Critical in a crisis, o creative in court.

MAY 4, 2021

Vaccine Mandates Can companies require employees to get the COVID vaccine?

Presenters

Tom Wynsma & Kirk Bacon



PISESENTES SHB.COM SHB.COM



Kirk Bacon

8th Year Associate at Shook Intellectual Property



Tom Wynsma

8th Year Associate at Shook Environmental + Toxic Tort SHOOK
HARDY & BACON

Glance

Shook has 16 offices strategically located across the United States and Europe.



492

ATTORNEYS

284

WOMEN + MINORITY ATTORNEYS

120+

FULL-TIME SCIENTIFIC/ RESEARCH ANALYSTS

By the Numbers

40+

DRUG + MEDICAL
DEVICE COMPANIES
REPRESENTED

#1

MOST FEDERAL DISTRICT COURT CASES HANDLED CASES FILED IN 2020 200+

DRUG + MEDICAL
DEVICE PRODUCTS
REPRESENTED

150+

CASES TRIED TO VERDICT SINCE 2013 100+

MDLS HANDLED BY SHOOK ATTORNEYS



Game Time



- Two hypotheticals –
 Five total questions
- We will do a poll for each question, and discuss the answers at the end of the presentation

GOOD LUCK!

- John Doe works in the accounting department and Jane Doe works in manufacturing at Company A. John has been working remotely for the last nine months, while Jane has been working in the factory.
- As Company A is transitioning back to in-office work, it is implementing a mandatory vaccination program. John does not want to get the vaccine because he has had bad allergic reactions to vaccines in the past that required hospitalization and Jane does not want the vaccine due to firmly held religious beliefs.

Can Company A require John to get the vaccine?

- A. Yes; assuming John is a contract employee who agreed to work for two years in the office, he must get the vaccine if he wants to keep his job.
- **B. Yes;** Because it would be a undue burden on the company to have its employees working from home.
- C. No; But, Company A may reduce his salary since he is refusing the vaccine.
- **D. No;** Because John has proven that he can perform his job duties at home; allowing him to work from home is a reasonable accommodation.

Can Company A require Jane to get the vaccine?

- A. Yes; Because Jane is an essential employee and cannot perform her job duties from home.
- **B. Yes;** If Jane was positive for COVID, she could pose a direct threat to her co-workers who work in close proximity. There is no reasonable accommodation that Company A can provide her.
- C. No; Because Jane wears PPE when she is working on the factory floor.
- D. No; Because Jane's religious beliefs are sufficient to avoid mandatory vaccination.

Assuming Company A does not require John to get the vaccine, and he returns to the office and infects others with COVID, could Company A be liable to the infected employees?

- A. Yes; Because under the doctrine of respondeat superior, as John's employer, they are responsible for his negligent actions.
- **B. Yes;** Company A could reasonably foresee that an unvaccinated employee could spread COVID.
- C. No; Because John wore PPE in the office on the day he allegedly infected others.
- **D. No;** Because Company A was not aware that John was positive for COVID when he came into the office and Company A provided PPE and hand sanitizer for all employees working in the office.

- Company B has 50 employees who all work in an open collaborative workspace with little to no ventilation. Employees sit face-to-face and work within one to two feet of each other.
- Due to remote work over the last year, productivity has decreased significantly and Company B has noticed a 50% decrease in net profits.
- Company B is transitioning back to inoffice work, and is implementing a mandatory vaccination program.

An employee, Jack Doe, does not want to get the vaccine due to personal medical reasons. Company B estimates that the cost to build out an enclosed workspace for Jack Doe would be substantial. Can Company B require Jack to get the vaccine in order to return to work?

- A. Yes; Because in the last year, Jack was not productive working from home.
- **B. Yes;** Because Company B would incur more than a de minimis cost in order to prepare the workplace for Jack to return to work safely without the vaccine.
- C. No; Because, even though overall production for the company was down, allowing Jack to work from home would be a reasonable accommodation.
- **No;** Because other employees can work extra to take on Jack's workload while he is out of the office.

