



Ep. 15: Vaccines in the time of COVID

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*In the time of Coronavirus with many municipalities implementing restrictions on business and individual activity, employers are anxious to return to normal operations with staff onsite as soon as possible. With vaccines becoming available, employers may be wondering, **can I require my employees to get the COVID vaccine?***

Rasch Brown: I'm Rasch Brown, a Member of the firm's Labor and Employment group in the New Orleans office, along with Mag Bickford, the head of the firm's Labor and Employment section, also in New Orleans, and Chase Stoecker, who is with our group in the Fort Lauderdale office. I'll start by asking, Mag, what are the major issues around requiring employees to get a COVID-19 vaccine?

Mag Bickford: Well, the EEOC (Equal Employment Opportunity Commission) has given us some information back on December 16th that's going to help us identify the issues and work through them as we make a plan on whether COVID vaccinations are going to be part of a particular workplace. So on December 16, 2020, the EEOC issued guidance that specifically said that vaccinations are not medical examinations. Because of the guidance, we have some clarity on proceeding with the vaccination program in the workplace, either as a mandatory program or as a voluntary program. The one thing the EEOC did specify in that guidance is that there are still provisions of the ADA (Americans with Disabilities Act) [and Title VII], which will limit us in some capacity.

So for example, if a mandatory or voluntary vaccination program is conducted in the workplace, and someone would identify the vaccination as being contrary to their status as a disabled person, you would have to undergo the analysis we would typically see when someone presents with a disability and ask for an accommodation. Secondly, if an employee who was subject to vaccination identified the shot (or shots, as the case may be) as being in violation of their good faith religious practices, then you would also have to go into an analysis of whether you're going to require them to proceed, or if there are going to be reasonable accommodations that you can offer, by the way, in each of those scenarios. And then lastly, the EEOC said we need to be careful to not run afoul of the Genetics Information [Nondiscrimination] Act (GINA, as they call it) rules and regulations

as well, which is going to require the same sort of analysis that the religious discrimination and the ADA mandate. So those are the big question marks.

The other question mark is whether you're going to make it mandatory or optional, as I hinted to earlier, because if you make it mandatory, it's a little bit more high-level analysis, because you're going to have to consider what's going to happen if someone refuses.

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- Rasch Brown:** Chase, can you give more detail about the issue of a sincerely held religious belief, including a lack of trust in vaccines, or moral and ethical concerns regarding vaccines, how that affects a requirement for employees to undertake the vaccine?
- Chase Stoecker:** Sure. Simply not wishing to be vaccinated is typically not a sufficient legal argument to justify exemption under title seven for a vaccination program. Likewise, being a member of an anti-vaccination movement would not qualify. "Sincerely held religious belief" means just that -- it must be a part of your religion.
- Rasch Brown:** Can you give me an example of a disability under the Americans with Disability Act, which would constitute a sufficient exemption?
- Mag Bickford:** Yes, Rasch. I can give you that example. So what happens if you announce that there's going to be a mandatory or voluntary vaccination plan, and your employee says "I have a physical condition, which would be aggravated by the vaccination"? We're seeing a lot of cases of vaccination sensitivities, and the EEOC so far has indicated that a sensitivity by itself is not enough to trigger a disabled state. But let's say that you had a disease that would have a more direct consequence to a reaction. Then you would definitely have to go through that process to determine whether or not it's going to be a viable exemption. The other thing to remember on the ADA, you still have the concept of "reasonable accommodation." So you may, in that scenario, want to look at alternatives to making it work in the ADA scenario. For example, if someone can't get a shot, then maybe the better solution is to allow them to work from home. It's all going to depend on the facts of the particular situation. And you're going to have to engage in what we call an "interactive dialogue" to figure out what the right solution is for all concerned.
- Rasch Brown:** And how are the benefits to vaccination taken into account?
- Chase Stoecker:** So the benefits, there are many, such as improved employee health, fewer absences, and improved staff morale. Additionally, the vaccination likely will fall under most employer sponsored healthcare plans. So there will not be a large out-of-pocket expense for the employee.

Rasch Brown: So if I'm an employer, can I require the employees to get a COVID test before they return to the workplace?

You can always offer a voluntary [vaccination] program, just like many employers do with their flu shots.

