

## Labor and Employment Issues Concerning the COVID-19 Vaccine December 17, 2020

In light of the imminent availability of a COVID-19 vaccine approved for emergency use, public sector employers have consistently inquired about their ability to require employees to be vaccinated as a matter of policy, and as a condition of continued employment. While the short answer to this question is “yes,” there are, of course, several qualifying factors. Ultimately, whether to impose such a mandate on all or a part of a public-sector workforce will be a policy decision for each municipality or entity, after carefully weighing the implicated risks and benefits. Employers, as applicable, will have to consider: (1) privacy issues; (2) religious and medical objections and responsibilities under the Americans With Disabilities Act (“ADA”); (3) union work force bargaining requirements; and, (4) Occupation Safety and Health Administration workplace obligations. We have discussed these issues, in turn below.

### **1. Privacy Issues**

With COVID-19 infection rates on the rise again, and concerns about even further spikes after the holidays, more employers may be considering mandatory vaccination programs, particularly for first responders or other personnel with jobs that require them to interact with particularly vulnerable populations. To be sure, municipal employers have not routinely mandated that employees be vaccinated. Of course, our state and our country have never before encountered a pandemic of this scope and severity.

It is expected that some employees may object to a mandatory vaccination program as being unreasonably intrusive and in violation of their individual right to privacy. In Massachusetts, courts generally balance an employee’s privacy interest against the employer’s legitimate business interest in determining whether an employer policy or requirement unreasonably intrudes upon employees’ privacy rights. With governmental employers, since the government is subject to compliance with certain constitutional restrictions that a private employer is not, there is an additional layer of analysis. While there is no directly applicable case law, given the scope of the current pandemic, the employer’s interest in maintaining a safe and healthy workplace, as well as preventing further community spread, would appear to outweigh an employee’s privacy interest in not being subjected to a vaccination.

### **2. Reasonable Accommodations to Religions Beliefs or Due to Medical Concerns**

As noted above, employers will need to consider how to handle union and non-union employees who refuse to be vaccinated based upon sincerely held religious beliefs or as a result of a disability or medical condition. In either circumstance, employees are essentially asking for a “reasonable accommodation,” and employers need to process such requests carefully. In light of the potential for discrimination if an accommodation is requested and

improperly denied, the federal Equal Employment Opportunity Commission (EEOC) has urged employers to consider simply encouraging employees to receive a vaccine rather than mandating that employees be vaccinated. However, aside from the exemptions stated below, there is no law that prohibits employers from implementing a mandatory vaccination policy (subject to bargaining as may be required for union employees). The contours of what constitutes a reasonable accommodation, and similarly whether an employee's refusal to be vaccinated constitutes an undue hardship on the employer, are case-specific and dependent on the employee's position and duties. Accommodations may include use of additional personal protective equipment, moving the employee's workstation, a temporary reassignment or temporary leave of absence, or remote work.

*(a) Religious Exemption*

Under Title VII of the Civil Rights Act of 1964 (Title VII), once an employer receives notice of an employee's "sincerely held religious belief" that prevents them from taking the vaccine, the employer must provide a reasonable accommodation, unless an accommodation would pose an "undue hardship" on the employer. The employer must then evaluate whether the belief is "religious" and "sincerely held." According to the EEOC, a belief may be "religious" even if it is not espoused or endorsed by any recognized house of worship. Religious practices include "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views." However, "social, political, or economic philosophies, as well as mere personal preferences, are not religious beliefs protected by Title VII." The question of whether a belief is "sincerely held" may turn on whether the employee has always acted consistently with their stated belief, or whether they have previously made exceptions to, or acted inconsistently with, that stated belief. Personal objections to vaccinations generally, and even concerns over the potential side effects of the COVID-19 vaccine, generally would not constitute religious beliefs, no matter how sincerely held. Nevertheless, each request for a religious accommodation to a vaccine requirement must be evaluated on a case-by-case basis.

In determining whether an accommodation for a sincerely held religious belief poses an "undue hardship," employers should consider a variety of factors, including but not limited to the "identifiable cost in relation to the size and operating costs of the employer, and the number of individuals who will in fact need a particular accommodation." Courts have not come to a consensus on whether speculative harm, i.e., the health risk posed by un-immunized employees to co-workers and clientele alike, is sufficient to establish undue hardship. However, a 2016 decision by the federal trial court for the District of Massachusetts did indeed find that allowing a nurse to refuse an influenza vaccine and continue working with patients created undue hardship because it "could have put the health of vulnerable patients at risk." Robinson v. Children's Hospital Boston, 2016 WL 1337255 (D.Mass. Apr. 5, 2016). While this is not binding precedent, the case provides an example of how an employer must attempt to balance the employee's role in the workplace and the impact that their refusal to be vaccinated would have on that work and the workplace at large.

