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This document addresses several recent questions received regarding the legal issues around the CoVID-19 vaccine and employer policies on vaccination. We will continue to update this guide as more vaccines become available and employers begin issuing vaccination policies.

Can my employer require the CoVID-19 vaccine as a condition of employment?

In general, employers may require employees to receive a CoVID-19 vaccination, although their authority to implement and enforce a mandatory vaccination program has several limitations. Under federal anti-discrimination laws, employees may refuse a mandatory vaccine on the basis of a disability or a sincerely held religious belief. Further, employers may commit an unfair labor practice if they fail to bargain with the union before implementing a mandatory vaccination program or retaliate against workers who collectively refuse to be vaccinated based on their belief that the vaccine is unsafe.

What should I do if I have a medical condition that prevents me from receiving the vaccine?

You may have a right to be excused from any vaccination requirement if you have a health condition that prevents you from being vaccinated.

On December 16, 2020, the Equal Employment Opportunity Commission (“EEOC”) issued updated guidance that discusses the conditions under which an employer may properly require CoVID-19 vaccinations. In particular, mandatory CoVID-19 vaccination programs must comply with federal laws protecting disabled employees from discrimination when implementing a mandatory CoVID-19, including the Americans with Disabilities Act (“ADA”).

Under the ADA, an employer may lawfully require that employees receive the CoVID-19 vaccine to avoid “pos[ing] a direct threat to the health or safety of individuals in the workplace.” However, if a worker demonstrates that they are unable to receive a vaccination due to a qualifying disability, then “the employer must show that an unvaccinated employee would pose a direct threat due to a ‘significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.’”

An employer can show a significant risk of substantial harm by determining that “an unvaccinated individual will expose others to the virus at the worksite.” When an unvaccinated worker represents a significant risk of substantial harm, employers must provide reasonable accommodations unless doing so would pose an “undue hardship,” defined as “an action requiring significant difficulty or expense.” Depending on the circumstances, reasonable accommodations may include additional personal protective equipment (“PPE”), a change in workstation or assignment, remote work arrangements, or a leave of absence.

What if I have a religious objection to vaccination?

You may have a right to be excused from any vaccination requirement if you have a sincerely-held religious belief against vaccination.

On December 16, 2020, the Equal Employment Opportunity Commission (“EEOC”) issued updated guidance that discusses the conditions under which an employer may properly require CoVID-19 vaccinations. In particular, mandatory CoVID-19 vaccination programs must comply with federal laws preventing religious discrimination by employers.

If an employee requests accommodation based on a religious belief, an employer must provide a reasonable accommodation unless it would pose an undue hardship. However, unlike the ADA’s high standard for undue hardship, Title VII permits employers to deny an accommodation that is more than a “de minimis cost or burden on the employer.”

EEOC guidance provides that employers should generally assume that an employee’s request for religious accommodation is based on a sincerely held religious belief. However, employers may be justified in requesting additional supporting information if they have “an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance.”

What rights does my union have to bargain over vaccine policies?

Employers generally have a duty to bargain over terms and conditions of employment and may not implement policies that involve such mandatory subjects of bargaining without first negotiating with the union unless the collective bargaining agreement authorizes the employer to take action unilaterally.

For example, the Board has found that employers may not require drug testing as a condition of employment without first bargaining with the union. Like mandatory drug testing, requiring a vaccine is a condition of employment and therefore constitutes a mandatory bargaining subject under the NLRA. Accordingly, in unionized workplaces an employer must first bargain with the union before implementing CoVID-19 vaccination policies unless an applicable CBA authorizes the employer to make unilateral decisions related to health-related work policies. And even if the CBA provides the employer with the right to make unilateral decisions related to health-related work requirements, the employer would likely still need to bargain over the effects of a mandatory vaccination policy.

Do workers without a collective bargaining agreement in place have the right to oppose their employer’s vaccination policy?

If employees collectively refuse to comply with their employers’ mandatory CoVID-19 vaccination program because they believe the vaccine is unsafe, such action could constitute “protected concerted activity for mutual aid or protection” under Section 7 of the NLRA. Under Section 7, employees have the right to collectively refuse to comply with working conditions that allegedly threaten their safety. If employees believe the CoVID-19 vaccine is unsafe and join together to oppose a mandatory vaccination policy, employers may commit an unfair labor practice by retaliating against protesting employees who refuse to get the vaccine.

Is there a federal relief fund that covers any adverse reactions or other consequences of the CoVID-19 vaccine?

While the CoVID-19 vaccines are not covered under the National Vaccine Injury Compensation Program, individuals injured by CoVID-19 vaccines may be eligible for benefits under the Countermeasures Injury Compensation Program (“CICP”). The CICP is authorized by the Public Readiness and Emergency Preparedness Act (“PREP Act”) to provide benefits to individuals who are seriously injured or die after receiving a covered countermeasure administered under a PREP Act declaration. In response to the pandemic, the Secretary of Health and Human Services issued a PREP Act declaration for medical countermeasures against CoVID-19. This declaration provides that covered countermeasures include “any vaccine manufactured, used, designed, developed, modified, licensed, or procured to diagnose, mitigate, prevent, treat, or cure CoVID-19, or the transmission of SARS-CoV-2 or a virus mutating therefrom.” Because CoVID-19 vaccines are covered countermeasures, those who experience a serious injury from a vaccine may be considered for CICP benefits.

The CICP is administered by the Health Resources and Services Administration, which operates within the U.S. Department of Health and Human Services. CICP applicants must request benefits within one year after receiving the vaccine or other countermeasure. Benefits available through the CICP include unreimbursed medical expenses, lost employment income and survivor death benefits.