Mag Bickford: Possibly. The EEOC came out with their guidance in mid-December and said that a vaccination is not a medical examination under Title VII in the ADA. And that frees us to consider whether we can have a voluntary or mandatory program for vaccination in the workplace. It also opens the question of whether we can require it in order for a worker to come back to work. So what we know is this: if we're going to engage in a mandatory vaccination program, we have to go through certain analysis. For example, when you go to get your flu shot, there's a form you fill out that asks some personal questions that potentially might be protected health information under HIPAA. I would caution an employer to proceed in a way where they're not collecting that information, because that brings in certain onerous implications in maintaining that data.

What some employers are doing right now is bringing in outside pharmacies, such as CVS or Walgreens. I know they're doing this locally here in New Orleans, where they come in, they get the protected health information, they maintain that process. So the employer doesn't have an issue with that. That's one thing to consider. The other thing you want to consider if you're going to do a mandatory or a voluntary vaccination program internally, is it a business necessity? Because particularly with a mandatory program, you want to make sure there's a business necessity for it. For example, if you're a hospital or you're a retirement community or a physical therapy practice, or some place that treats people on a medical basis, there's a very strong argument that it's a business necessity to have a mandatory program. And you should definitely go through the analysis of whether that is in fact true, but it seems more likely. If you're a company that has everybody telecommuting in their home offices, then it doesn't seem to have a strong business necessity for a mandatory program. But regardless of that, you can always offer a voluntary program, just like many employers do with their flu shots. You have a third party vendor come in, they administer the vaccinations. They keep the health information too. Either way, that's probably a win-win in figuring out how you want to handle that in the workplace.

Rasch Brown: We've discussed EEOC guidance. Are there any other laws or regulations that an employer should be concerned about?

Chase Stoecker: Yeah, Rasch, and that's kind of the overarching theme here, right? We have the EEOC guidelines, but there's other departments that are going to be looking at this. This time, the EEOC has issued its guidelines and we don't have guidelines from any other departments, such as the Occupational Safety and Health Administration (OSHA). We expect guidance from the Occupational Safety and Health Administration to be forthcoming. We can look at history though to determine what those guidelines will say. For example, in 2009, the Occupational Safety and Health Administration issued

guidelines allowing healthcare employers require their employees to get flu vaccination. So if we look at past as prologue, we can expect similar guidelines to be issued in the future. It should also be noted that the National Labor Relations Act (NLRA) protects employees' rights to engage in concerted activity, and this includes employees who collectively discuss, object, or protest any employer mandated vaccination program. So we have to keep in mind that there might be some additional guidance issued by the National Labor Relations Board (NLRB) regarding a mandatory vaccination plan. Additionally, there might be existing Collective Bargaining Agreement language that could impact a vaccination program.

Rasch Brown: An employer would want to make the COVID vaccination as convenient as possible. Can an employer offer COVID vaccine at a clinic on site at the workplace?

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Mag Bickford: Absolutely. Just as flu shots have been administered in the workplace for some time now, that process can still happen in a work environment. I liked that process, quite honestly, because then you make sure that people get the second dose. I think one of the concerns that people have is that okay, they show up for the first one, and their arm hurts for a few days afterward, or they don't feel so well. And then they don't want to go back for step two. That's understandable. But if it's in the workplace, it's going to make that easier. The other thing is it also is more convenient for everybody. You have the assurances and convenience of not losing your employee too long for that shot. And the employee similarly has very easy access to something that will help their ongoing health conditions. I think that having an onsite clinic come into the workplace is an excellent idea. And as I mentioned previously, it helps with the HIPAA health information that needs to be protected.

Rasch Brown: Mag and Chase, we appreciate your insight on this topic this afternoon. Thank you very much.

Mag Bickford: Well, you're very welcome, Rasch. It's a pleasure to do this. I think this is a very interesting topic. I think employers should also stay tuned to the headlines and the legal analysis, because it certainly is a continuing, evolving process. And it's also the beginning to maybe getting this pandemic under control for all of us to get back to normal.

Chase Stoecker: Absolutely. Yes. I think it will be interesting. I expect there's going to be a lot of new guidance, and then a lot of new case law coming out in the next few months on this subject.

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