*(b) Medical/Disability Exemption*

The EEOC has declared COVID-19 a "direct threat," meaning that it poses a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." This designation has afforded employers greater latitude in requiring employees to undergo

COVID-19 testing and mandating that employees have their temperatures taken, without violating the Americans With Disabilities Act (ADA). Standing alone, however, this designation does not permit employers to automatically exclude from their workplaces employees who refuse to be vaccinated based on medical or disability-related concerns.

If an employee refuses to receive the COVID-19 vaccine on the basis that they have a disability, the employer must engage in an “interactive process” with the employee. The goal is to identify whether the employee’s limitations can be accommodated without undue hardship to the employer, such that they can perform the essential functions of their position without receiving the vaccine. The threshold requirement for an employer is determining whether the employee in fact has “disability,” defined under the ADA as a physical or mental impairment that substantially limits one or more major life activities. When a disability is not obvious, employers can require employees to provide certification from a health care provider describing the restrictions that the disability imposes on the employee’s ability to perform job duties. One commonly-stated concern regarding vaccines in general is that employees may be allergic or otherwise sensitive to certain ingredients of the vaccine. Although courts are unsettled as to whether allergies or other chemical sensitivities constitute an ADA-covered “disability,” employers may wish to treat it as such, out of an abundance of caution, at least for the purpose of engaging in the “interactive process.” Assuming that the employee has a disability under the law, the EEOC has advised that employers should conduct an individualized assessment of the following four factors in determining whether a direct threat exists by virtue of an unvaccinated employee: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm. If, after engaging in the interactive process, an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer may only exclude the employee from the workplace—or take any other action—where there is no way to provide a reasonable accommodation that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.

Employer should be careful when engaging in this interactive process, in terms of the scope and extent of information requested of an employee to support a reasonable accommodation request based upon medical / disability reasons. Any such information elicited from the employee will likely constitute “disability related inquiries”, which must be “job related and consistent with business necessity” under the ADA. In addition, this information must be maintained confidentially to the same extent as other employee medical information.

Note that while the EEOC has opined that a vaccination is not a “medical examination” under the ADA, there are still restrictions on the scope and extent of medical questions that can be asked of employees pre-vaccination, should the employer choose to administer the vaccination program itself. According to the EEOC, those same limitations do not apply if a third-party (such as pharmacy or health care provider) conducts the vaccinations, since the information elicited from these pre-vaccination inquiries is not provided to the employer.

### **3. Union Workforce**

Additional considerations are relevant to unionized workforces. Where an employer seeks to introduce a new policy that affects the terms or conditions of employment for unionized employees, the employer must provide

the union(s) with notice and an opportunity to bargain to impasse or resolution over the decision to adopt said policy, as well as the impacts of that decision. A decision to require employees to receive a vaccine effectively introduces a new condition of employment that, if not met, could disqualify that individual from their position with the employer, or at the very least alter the way in which they perform their duties. Because of the effects this decision would have on mandatory subjects of bargaining, namely (but not exclusively) an employee's ability to report to work, public employers must provide affected unions with notice and an opportunity to bargain about the policy prior to its implementation.

Given the inherent urgency in all matters surrounding the pandemic, and particularly with the imminent arrival of a limited number of vaccines throughout the Commonwealth, it would be appropriate to ask unions for a prompt response to an employer's notification of a proposed vaccine mandate. Prior to contacting unions, however, employers should review the relevant collective bargaining agreements they have with each union, as those agreements may contain language (such as in a management rights provision) that impacts the extent to which the employer is required to bargain.

#### **4. Employer's Duty to Provide Employees with a Safe and Hazard-Free Work Environment under OSHA**

In response to questions concerning influenza and H1N1 vaccinations, the federal Occupational Health and Safety Administration (OSHA) has stated that employers *may* institute a vaccine requirement, provided employees are properly informed of the benefits and risks of the vaccination in question. In doing so, OSHA has also noted that requiring employees to be vaccinated does not necessarily render that workspace safe and hazard-free, and therefore additional safety precautions may still be necessary. We see no reason why OSHA, if posed this question with respect to COVID-19 vaccines, would not come to the same conclusion. Thus, when you are considering adopting a vaccine mandate, you should also conduct a broader assessment of your workplace(s) to ensure that you have any necessary additional safety precautions in place, such as the wearing of face masks, or maintaining social distancing. You should also be aware that an employee's refusal to receive a vaccination because of a reasonable belief that they have a medical condition that creates a real danger of serious illness or death (such as a serious reaction to the vaccine), may be protected under Section 11(c) of the Occupational Safety and Health Act of 1970 pertaining to whistleblower rights.

If you have any questions concerning the COVID-19 vaccine and your workplace, the extent of your bargaining obligations, or the manner in which you respond to requests for reasonable accommodations, please contact any member of the firm's Labor and Employment Practice Group at 617.556.0007.

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