An employee, Jill Doe, does not want to get the vaccine due to a religious belief. In order to accommodate Jill while maintaining a safe workplace, Company B could provide face masks to wear while in the office. Can Company B still require Jill to get the vaccine in order to return to work?

- A. **Yes**; Because it would be an undue burden on Company B to purchase face masks for everyone in the office and police the wearing of masks.
- **B. Yes;** Because Jill shares common areas with other employees and the risk of transmitting COVID outweighs Jill's religious beliefs.
- C. No; Because more than 75% of the other employees are vaccinated, so there is herd immunity within the company.
- **No;** Because the cost of face masks is de minimis and masks would adequately address the safety concerns in the workplace.

2

What Do the ADA, Title VII, OSHA, and DFEH Say About Vaccine Mandates?

The Americans with Disabilities Act (ADA)

- Under the ADA, an employer cannot discriminate against an employee on the basis of disability
- The term "discriminate" includes medical examinations and disability-related inquiries
- Employers cannot require employees to get a medical examination or make inquires into whether an employee has a disability or the nature and severity of the disability, unless the examination or inquiry is shown to be job-related and consistent with business necessity

- The ADA allows an employer to have a qualification standard that includes a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace
- Using this "qualification standard," an employer may require all in-person employees to be vaccinated in order to avoid the direct threat of contracting or spreading COVID-19, provided there are no other reasonable accommodations the employer could adopt to prevent the spread of COVID-19

- To decide whether an employee poses a direct threat if he or she does receive the vaccine, employers should conduct an individualized assessment of four factors in determining whether a direct threat exists
- Factors to determining a "direct threat"
 - Duration of the risk
 - Nature and severity of the potential harm
 - Likelihood that the potential harm will occur
 - Imminence of the potential harm

- The Equal Employment
 Opportunity Commission (EEOC)
 has stated that administering the
 vaccine is not a medical
 examination or a disability-related
 inquiry
- But pre-screening questions before the vaccine is administered may be medical examinations or disability-related inquiries; therefore, any questions must be job-related and consistent with business necessity

In order to be job-related and consistent with business necessity, "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"1

1. SECTION K.2

<u>Synopsis</u>:

- Asking pre-screening questions to administer the vaccine qualifies as a medical examination or disability-related inquiry.
- An inquiry may be job-related and consistent with business necessity if asking the questions avoids a direct threat.
 - As an example, employees who are working in person but do not receive vaccines pose a direct threat.
 - As a result, employers likely may ask employees in medical services and large office settings prescreening vaccination questions.
 - But for remote employees, employers likely may not ask pre-screening questions because they would be impermissible medical examinations

• An employer may require a vaccine, but if the vaccine requirement tends to screen out an individual with a disability, the employer must consider reasonable accommodations¹

- Examples of Reasonable
 Accommodations¹
 - Remote work policy
 - Personal Protective Equipment (PPE)
 - Social distancing
 - Installing barriers
- However, if adopting these accommodations would impose an undue hardship on the business, then the employer has no duty to adopt the reasonable accommodation

- What is an undue hardship?
 - An action requiring significant difficulty or expense¹
- Factors that courts consider when determining whether a reasonable accommodation is an undue hardship²
 - Nature and cost of accommodation
 - Employer's overall financial resources
 - Employer's type of operation

- Employer's should not only consider the cost, but ways to mitigate or offset the cost
 - Apply for funding from state agency
 - Look into available tax deductions or credits
 - For portion of cost that pushes accommodation into undue hardship, ask employee if they want to pay the difference

Synopsis:

- An employer may require its employees to receive the vaccine
- However, for employees with a disability, reasonable accommodations must be made, unless the reasonable accommodations pose an undue hardship on the employer's ability to operate the business

- Title VII prevents an employer from discriminating against employees on the basis of their race, color, religion, sex, or national origin¹
- Under Title VII, an employee can refuse the vaccine due to a sincerely held religious belief or practice

