



Flu Season And Possible COVID-19 Vaccine Will Shine A Spotlight On Workplace Vaccination Policies

Insights

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As the flu season approaches and the COVID-19 pandemic continues, employers' mandatory vaccination policies may soon become more important than ever. For several reasons, those policies will also attract unprecedented scrutiny. First, the Centers for Disease Control (CDC) has stated that getting the flu vaccine this fall will be all the more important, both to reduce health risks for individuals and to conserve the country's potentially scarce healthcare resources, particularly for respiratory conditions like the flu and COVID-19. Second, one or more COVID-19 vaccines are expected to become available later this year or in early 2021, offering possible protection from this worldwide scourge. Third, mandatory vaccination policies sometimes spark deeply personal responses at a time when political differences and social justice issues remain at the forefront of the nation's consciousness.

As employers seek to balance their duty to maintain a workplace free of recognized dangers and the rights of individual employees, questions abound: Can you enforce mandatory vaccination policies? (In most cases, the answer is "yes," as discussed below.) If you mandate flu shots or COVID-19 vaccinations, what specific risks and responsibilities must you consider and address? And finally, is a mandatory vaccination policy the right option for your company? As usual, the answers to these critical questions lie in the details. This article will provide you an outline of issues to consider as you answer these questions, along with some recommended best practices guidance to lead you through these unprecedented times.

The Legal Backdrop

As you proceed under the current unique circumstances, it is important to bear in mind the distinction between mandatory *vaccinations* and employee *screenings* such as temperature-taking, symptom checklists, and actual testing, that are currently in widespread use. Under applicable law, these screenings are considered medical inquiries or examinations that must be approached differently from vaccinations, as explained below.

The federal Occupational Safety and Health Administration (OSHA), among other agencies, enforces employers' duty to maintain a workplace that is free of recognized hazards. The Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability, while also limiting employers' rights to make related inquiries and to conduct medical examinations of employees. Any such actions must be job-related and consistent with business necessity.

This means that you must reasonably believe that the employee's ability to perform essential job duties will be impaired by a medical condition or that the medical condition will pose a significant risk of substantial harm to workplace health or safety that cannot be eliminated by reasonable accommodation. Your belief must be based upon factual information, not subjective perceptions or irrational fears. Therefore, your inoculation requirements should be based upon reliable, objective criteria that supports the business need for the policy.

The ADA also protects the privacy of employees' medical information when their employers obtain it. To a less relevant extent in this context, the Privacy Rule of the Health Insurance Portability and Accountability Act (HIPAA) protects the confidentiality of individually identifiable health information held by covered entities (HIPAA, however, expressly excludes employment records from the definition of medical information that it protects). These and other laws provide a framework to guide employers in dealing with employees' private medical data.

The Question Of Mandatory Flu Shots

In the absence of a state or local law to the contrary, and with some important caveats, employers may require employees to get vaccinations to protect them from contracting and spreading influenza (the flu). Where applicable, however, collective bargaining agreements may limit an employer's right to require vaccines. On the other hand, some jurisdictions *require* flu shots for employees in certain positions, such as healthcare workers with patient contact. Healthcare, education, and retail are settings in which employers are relatively accustomed to dealing with mandatory vaccine issues. The possible availability of a COVID-19 vaccine obviously ups the ante. As this will likely be an evolving area of the law, you should stay abreast of developments where you conduct business.

Where otherwise permitted, however, your right to require flu shots is not unlimited. Specifically, the Equal Employment Opportunity Commission (EEOC) has repeatedly emphasized that, even during a pandemic, an employee may be entitled to an exemption from mandatory flu shot requirements based on an ADA-covered disability. Likewise, an employee may be exempted from the requirement if taking the shot would violate their sincerely held religious beliefs, practices or observances.

In either case, you must engage in (and document) an interactive exchange with the employee to determine whether a reasonable accommodation would enable them to perform essential job functions without compromising workplace safety. Accommodations may take many forms, including but not limited to use of additional personal protective equipment (PPE); moving the employee's workstation; a temporary reassignment; teleworking; or a leave of absence, to name a few. You are not required to provide an accommodation that would pose an undue hardship (and the evaluation of the "undue hardship" standard varies depending upon whether the requested accommodation is based upon a disability or sincerely held religious beliefs).

