

## COVID-19 EMPLOYMENT UPDATE VACCINATIONS

**EMPLOYERS ARE ASKING:** As COVID-19 vaccines are being delivered to states across the country, many arriving at their destinations on Monday, December 14<sup>th</sup>, employers continue to ask: “Can I require my employees to get vaccinated against COVID-19?”

**EXPERTS ARE SAYING:** The answer to that question depends largely on guidance from the Equal Employment Opportunity Commission (EEOC) and the employer’s industry. The EEOC is the agency responsible for enforcing federal anti-discrimination laws related to employment. The EEOC issues guidance related to these federal laws and offers insight into how it intends to enforce those laws. Historically, the EEOC has been very cautious in recommending or greenlighting mandatory vaccinations outside the healthcare industry. The EEOC has not yet issued guidance on whether employers can mandate COVID-19 vaccinations. Given the spread, impact, and death toll resulting from COVID-19, it is likely the EEOC will not remain silent much longer.

We anticipate that the EEOC will issue guidance similar to what it issued in response to the 2009 H1N1 flu pandemic. In 2009, the EEOC issued guidance stressing that an employer considering a mandatory flu vaccine policy must comply with federal anti-discrimination laws. As detailed below, employers mandating the vaccine should ensure that the mandate is based upon objective facts and related to job duties and workplace needs. Then, employers must be prepared to accommodate those with medical or religious objections.

First, whether an employer can require vaccinations depends largely on the employer’s business. The EEOC has made clear that vaccinations and health screenings are “medical examinations” under the Americans with Disabilities Act (ADA). Thus, in order to mandate the vaccination, it must be job-related, consistent with business necessity or justified by a direct threat. This is why health care providers, schools, nursing homes, and other employers that work in high risk environments or with high risk populations can require mandatory vaccinations while other employers, who may not be able to satisfy these standards, may not issue such mandates.

Second, an employer who undertakes this analysis and implements a mandatory vaccine policy may be obligated to accommodate (1) an employee’s sincerely held religious belief under Title VII and (2) an employee’s disability or medical condition under the ADA. To avoid potentially significant liability, an employer must provide the appropriate carve-outs for covered employees needing religious or disability accommodations.

The last time the EEOC addressed the mandatory vaccine issue, during the H1N1 pandemic, it found that employers in the healthcare, nursing home, and other high risk industries satisfied the job-related and business necessity requirements. This finding allowed employers in those industries to mandate the flu vaccine subject to accommodation requirements. Unlike the H1N1 flu, the Centers for Disease Control (CDC) has already determined that COVID-19 meets the direct threat standard (even outside the healthcare industry) which heightens the likelihood that the EEOC will issue guidance that gives greater latitude to employers wanting to mandate the vaccine. Indeed,

the EEOC has already acknowledged in its Pandemic Preparedness plan that the COVID-19 pandemic met the ADA’s “direct threat standards,” meaning that someone with COVID-19 or symptoms of it in the workplace poses a “significant risk of substantial harm” to others in the workplace. This finding allows employers to engage in certain actions, such as taking employee temperatures. It also may signal how the EEOC may address this issue now that a vaccine is available.

**WHAT IS THE ANSWER?** Currently, there is no definitive answer. Industries that were allowed to mandate the flu vaccine already satisfy the standards under federal law to mandate the COVID-19 vaccine. Other industries having interaction with the public, like retail and food service, likely also meet those standards. But for now, employers should continue to monitor the EEOC guidance and encourage, rather than require, employees to get vaccinated. Since COVID-19 vaccines are currently being distributed across the country, it is likely the EEOC will issue guidance soon. While the vaccine is making its way through the distribution priority list, the more important question might be, even if they can require it, “SHOULD employers require employees to get vaccinated against COVID-19?”

For questions related to COVID-19 vaccinations, updates, and any other COVID-related issues, please contact Jaffe’s COVID-19 employment law experts:

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