• If an employee refuses the vaccine under Title VII, the employer must offer a reasonable accommodation, unless the accommodation would pose an undue hardship on the employer

- Title VII does not define "undue hardship," leaving it to the courts to determine on a case-by-case basis
 - An accommodation causes undue hardship whenever that accommodation results in "more than de minimis cost" to the employer¹
 - California takes a more stringent interpretation of de minimis cost – requiring an actual cost, not just hypothetical²

Synopsis:

- An employer must provide a reasonable accommodation to any employee who refuses taking the vaccine for reasons protected by Title VII (religious reasons), unless the reasonable accommodations would impose an undue hardship.
- What qualifies as an "undue hardship" must be determined on a case-by-case basis.

Occupational Safety and Health Act (OSHA)

- Historically, OSHA has allowed employers to require mandatory vaccinations
 - In the context of H1N1, OSHA stated that an employee who refuses vaccination because of a reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death (such as serious reaction to the vaccine) may be protected under Section 11(c) of OSHA pertaining to whistle blower rights
- As of now, OSHA has not taken a position on COVID-19 vaccinations; however, OSHA generally would permit employers to require mandatory vaccines, but would caution employers to know the benefits of vaccines and to respect refusals for medical reasons

California Department of Fair Employment and Housing (DFEH)

- An employer may enforce mandatory FDA-approved vaccinations as long as the employer adheres to the requirements of the Fair Employment and Housing Act (FEHA)
 - Mandatory vaccination policies and practices must not discriminate against or harass employees based on a protected characteristic
 - Employers must reasonably accommodate employees with disabilities and sincerely-held religious beliefs or practices
 - Employers must not retaliate against employees for engaging in protected activity

California Department of Fair Employment and Housing (DFEH)

- If an employee resists mandatory vaccination absent a disability or sincerely-held religious belief or practice, no reasonable accommodation is necessary
- The type of medical information that can be elicited from employees will depend on whether the employer is administering the mandatory vaccination program
- Employers may require "proof" of vaccination if a third party is administering the mandatory vaccination program

California Department of Fair Employment and Housing (DFEH)

Synopsis:

- The DFEH indicates that it is not commenting on whether, or to what extent, employers *should* mandate that employees get vaccinated. Its guidance just addresses how to comply with the FEHA in the event employers mandate vaccination.
 - Employers should consult with legal counsel in the event they wish to put a mandatory vaccination policy or practice in place.
- Whether a reasonable accommodation exists for employees with disabilities and/or sincerely-held religious beliefs or practices is a highly fact-specific inquiry.
- Keep in mind that "undue hardship" is difficult to demonstrate if you are considering denying a reasonable accommodation.
- If employers want to administer the mandatory vaccination program themselves, they should consider what medical information can safely be obtained from employees

So, Can An Employer Require Its Employees To Get Vaccinations?

- In general, employers can mandate that their employees get vaccinated if unvaccinated employees would pose a direct threat to the workplace
- But, there are exceptions for employees who have a qualifying disability and/or a sincerely held religious belief
 - In these circumstances, the employer must evaluate ways to reasonably accommodate these employees
 - If no reasonable accommodation can be made without creating an undue burden on the employer, then the employer can require these employees to get vaccinated

So, Can An Employer Require Its Employees To Get Vaccinations?

- Consider the nature of the employer's business and its employees' job duties
 - How closely do employees work?
 - Do employees have exposure to food products or other consumables in a restaurant, retail, or manufacturing setting?
 - How much exposure do employees have to customers or the public?
- Does the nature of the business support the necessity for employee vaccinations

Is There Tort Liability for Requiring or Not Requiring Vaccines?

