NELSON HARDIMAN
HEALTHCARE LAWYERS

Client Alert: Employer's Dilemma – To mandate or not mandate COVID Vaccines in the workplace?

1. Workplace Vaccinations: Can or Should they be Mandatory?

Neither federal nor California government agencies have offered consistent or conclusive rules or guidelines which could serv employers as reliable guidance on the question of mandatory vaccination policies. In part, this reflects both the "interim" autho but not fully approved status of the vaccines, as well as the novel and unprecedented nature of this pandemic, with the lingeri questions concerning virus transmission and prevention. Moreover, the question of vaccine effectiveness over time, along wit recent detection and transmission of virus variants raises additional questions that to date remain unanswered, even within th scientific community.

In view of the uncertainty, our recommendation at the present time is to defer establishment of workplace vaccine mandate policies. While an argument can be made in favor of such a mandate, employers take meaningful risks in implementing such policy given the potential to generate fierce opposition among those in the workforce who choose not to be vaccinated, creati risk of a contentious and disruptive environment. Additionally, as detailed below, in the absence of formal Food and Drug Administration (FDA) approval of the vaccines and establishment of clear regulatory agency policy on the issue, employers m inviting the filing of civil suits by disgruntled employees.

Nonetheless, some employers – particularly in higher risk settings, such as healthcare workplaces with unavoidable contact w highly vulnerable, at-risk populations – are electing to proceed with either vaccine mandates or similar limits. Below, we descr the considerations.

1. Current Interim FDA Status of Vaccines

When the FDA issued its Emergency Use Authorization (EUA) for the use of the Pfizer and Moderna vaccines (and later, the vaccine), it did so under its authority to provide access to medical products that *may potentially be used when there are no adequate and available options.* The EUA criteria threshold is appreciably less stringent than that required for FDA drug appro which may not occur until 2022 (or potentially later). Simply stated, by utilizing the EUA pathway, the FDA made a product ava to the public for a dire emergency, based on the best available evidence and without awaiting the full presentation of evidence would be needed for formal FDA drug approval. To be clear, by issuing its EUA, the FDA has *authorized and recommended* t vaccines against COVID-19 but has not yet bestowed formal approval for any of the current vaccines. Once FDA approval of vaccine(s) occurs, the institution of a mandate will be significantly more defensible.

1. Absence of a Current Federal Mandate

1. The issuance of the vaccine EUAs was not accompanied by a federal COVID-19 vaccine mandate of any kind. Indeed, the has stated that to the extent practicable, recipients of the current emergency use authorized vaccines should be informed that have the "option to accept or refuse the vaccine, and of any available alternatives to the product." 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III). This is not unusual because it is not the ordinary function of the FDA or any other federal agency to mandates on vaccinations. Instead, this issue falls within the jurisdiction of each individual state. Zucht v. King, 260 US 174.

1. California Vaccine Policy

In California, the Department of Fair Employment and Housing (DFEH) has authority to set guidelines as to whether an emplo *may* require an employee to be COVID vaccinated before returning to work. To date, DFEH has announced that employers *m* legally require employees to receive an FDA-approved COVID-19 vaccination – addressing only the circumstance that is not upon us. This supports the view that a California employer is within its rights to issue such a mandate to employees – once FD approval occurs. The question remains of what to do until that time. Until the FDA formalizes vaccine approval, DFEH policy i effectively ambiguous on the permissibility of COVID-19 vaccines mandates in the workplace, and in fact expressly states tha "DFEH does not provide guidance on whether or to what extent an employer should mandate vaccination within its workforce. *at page 8.* There is no explicit prohibition. Instead, employers must take care in the process of implementing vaccine policies further described below.

2. Considerations in Implementing a Discretionary Vaccine Mandate or More Restrictive Policy

As noted above, despite the absence of explicit federal or state guidance for vaccine mandates, some employers – most notably in healthcare settings – are adopting mandates. The Equal Employment Opportunity Commission (EEOC), in issuing its COVID-19 guidance for employers, has implied that employers *could* in fact elect to mandate vaccinations. Specifically, EEOC guidelines allow an employer to establish a mandatory vaccination policy if the "… need for it is job-related (*e.g.* nurses working in acute care hospitals), or if remaining unvaccinated would pose a direct threat to other employees, customers or themselves." *Citing, 29 C.F.R. 1630.2(r).*

