unable to take the vaccine for medical reasons or for sincerely held religious beliefs.

Regarding religious beliefs, the EEOC recommends that employers assume a request for religious accommodation is legitimate unless there is an objective basis for questioning either the religious nature or sincerity of a particular belief, practice or observance. Under Title VII, an employer is not required to provide a religious accommodation if doing so would require the employer to bear “more than a de minimis cost.”¹ Costs to be considered include financial costs and other burdens on the employer’s business.

Under the ADA and Title VII, employers must engage in the “interactive process” with employees about their requests for reasonable accommodations. Such reasonable

¹ This standard for providing religious accommodations is not as demanding as the ADA standard. Also, with the recent passage of SB 1824 (which Governor Ducey signed into law on June 30, 2021), Arizona has adopted the same standard as Title VII for religious objections to and accommodations for COVID-19 vaccines.

accommodations include allowing unvaccinated workers to work remotely, to wear face masks, and/or socially distance from coworkers.² However, the EEOC recognizes that no accommodations may be reasonable for specific jobs in certain industries (e.g., employees involved in protecting public safety and in providing direct health care and intimate personal services). In such cases, most employers would be able to prove that unvaccinated employees would pose a “direct threat” of substantial harm that cannot be eliminated or reduced by reasonable accommodation(s).

FAQ #3: Should we require vaccines?

Answer. It depends. Whether to mandate the vaccine is a tremendously important employee relations decision. And the ultimate decision may depend on how your current customers/clients perceive your products/services and how your employees feel about their jobs, the vaccine, and job opportunities elsewhere if they object to your decision. A substantial segment of the population (and workforce) remains skeptical of the vaccine and has resisted receiving it for many complex cultural, economic and political reasons. Thus, providing objective information that employees trust will do much to increase the number of employees who decide to get vaccinated. Some employers are providing financial incentives or “perks”³ and some are imposing surcharges/penalties.⁴

Our experience is that most employers outside the health care industry are not requiring the vaccine. Rather, most are simply encouraging it.

FAQ #4: Do we have to accommodate an employee who objects to vaccination for personal reasons -- unrelated to a medical condition or religious belief?

Answer. No. The EEOC recognizes that “[s]ocial, political, or economic philosophies, as well as mere personal preferences, are not ‘religious’ beliefs protected by Title VII.” Employees who have refused other types of mandatory vaccination based on personal preferences or other reasons unrelated to a medical condition or religious belief have been unsuccessful in asserting viable claims under Title VII. For example, the federal courts have consistently dismissed Title VII claims by employees who challenged their employer’s mandatory flu vaccination policy on the basis of strongly held personal beliefs because such beliefs are not religious in nature. Thus, it is very likely that courts would analyze objections to COVID-19 vaccinations in the same manner. However, even if an employee’s objection to vaccination is not based on a disability or religious belief, an employer should thoughtfully consider the request before taking any action in response.

² Pregnant employees who are unwilling to receive the vaccine may also seek an exception from a mandatory vaccination policy. In such cases, you should engage in the interactive process with the pregnant employee in the same way you would with a disabled employee under the ADA.

³ Examples, include a \$50 gift certificate, extra paid time off benefits, or a “floating holiday.” However, the EEOC cautions that such incentives should not be “so substantial as to be coercive” or so large to make employees feel pressured to accept it. The EEOC’s guidance also makes clear that employers should not require an employee’s family members to become vaccinated or punish employees whose family members are not vaccinated.

⁴ <https://www.wsj.com/articles/delta-air-lines-to-impose-200-monthly-surcharge-for-unvaccinated-employees-add-testing-requirements-11629902326>

FAQ #5: If we require our employees to get a vaccine, what proof can we require?

Answer. You should ask the employee to provide documentation from the immunization source showing the dates the vaccine was administered. This documentation should be treated as a confidential medical record and kept separate from the employee's regular personnel record.

FAQ #6: If we require our employees to get a vaccine, what policies or procedures do we need to have in place?

Answer. If you make the COVID-19 vaccine mandatory, you should adopt a policy that clearly defines the procedures and process for the employee to request, and your human resources team to consider, accommodation requests for medical reasons and sincerely held religious beliefs. We also suggest that you adopt policies and procedures to address whether time that non-exempt employees spend getting the vaccine will be considered "hours worked." If the vaccine is required, that time is "compensable" and should be paid. If the vaccine is not required, the employee's time away to become vaccinated is not necessarily "compensable" paid time (although treating it as such would probably increase the number of vaccinations). Finally, your policies should encourage sick workers to stay home until they meet the CDC or local health authorities' "return-from-isolation" guidelines.

If we can help you develop such policies and procedures, please let us know.

Conclusion

We will continue to monitor this developing situation and provide updates as appropriate. Please let us know if we can help answer your questions or help you implement appropriate policies, procedures and COVID-19 response plans. Mr. Clark's contact information is (480) 844-0039 or etc@clarkfirm.com.

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