Tort Liability – No Vaccine Mandate

- Many states recognize the tort of negligent transmission of an infectious disease.¹
- Under this form of negligence, an employer may be liable for negligently causing the spread of COVID-19.
- In other disease contexts (typically sexually transmitted diseases), negligence is generally limited to knowingly transmitting the disease.²

Tort Liability - No Vaccine Mandate

- Likely, this actual or constructive knowledge would apply to any COVID-19 liability as well, meaning an employer or its employees would need to have a confirmed positive (or potentially an outstanding test) and still risk transmission before liability would be imposed.
- In light of that law, it seems unlikely that an employer deciding to not impose a vaccine requirement would be exposed to liability for COVID-19 transmission.
- But general negligence liability still applies to the transmission of diseases and under a "reasonableness" analysis for negligence; deciding to not require a vaccine may still be a factor.

Tort Liability – No Vaccine Mandate

Tips:

- Make reasonable and good faith efforts to comply with applicable government standards and guidance
 - Follow CDC and OSHA guidelines for the workplace (e.g., social distancing, cleaning and disinfecting, quarantining, etc.)
 - Inform employees about the measures being taken to protect them
 - Stay aware of employee's health while respecting legal right to privacy
 - Remind employees of COVID-19 symptoms and urge them to seek medical attention if they experience them
 - Be transparent with employees about confirmed COVID-19 cases in the workplace, while maintaining privacy

Tort Liability – Vaccine Mandate

- Mandatory vaccines may be considered a part of work, and thus adverse reactions to vaccines may fall under an employer's worker's compensation policy
- Where a vaccine is merely encouraged, workers' compensation policies may not be available
- Outside of workers comp, an employee would likely have to prove negligence on the part of the employer, but where vaccines are FDA approved and administered by a third party, this would be challenging for the employee



Game Time Answers

Hypothetical # 1

- John Doe works in the accounting department and Jane Doe works in manufacturing at Company A. John has been working remotely for the last nine months, while Jane has been working in the factory.
- As Company A is transitioning back to in-office work, it is implementing a mandatory vaccination program. John does not want to get the vaccine because he has had bad allergic reactions to vaccines in the past that required hospitalization and Jane does not want the vaccine due to firmly held religious beliefs.

Can Company A require John to get the vaccine?

- **A. Yes**; assuming John is a contract employee who agreed to work for two years in the office, he must get the vaccine if he wants to keep his job.
- **B. Yes;** Because it would be a undue burden on the company to have its employees working from home.
- C. No; But, Company A may reduce his salary since he is refusing the vaccine.
- **D.** No; Because John has proven that he can perform his job duties at home; allowing him to work from home is a reasonable accommodation.

Can Company A require John to get the vaccine?

- A. Yes; assuming John is a contract employee who agreed to work for two years in the office, he must get the vaccine if he wants to keep his job.
- **B. Yes;** Because it would be a undue burden on the company to have its employees working from home.
- C. No; But, Company A may reduce his salary since he is refusing the vaccine.
- D. No; Because John has proven that he can perform his job duties at home; allowing him to work from home is a reasonable accommodation.

Can Company A require Jane to get the vaccine?

- **A.** Yes; Because Jane is an essential employee and cannot perform her job duties from home.
- **B. Yes;** If Jane was positive for COVID, she could pose a direct threat to her co-workers who work in close proximity. There is no reasonable accommodation that Company A can provide her.
- C. No; Because Jane wears PPE when she is working on the factory floor.
- **D.** No; Because Jane's religious beliefs are sufficient to avoid mandatory vaccination.

Can Company A require Jane to get the vaccine?

- A. Yes; Because Jane is an essential employee and cannot perform her job duties from home.
- B. Yes; If Jane was positive for COVID, she could pose a direct threat to her co-workers who work in close proximity. There is no reasonable accommodation that Company A can provide her.
- C. No; Because Jane wears PPE when she is working on the factory floor.
- **D.** No; Because Jane's religious beliefs are sufficient to avoid mandatory vaccination.

Assuming Company A does not require John to get the vaccine, and he returns to the office and infects others with COVID, could Company A be liable to the infected employees?