1. Determining Whether to Implement a Vaccine Mandate

Our recommendation, at the current time, is to take caution in applying this standard of a "direct threat". Before determining such a threat to exist, employers considering a mandate or restrictive policy should document thorough consideration of a comprehensive list of specific safeguards that would significantly reduce the likelihood that non-vaccinated employees will pose a *direct* threat to others. This can and should include exploration of why a voluntary vaccine policy is insufficient (more on this below) and the risks to employees, visitors, the public, and clients in the failure to issue a workplace vaccination mandate. In addition to safeguards and risks, consideration should be given to:

1. how and when to deny non-vaccinated employees' access to the workplace;
2. a process for consideration of employee requests for accommodation on health or religious grounds;
3. expected repercussions of terminating or disciplining non-compliant employees (potential claims of discrimination and harassment, and wrongful termination); and
4. whether employees are members of a trade union (requiring compliance with applicable MOUs and "meet and confer" obligations for represented employees in order to mandate vaccinations).

In other words, before an employer issues a vaccination mandate or restrictive policy on who is permitted to return to the workplace, it must carefully consider the benefits, risks and expenses that may accompany such a mandate, and in the face of such considerations, decide whether requiring vaccination is truly necessary.

1. Consideration of Less Restrictive Measures

Based on the above considerations, the majority of California employers are currently electing to defer any vaccine mandate, in favor of voluntary vaccination policies. In this model, the goal is to encourage employees to submit to vaccination voluntarily. Many employees are offering incentives, such as paid time off or other rewards, to employees to encourage vaccinations. These voluntary incentives are permissible.

Anecdotally, the feedback from many workplaces has been that the patience exhibited by employers in adopting in voluntary vaccine policies, coupled with gentle but steady encouragement from co-workers, has been effective in persuading many employees who were initially "vaccine reluctant" or "vaccine ambivalent" to agree voluntarily to proceed with vaccination. The "reluctant" and "ambivalent" cohort is believed to be considerably larger than the number of employees who are dogmatically opposed to vaccination (which includes a subset that will only be vaccinated when they are forced to do so).

c. Proof of Vaccination.

An employer may require an employee to submit "proof" of vaccination. Although the expressed reason that an employee is not vaccinated *may* be related to a medical disability or based upon religious grounds (therefore protected under the state's anti-discrimination laws), merely inquiring or asking an employee for proof of vaccination is not a disability-related inquiry or religious creed-related inquiry, nor does it constitute a medical "examination", and therefore is permissible. However, since such documented proof could potentially include other disability or medical condition-related information, employers may wish to instruct their employees to omit any such disability or medical information from such documentation. Such documentation must be maintained by the employer as a confidential medical record.

1. Steps in Implementing a Vaccine Mandate

In implementing a workplace vaccine mandate, there are critical steps and safeguards that should be in place as employees return to the workplace in a compressed time-period and in large numbers, including:

- Memorializing a detailed vaccination policy in writing;
- Collection and protection of employees' proof of vaccination records;
- Institution or maintenance of other safety measures, including mandatory use of PPE and social distancing in the workp

As addressed in greater detail below, even with a vaccine mandate in place, employers need to be mindful of their obligations under the Americans with Disabilities Act (ADA) to reasonably accommodate employees with underlying medical conditions who assert that a disability prevents them from vaccination.

3. Alternatives to Vaccine Mandates

1. Workplace Screening and Testing

Employers are permitted to ask employees if they are experiencing COVID-19 symptoms (fever, chills, coughing, sore throat), and if so, are permitted (and should) send an employee home, the rationale being that an employee with COVID-19 is unable to perform the employee's essential duties in a manner that would not endanger the health and safety of others in the workplace even with reasonable accommodation (such as an isolated work station).

Under current FEHA guidelines, employers may require employees to submit to COVID-19 viral testing (but not antibody testing) before permitting employees to enter the workplace. Those test results should be maintained and placed in a folder separate from the employee's personnel folder. Employers may institute reasonable virus screening measures, such as requiring each worker to submit to a temperature check before entering the workplace.

1. Employees with COVID-19

An employee with COVID-19 and therefore unable to enter/remain at the workplace must must. If the employee's sick leave under the employer's policies is exhausted, the employee may be entitled to utilize other paid leave (including vacation or paid time off) or job-protected unpaid leave. As to the latter point, and under the California Family Rights Act, employees may be entitled up to twelve (12) weeks of job-protected unpaid leave for their own "serious health condition", or those of a close family member. Serious health condition means the condition results in inpatient care or continuing treatment or supervision by a health care provider (which would undoubtedly include COVID-19 and COVID-19 associated illnesses).