Some employees' objections to mandatory inoculation may be grounded in the "anti-vax" movement, which could arguably form the basis for a legal claim based upon state laws that protect an employee's right to engage freely in outside political activities. California and New York are just two

or the states that provide such protections. In most cases, such claims would be far less clear-cut than claims for failure to accommodate an employee's disability or religious beliefs. Other state laws may limit employers' flexibility regarding their vaccination policies.

Regardless of the setting, you should ensure that your rationale for requiring flu shots is based upon objective facts, tied to employees' job descriptions, and that your practices are administered consistently. You must develop and publish a policy explaining your expectations and clearly explaining how an employee may request an exception or accommodation. You must also ensure that employees who request an accommodation suffer no negative repercussions. In all cases, you must also safeguard the privacy of employees' medical information, including but not limited to keeping it separate from your general personnel files.

May Employers Require A COVID-19 Vaccination When One Becomes Available?

Unless and until the EEOC publishes more specific guidance, its commentary concerning mandatory flu shots, including the need to consider employees' reasonable accommodation requests, provides a good roadmap for evaluating the question of whether you will be able to require your employees to obtain a COVID-19 vaccination. Although the EEOC has advised employers to *encourage* flu shots rather than *requiring* them, it has not prohibited employers from requiring the shots, especially when the flu is severe.

Considering the scope and severity of the COVID-19 pandemic, the EEOC's guidance regarding workplace screening for COVID-19, and the Commission's position regarding mandatory flu shots, you will probably have the right to require workers to be inoculated when a reliable COVID-19 vaccine is available, *subject to the same caveats described above for mandatory flu shots*. In other words, you should be able to require approved COVID-19 vaccinations if the requirement is job-related, your policies adequately inform employees of the requirement, and you allow them to seek an exception (or accommodation) on the basis of a disability or sincerely held religious belief. The above-referenced anti-vax movement and any state laws that allow employees to opt out of vaccinations must also be taken into account. And of course, you must ensure the privacy of each employee's medical information.

Employers' Rights To Make Medical Inquiries Or Conduct Screenings Remain Far More Limited Than The Right to Require Vaccinations

In considering the above questions regarding mandatory vaccinations, you must be cautious not to conflate the concept of inoculation with the current widespread practices of daily employee screenings (i.e., medical examinations). The current permissible practices of temperature checks, symptom screening, and COVID-19 testing are very unusual and unique to this current severe pandemic. For reference, an epidemic affects a large number of people, often rapidly. A pandemic is an "epidemic that travels," occurring worldwide or over an extremely wide area. Even if very significant, however, seasonal or pandemic flu will **not** necessarily justify screening or testing in the workplace.

The EEOC has stated that whether a pandemic influenza rises to the level of a "direct threat," as explained above, depends upon the severity of the illness. The Commission determined, for example,

explained above, depends upon the severity of the illness. The Commission determined, for example, that the COVID-19 pandemic met the direct threat standard, based on the significant risk of substantial harm that someone with the virus or symptoms of it would present in the workplace. This guidance established the rationale and need for employee medical inquiries or examinations, which may include temperature-taking, symptom screening, or actual testing.

Should An Employer Require Mandatory Vaccinations?

Considering the current CDC guidance regarding the importance of flu shots, which should be administered beginning in September or October, you should review and formalize your inoculation policies now. Historically, when employers require flu shots, the proportion of workers who get them tends to increase from less than half to well over 80%. Many employers outside of the healthcare industry have *encouraged* but not *required* flu shots. That choice has primarily been an employee relations issue.

No one knows when a reliable COVID-19 vaccine may be available, but you should be prepared to respond when that happens. Keep in mind while that mandatory vaccinations may not be appropriate for every setting, encouraging vaccinations will help bolster participation and protect your workplace, while also helping reduce demands on the nation's healthcare system. Recognize that although it may not be feasible to offer on-site flu shots on-site this year, you may still be able to facilitate their employees' access to inoculations.

If you do decide to make any vaccines mandatory, ensure that your policies are clear and that they inform employees of how to seek exceptions or accommodations. Additionally, keep in mind that flu shots and COVID-19 vaccines (if and when available) are distinct inoculations for two different health threats. Finally, you should ensure that your policies encourage sick workers to stay home without fear of reprisal, especially if they have a fever. Employees who are sick should remain home until they meet applicable return to work standards.

Conclusion

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney or any member of our Post-Pandemic Strategy Group Roster. You can also review our FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers and our FP Resource Center For Employers.

This Legal Alert provides an overview of a specific development. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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A. Kevin Troutman

Senior Counsel

713.292.5602

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