



IT'S WORTH A SHOT

The COVID-19 Vaccine from an Employer's Perspective

Allison P. Sues SmithAmundsen

As the COVID-19 vaccine becomes available to more and more people, employers may grapple with how to best ensure that their workforce is vaccinated. The question raises several thorny issues. Should the employer mandate that their employees receive the vaccine? If not, what incentives can be provided to motivate employees to get vaccinated short of compelling them? Can employers arrange to provide the vaccine onsite?

Employers may mandate that employees receive the COVID-19 vaccine as a condition of their employment if the need for vaccination is job-related and consistent with business necessity, and if the failure to vaccinate the workforce poses a direct

threat to other employees. Employers will have an easier time justifying a mandatory vaccine program if the employees cannot perform their work remotely, must work in close quarters with each other, have regular contact with customers or other third parties, or work in certain industries, including healthcare, travel, hospitality, and manufacturing.

Mandating vaccines is not without legal risks of which employers should be aware. Employers must consider exemptions for those employees who do not want to be vaccinated due to disability, pregnancy, or a religious belief. Employers should analyze each request for exemption on a case-by-case basis, including a review of the employ-

ee's specific job position.

For employees who object to vaccines based on religious grounds, employers should first determine if the employee sincerely holds the religious belief. Courts do not overly scrutinize this question. While the belief cannot be social or political, courts cast a fairly wide net as to what constitutes a religious-based belief and Title VII's protection extends to firmly and sincerely held moral or ethical beliefs. The religious belief may be newly adopted, inconsistently observed, not part of a formal church or sect's religious practice, or different from the commonly followed tenants of the employee's religion.

For employees who seek an exemption

from mandatory vaccines based on their disabilities or pregnancy, the employer may ask for medical documentation corroborating the medical condition. Some examples of disabilities that may prompt employees to avoid the COVID-19 vaccine include prior allergic reactions to other vaccinations, a known allergy to polyethylene glycol (an ingredient in two COVID-19 vaccines), or even a severe and well-documented anxiety associated with the side effects of receiving vaccines.

Once an employer determines that an employee is objecting to a mandatory vaccine based on a sincerely held religious belief or documented disability, the employer must determine whether allowing the employee an exemption from the vaccine creates an undue burden on the organization or poses a direct threat to its workforce.

This analysis requires the employer to consider if there are alternatives to vaccination that could sufficiently protect the employee and other occupants of the workspace from the virus. This inquiry is often directly related to the employee's position. While it may be feasible to excuse an employee from receiving the COVID-19 vaccine if she can work remotely or be assigned to a position or work area that limits contact with others, these accommodations may not be feasible for all employees. In addition to allowing remote work or reassigning the employee's job duties, physical workspace, or work schedule to decrease the employee's proximity to others, employers should consider if an employee seeking an exemption could be accommodated through a leave of absence. For example, if an employee requests an exemption from the COVID-19 vaccine mandate due to a pregnancy, the employer may provide a leave of absence for the duration of the employee's pregnancy and then allow the employee to return after she has given birth and feels comfortable getting the vaccine.

If the employer determines that exempting the employee will create a direct threat of exposure to the virus that cannot be mitigated through any accommodation, it can require the vaccine as a condition of further employment, but this decision should be documented with a clear explanation as to why the vaccine is job-related and consistent with business necessity.

Employers should take proactive steps to lessen the legal risks of mandating the COVID-19 vaccine. The employer should create a clear written policy on its mandatory COVID-19 vaccine program that is available to all employees, as well as to all conditional new-hires – who should be notified that their employment is contingent on receiving the COVID-19 vaccine. The pol-

icy should refer employees to a specific staff member to handle questions and requests for exemptions. Employers should train this staff member, as well as other management and Human Resources personnel who may also field questions and requests for exemptions, to proactively open a dialogue on the need for an exemption and the possibility of accommodations. The employer must also monitor and ensure that it conducts the exemption consideration and decision process consistently for all employees.

Employers – especially those who operate in spaces where remote work is feasible and contact with the public is limited – may wish to avoid the legal risks of a strict vaccine mandate while still encouraging their workforce to be immunized against COVID-19. There are several practices that employers can take to motivate employees to receive vaccines short of job-contingent mandates. Employees are more likely to get vaccinated if it is easy and affordable to do so. Employers may want to subsidize the cost of vaccines, allow paid time off to go get vaccines, offer cash payments for each dose of the vaccine taken, or provide paid leave for any employees experiencing side effects in the days following the vaccine. Employers may educate its workforce on the benefits of the vaccine and provide information dispelling myths about the vaccine being unsafe. Management and other high-level members of the organization should lead by example and publicize when they receive their vaccines.

Employers may also encourage employees to receive the COVID-19 vaccine by providing it at their worksite, whether the employer enrolls as a vaccinators itself or partners with a third party to bring vaccines to the worksite. Employers wishing to enroll as a vaccinators itself should be cautioned that the process is trying. The employer must show that it has a medical director running the vaccine program and medical personnel available to administer the shots. The roll-out of the vaccine can be complicated by the fact that some COVID-19 vaccinations require multiple doses or need to be stored in ultra-cold freezers. The need for social distancing while efficiently vaccinating large groups also creates logistical challenges.

If employers provide mandatory vaccinations onsite, be mindful that while providing a vaccination does not qualify as a medical examination, pre-screening questions may elicit information on employees' disabilities. Therefore, under the ADA, an employer must be able to show that these pre-screening questions are "job-related and consistent with business necessity." To meet this standard, an employer would

need to be able to show that it must ask these questions in order for the employee to receive the vaccine, and that the employee needs to receive a vaccine in order to prevent a direct threat to the health and safety of the workplace. An employer does not need to show that vaccine pre-screening questions meet the "job-related and consistent with business necessity" requirement if it is providing voluntary onsite vaccinations because answering those screening questions would also be deemed to be voluntary.

For the many employers who outsource their vaccination program or require employees to receive their vaccinations at a pharmacy or healthcare site outside of the workplace, employers may require employees to provide proof of vaccination. An employer may ask an employee whether they have received the vaccine without implicating the ADA's limitations on disability-related inquiries. As long as the question is streamlined to only ask whether the employee has received the vaccine, the question is not eliciting information on employees' disabilities. Employers should tread carefully if asking any subsequent questions, including why the employee has not yet received a vaccination, because these questions may elicit information about an employee's disability and are therefore subject to the ADA's requirement that the question be "job-related and consistent with business necessity."

The bottom line is that employers may mandate COVID-19 vaccines, but this decision should be guided by an assessment of the actual risk as to whether an unvaccinated employee would expose coworkers, customer, or clients to the virus. Employers who require the vaccine must consider accommodations for those who do not want it due to disability, pregnancy, or religion. Short of mandating the vaccine, there are several steps employers may take to encourage vaccination. Whether the vaccine is mandated or encouraged, employers must be careful in narrowly tailoring any information collected from employees about the vaccination so as not to unnecessarily require an employee to disclose information about a disability.



Allison Sues is a partner in SmithAmundsen's Labor & Employment Practice Group. She handles workplace disputes, including claims for discrimination, harassment, retaliation, lost wages, and failure to accommodate a disability. Allison can be reached at asues@salawus.com.