1. Workplace Administrative Safeguard and Policies

There are a number of safeguards and policies that an employer should put into place, irrespective of a mandatory vaccine policy, including:

- Implementing social distancing, hand washing, cloth face covering and PPE policies (which may be mandatory)
- Rearranging employee seating to allow for social/physical distancing protocols
- Adding partitions or barriers when needed
- Designating single-direction hallways whenever possible
- Considering elevator safety and design crowd control plans
- Assessing risks associated with common areas and close areas or remove seating as necessary
- Determining if doors, sinks, and toilets can be converted to touchless systems
- Removing coffeemakers, toasters, microwaves, and other communal food equipment
- Providing touchless waste bins or remove lids
- Providing for proper personal protective equipment disposal
- Assessing your HVAC system and update if necessary
- Providing for open windows/doors to allow for natural ventilation wherever feasible
- Implementing temperature checks or health screenings
- Adjusting or staggering employee schedules to reduce the number of individuals on site and better allow for social dista
- Redesigning where and when employees will be permitted to eat lunch
- Considering how to handle employees who are at higher risk for complications from a COVID-19 infection

As addressed more fully below, compliance with the foregoing policies is also subject to a reasonable accommodation standard (as addressed more fully below). This may include employee requests for non-latex gloves or gowns designed for individuals who use wheelchairs).

4. Reasonable Accommodation for Employees

Reasonable accommodation for disability is required by both federal law (the ADA) and, for employers with five or more employees, the California Fair Employment and Housing Act (FEHA). FEHA also requires employers to

reasonably accommodate employees with a legitimate disability or religious concern unless an employer shows undue hardship after engaging in the interactive process with the employee.

1. The Accommodation Process

The reasonable accommodation process entails a careful evaluation of the employee's request. Employers are not required to grant an accommodation if they determine that such accommodation would pose an undue hardship to the business under the current circumstances. This is a fact-based determination that should be undertaken with an interactive process and careful documentation that the employee was given the opportunity to be heard and that consideration was given (treating similarly situated employees similarly) to verify the underlying condition or reason, the request, and the consideration of the process.

The determination whether to offer such an accommodation should be based upon that individual's circumstances (*i.e.,* not an 'across-the-board' preset guideline) and made after engaging in the necessary interactive process. This process can be position-specific; a person who cannot be vaccinated might be accommodated by working from home if their position made that possible, while a person whose work of necessity required being onsite might not be able to be accommodated at all. Factors to consider when deciding whether an accommodation to the employee presents an undue hardship could include the number of employees, the size of employer's budget, and the nature of the business or operation. In the current environment, the employer should exercise an abundance of caution before dismissing a plausible accommodation through assertion of an undue hardship.

1. COVID-19 Accommodation Requests

An employer should also anticipate that certain employees, while not infected with the COVID-19 virus, will assert that they have medical conditions that increase their risk for serious illness from COVID-19 and should be regarded as having a "disability" for purposes of this pandemic. There is a list of notable medical conditions that likely qualify as such a disability for purposes of requiring reasonable accommodation throughout the pandemic, those that scientists say can cause one to be more susceptible to severe illness or death if the virus is contracted (*e.g.,* type-2 diabetes, obesity, serious heart condition, pregnancy). We generally recommend that employers err on the side of caution when confronted with such circumstances. Although there are instances when an employee's asserted medical condition may not qualify as a "disability", we recommend that the employer endeavor to accommodate workers who are or may be at increased risk of severe illness from COVID-19 as a general strategy to keep their workers safe and healthy.

In addition to allowing remote working and common sense steps like separation of desks and workspaces to the appropriate distances, some employers have accommodated those who have not been vaccinated by segregating them to a workspace location appropriately distanced from the others. This should be implemented in such a fashion so as not to cause those unvaccinated to "stand out" from the rest of the workforce, i.e., not viewed as punitive or harassment. Ensure that such arrangements are first explained to the employee so that it does not come as a sudden surprise, and have it discussed as part of the interactive process. If feasible and in weather-favorable conditions, the employer could make use of nearby outdoor workspaces for those not vaccinated. If handled appropriately, taking such precautionary measures could be welcomed by the unvaccinated worker, while providing temporary comfort and promoting good will to those working within the workplace who have gone to the trouble of receiving a vaccine.

In summary, in these early days of workplace vaccine policies, the majority of employers appear to be adopting policies to encourage, rather than mandate, COVID-19 vaccination. Some employers in healthcare and other settings involving higher risks of infection, are electing to impose vaccine mandates now, but the shift to more widespread mandatory policies will probably not occur until the formal FDA approval of the vaccines. In in the interim, employers should anticipate forthcoming statutes, regulations, and guidance at both the federal and state level on the requirements for a "safe workplace" in the era of COVID-19.

Authored by: Alan J. Sedley & Harry Nelson

For more information about this client alert, contact: info@nelsonhardiman.com

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