



## **Mandatory or Voluntary Vaccination Policy Update**

Each day, more and more people are vaccinating against the COVID-19 virus. President Biden announced this month, that by the end of May every adult can be vaccinated. This is great news in ending the struggles of this pandemic, but not everyone wants to receive the vaccine. We have touched on whether companies are **allowed to mandate** that employees get the vaccine. We now need to discuss some of the issues possible when requiring the shot(s), or not.

### **Mandatory Vaccination Policy Issues**

#### **Employers need to provide accommodation under the ADA**

The Equal Employment Opportunity Commission (EEOC) has indicated that employers can require employees to obtain a COVID-19 vaccination. Notwithstanding, employers will still have to provide exceptions to any vaccination mandate under the Americans with Disabilities Act (ADA), and based upon legitimate religious beliefs.

Under the ADA, employers will likely be required to accommodate disabled employees who cannot take the COVID-19 vaccines due to their disabilities. The EEOC specifically warned that certain pregnancy-related medical conditions might constitute an ADA disability for which an accommodation will be required. For these and other disabilities, employers must offer vaccine exemptions as an accommodation. That is, unless the employer can show that the 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.” Reasonable accommodations can include distancing the employee from colleagues, allowing work from home, or anything that would keep everyone out of the way of the virus. Whether or not an exemption is ultimately given, the ADA requires employers to keep confidential all employee medical information obtained in the course of the vaccination program.

Reasonable accommodations should also be provided if an employee is prevented from receiving the vaccine due to a “sincerely held religious belief, practice, or observance.” One such legitimate religious objection could arise with respect to the Johnson & Johnson vaccine. A small group of Catholic Bishops has urged Catholics not to get this specific vaccine as it was developed, in part, using cell lines derived from an aborted fetus. This religious objection would not extend to the other vaccines, but could provide cause for an employee to delay vaccination until he or she is able to get a Pfizer or Moderna vaccine.

With a mandatory vaccination policy, it is paramount that employers engage in an interactive process with all employees rightfully refusing the vaccine to determine a reasonable

accommodation. Employees who refuse the vaccine on these bases cannot be automatically terminated without first considering their accommodation options. By contrast, social, political, economic, and anti-vax viewpoints are not protected bases for employee objections to a vaccine policy. Because they are not protected, employee objections based on these viewpoints need not to be accommodated under current law.

### **Employers face possible issues with GINA and the ADA with implementation**

Under a mandatory policy, pre- or post- vaccination questions asked of an employee can be problematic. Employers must only ask questions that are “job-related and consistent with business necessity.” Employees can be asked to show proof of vaccination, but not questions pertaining to any other medical information or an employee’s family medical history or genetic information. The EEOC has indicated that a question concerning *why* an employee has not received a vaccine would likely constitute a disability-related inquiry that is impermissible under the ADA. Soliciting this type of information could constitute an ADA violation or be in violation of Title II of the Genetic Information Nondiscrimination Act (GINA).

### **Emergency Use Authorization**

The COVID-19 vaccinations have yet to receive final approval from the FDA and are being provided only under an emergency use authorization. Thus, some commenters have questioned whether employers can require employees to receive the unapproved COVID-19 vaccine.

These comments are based upon Section 564 of the Federal Food, Drug, and Cosmetic Act (FDCA). That Section requires the Secretary of Health to ensure that individuals receiving a vaccine with an emergency use authorization are informed of their option to accept or refuse the vaccine. Section 564, however, does not provide for a private right of action, meaning that individuals cannot bring civil suits for alleged violations of the FDCA. As a result, the FDCA likely only bars governmental entities from requiring individuals to get a vaccine with only emergency use authorization. If this is the case, only military personnel and government civil servants could opt out of a mandatory vaccination requirement.

Some, however, suggest that the right to refuse the vaccine under the FDCA should flow to all U.S. citizens. Recently, this issue was raised in a case filed by a state-government employee. In the case, the plaintiff seeks to prevent his state-agency employer from terminating him for refusing to get the emergency-use-authorized COVID vaccine. The plaintiff alleges that the state “is in direct violation” of Section 564. Although this case concerns only a government employee, it may shed some light on Section 564’s effect on the population at large.

While the FDCA controls over any contrary state law, it is unlikely that Texas’ employment at-will law will be found directly contrary to Section 564 of the FDCA. If an employer requires that an employee get a vaccine as a condition of employment, the employee need not get the vaccine. However, the employee can be terminated based on a failure to accept the vaccine. This is the same option a private employee has with any employer mandate, regarding vaccines or otherwise.

## **Voluntary Vaccination Policy Issues**

### **Incentives could violate various laws**

Some employers are not requiring vaccines, but are encouraging employees to get vaccinated. Encouragement through incentives has come in forms such as additional pay, paid time off, gift cards, or actual gifts. Employers that offer incentives to employees must be mindful of the Employment Retirement Income Security Act (ERISA), the Health Insurance Portability and Accountability Act (HIPAA), the ADA, and GINA. Certain vaccination programs that incentivize employees to get vaccinated could inadvertently create an ERISA compliance obligation. Further, under HIPAA, a vaccination program with an incentive might be considered a health-contingent wellness program and subject to wellness program rules.

### **The EEOC will comment soon**

As with all things COVID, the landscape is perpetually changing. Lately, the EEOC has been discussing employer-paid incentives for participating in wellness activities; it is unclear whether those activities include receiving vaccinations. The EEOC recently released a set of proposed rules constricting the scope of incentives for participating in programs that collect employee health information. Generally, the guidance permits only gifts of minimal, or "de minimis," value, such as water bottles or gift cards of small amounts. However, the EEOC has determined that high-value incentives would violate the ADA or GINA by essentially forcing participation in wellness activities. With the installation of the Biden administration and a new EEOC chair, we expect an announcement with clarification concerning vaccine incentives soon.

### **Continued Restraints**

With only a voluntary vaccine policy in place, there will inevitably be employees who choose not to get the vaccine. Without a fully vaccinated workforce, the risks resulting in the current workplace restrictions persist. Consequently, those employers with a voluntary vaccine policy will need to keep all current COVID-19 precautions in place. Further (and despite the potential for lost work time), employers must continue to require unvaccinated employees to quarantine in the event of exposure. Recently, the CDC released [new guidance](#) which lessens the restrictions for fully vaccinated individuals, which will eventually lessen the burden on employers as well.

### **Not everyone will bite at the incentive**

Even with an incentive, not all will be motivated to get the vaccine. The old adage "you can lead a horse to water, but you can't make it drink" applies here. While employers, like Kroger, have offered up to \$100 to their employees who receive the vaccine, other companies like Trader Joe's, Dollar General, and Target are offering their employees four hours of pay in return for full vaccination. Target is even providing up to a \$15 credit each way on the LYFT rideshare app for rides associated with receiving the vaccine. However, because of the "de minimis" value of the incentive, some employees will remain unmotivated.

**For more information, please contact [Tony Stergio](#) or [Wesley Walker](#).**