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A vaccine for 'normal,' but legal issues to consider for employers

With the COVID-19 vaccine becoming increasingly available, Illinois employers should be aware of various legal issues regarding the vaccine and the workplace.

Can employers require employees to receive the vaccine? If so, what about employees who request an exemption?

There are currently no statutory prohibitions on an employer's ability to mandate COVID-19 vaccines for employees. The Equal Employment Opportunity Commission ("EEOC") has taken the position that an employer may require employees to receive the vaccine, provided it allows for appropriate accommodations under the Americans with Disabilities Act ("ADA") and/or sincerely held religious belief, practice or observance under Title VII of the Civil Rights Act of 1964.

For exemption requests based upon a sincerely held religious belief, employers must provide a reasonable accommodation unless it would pose an "undue hardship." Employers should ordinarily assume that an employee's religious accommodation request is based on a sincerely held practice or belief, since Title VII defines those concepts broadly. If, however, the employer has an objective basis for questioning either the religious nature or sincerity of the belief, practice, or observance, the employer

may request supporting information.

If an employee requests an exemption based on a medical condition, the employer will need to individually assess whether that person will pose a "direct threat" to herself or other employees as set forth in the ADA regulations. If so, the employer must attempt to provide the employee with a reasonable accommodation that would eliminate or reduce the risk posed by the unvaccinated employee. If the risk cannot be reduced to an acceptable level by a reasonable accommodation, the employer may exclude the employee from physically entering the workplace, but should then consider whether the employee may be entitled to an alternative accommodation, such as performing the current position remotely, and whether any other rights may apply under other federal, state or local laws.

For employees who object based on a moral or other non-protected reason (such as safety concerns), there is no legal requirement to excuse the employee from the mandatory program (though there may be other practical reasons to do so). If an employer opts to accommodate for a non-protected reason, it should be sure to make such decisions in a non-discriminatory manner.

Employers who do not mandate can educate their employees about the vaccine, or might consider offering an

EMPLOYMENT LAW

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incentive to get vaccinated. The legal landscape concerning incentives is currently murky, and employers must consider implications under the Employee Retirement Income Security Act, the Affordable Care Act and rules regarding wellness programs under the ADA. The EEOC is expected to soon provide guidance regarding employer vaccine incentive programs. Employers who are considering such a program should first seek legal counsel.

Who pays the cost for employees to be vaccinated?

According to the Centers for Disease Control and Prevention, the federal government is providing the vaccine free of charge to all people living in the United States. Vaccination providers can be reimbursed for vaccine administration fees by the person's public or private insurance company or for the uninsured, from the Health

Resources and Services Administration's Provider Relief Fund.

If an employer mandates the vaccine, must the employer provide paid time off to get vaccinated?

The Illinois Department of Labor ("IDOL") recently issued guidance for employers on "Compensation, Paid Leave and the COVID-19 Vaccine," in which the IDOL states that pursuant to the Illinois Minimum Wage Law and the federal Fair Labor Standards Act, if an employer requires employees to get vaccinated, then the time the employee spends getting the vaccine "is likely compensable," even if the employee gets vaccinated during non-working time.

Has OSHA provided guidance regarding vaccinations?

In response to an executive order issued by President Biden, OSHA released revised COVID-19 guidance for employers. The new guidance (which is not mandatory yet, but likely a sign of things to come) includes recommendations that employers provide face coverings to all employees, whether they have been vaccinated or not, and advises that employers should not distinguish between vaccinated and non-vaccinated workers when complying with protective measures such as wearing face coverings or maintaining social distancing. OSHA does

not require employers to implement mandatory vaccination programs, but OSHA's guidance suggests that employers should provide vaccines to eligible employees. A vaccine clinic hosted or contracted by the employer raises issues under the ADA, however, and legal counsel is recommended for employers considering this route.

Can employers who mandate be held liable for

adverse side effects?

Existing COVID-19 vaccines may cause some mild short-term side effects (such as fatigue, or sore arms), which might require employees to seek time off, but would not likely result in any actionable harm for employers who mandate. As to the potential for more serious side effects (reports of which have been rare) or long-term harm, employees who claim to have been injured by a COVID-19 vaccine that was mandated by

an employer may attempt to bring suit. Such claims, however, likely would be preempted by workers' compensation law as injuries arising out of or in the course of employment.

Can an employer have different travel/quarantine policies for vaccinated employees?

We are aware of no guidance suggesting that an employer may not have different travel/quarantine poli-

cies for vaccinated employees, so long as the employer's policies are consistent with applicable state and local guidance.

Conclusion

The increasing availability of the COVID-19 vaccine provides hope that "normal" is within reach. However, employers need to remain vigilant about vaccine-related legal developments as they manage this new phase of the pandemic.