- **A. Yes**; Because under the doctrine of respondeat superior, as John's employer, they are responsible for his negligent actions.
- **B. Yes;** Company A could reasonably foresee that an unvaccinated employee could spread COVID.
- **C. No;** Because John wore PPE in the office on the day he allegedly infected others.
- **D.** No; Because Company A was not aware that John was positive for COVID when he came into the office and Company A provided PPE and hand sanitizer for all employees working in the office.

Assuming Company A does not require John to get the vaccine, and he returns to the office and infects others with COVID, could Company A be liable to the infected employees?

- A. Yes; Because under the doctrine of respondeat superior, as John's employer, they are responsible for his negligent actions.
- **B. Yes;** Company A could reasonably foresee that an unvaccinated employee could spread COVID.
- C. No; Because John wore PPE in the office on the day he allegedly infected others.
- D. No; Because Company A was not aware that John was positive for COVID when he came into the office and Company A provided PPE and hand sanitizer for all employees working in the office.

Hypothetical # 2

- Company B has 50 employees who all work in an open collaborative workspace with little to no ventilation. Employees sit face-to-face and work within one to two feet of each other.
- Due to remote work over the last year, productivity has decreased significantly and Company B has noticed a 50% decrease in net profits.
- Company B is transitioning back to inoffice work, and is implementing a mandatory vaccination program.

An employee, Jack Doe, does not want to get the vaccine due to personal medical reasons. Company B estimates that the cost to build out an enclosed workspace for Jack Doe would be substantial. Can Company B require Jack to get the vaccine in order to return to work?

- **A.** Yes; Because in the last year, Jack was not productive working from home.
- **B.** Yes; Because Company B would incur more than a de minimis cost in order to prepare the workplace for Jack to return to work safely without the vaccine.
- **C. No;** Because, even though overall production for the company was down, allowing Jack to work from home would be a reasonable accommodation.
- **D.** No; Because other employees can work extra to take on Jack's workload while he is out of the office.

An employee, Jack Doe, does not want to get the vaccine due to personal medical reasons. Company B estimates that the cost to build out an enclosed workspace for Jack Doe would be substantial. Can Company B require Jack to get the vaccine in order to return to work?

- A. Yes; Because in the last year, Jack was not productive working from home.
- B. Yes; Because Company B would incur more than a de minimis cost in order to prepare the workplace for Jack to return to work safely without the vaccine.
- C. No; Because, even though overall production for the company was down, allowing Jack to work from home would be a reasonable accommodation.
- **No;** Because other employees can work extra to take on Jack's workload while he is out of the office.

An employee, Jill Doe, does not want to get the vaccine due to a religious belief. In order to accommodate Jill while maintaining a safe workplace, Company B could provide face masks to wear while in the office. Can Company B still require Jill to get the vaccine in order to return to work?

- **A. Yes;** Because it would be an undue burden on Company B to purchase face masks for everyone in the office and police the wearing of masks.
- **B.** Yes; Because Jill shares common areas with other employees and the risk of transmitting COVID outweighs Jill's religious beliefs.
- **C. No;** Because more than 75% of the other employees are vaccinated, so there is herd immunity within the company.
- **D.** No; Because the cost of face masks is de minimis and masks would adequately address the safety concerns in the workplace.

An employee, Jill Doe, does not want to get the vaccine due to a religious belief. In order to accommodate Jill while maintaining a safe workplace, Company B could provide face masks to wear while in the office. Can Company B still require Jill to get the vaccine in order to return to work?

- A. **Yes**; Because it would be an undue burden on Company B to purchase face masks for everyone in the office and police the wearing of masks.
- **B. Yes;** Because Jill shares common areas with other employees and the risk of transmitting COVID outweighs Jill's religious beliefs.
- C. No; Because more than 75% of the other employees are vaccinated, so there is herd immunity within the company.
- D. No; Because the cost of face masks is de minimis and masks would adequately address the safety concerns in the workplace.

Critical in a crisis, of creative in court.

Questions?

SHOOK HARDY & BACON

