



KITCH

Attorneys & Counselors

Terence P. Durkin
Kitch Drutchas Wagner Valitutti & Sherbrook
One Woodward Avenue, Suite 2400
Detroit, MI 48226-5485
313.965.6971
www.kitch.com

Detroit Lansing Mt. Clemens Marquette Toledo Chicago

BOMA

COVID-19 Vaccination

Can You Mandate? Should You Mandate?

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Takeaways

- Is it legal?
- Is it right for your workplace?
- Be mindful of potential liabilities

Can you mandate COVID-19 Vaccination?

In general, the answer is yes

How do we come to this
conclusion?

Equal Employment Opportunity Commission (EEOC)

- 2009: First tackled mandatory vaccinations in response to H1N1 (“swine flu”) pandemic
- Publication: Pandemic Preparedness for the Workplace provided guidance regarding disability-related medical inquiries and medical examinations that could be relevant in a pandemic

2009 Guidance

- Americans with Disabilities Act (ADA) and Title VII prohibit an employer from compelling its employees to be vaccinated for influenza regardless of their medical condition or religious beliefs
- This is true even during a pandemic

2009 Guidance

- ADA: an employee with underlying medical conditions should be entitled to an exemption (if requested) from mandatory vaccination for medical reasons
- Title VII: protects employees with a “sincerely held religious belief, practice or observance” from being forced to undergo vaccination if it legitimately offends an employee’s religious beliefs

If an employee has a sincerely held religious belief under Title VII or an underlying medical condition, then what must an employer do?

An employer must provide accommodations*

- Accommodations could include minimizing interactions with other employees or the general public (flexible scheduling, voluntary shift substitutions or swaps), allow work to be performed without coming into contact with others (virtual, remote)
- *The accommodation may not pose an “undue hardship”

Religious Accommodations

- Personal anti-vaccination?
- Employee's opposition to vaccines was a personal belief that did not "occupy a place in his life similar to that occupied by a more traditional faith" *Fallon v. Mercy Catholic Medical Center of Southeastern Pennsylvania*

Religious Accommodations

- What about veganism?
- U.S. District Court for the Southern District of Ohio found that “it is plausible that [p]laintiff could subscribe to veganism with a sincerity equating that of traditional religious views” *Chenzira v. Cincinnati Children’s Hospital Medical Center*

Medical Accommodations

- There is a circuit split on whether sensitivity to vaccinations constitutes a covered disability
- Eighth Circuit held alleged chemical sensitivities and allergies did not constitute a disability under the ADA
- Third Circuit held a history of allergies and anxiety related to the possible side effects qualified as an ADA-covered disability

Coronavirus Pandemic

- EEOC updated its Pandemic Preparedness for the Workplace (December 2020)
- EEOC acknowledged that the COVID-19 pandemic met the ADA’s “direct threat standard” permitting more extensive medical inquiries and controls in the workplace

Coronavirus Pandemic

- “Direct threat” – having someone with COVID-19 or symptoms in the workplace poses a “significant risk of substantial harm” to others in the workplace
- An unvaccinated person would likely pose a “direct threat” to others
- Implies that mandatory vaccinations are permissible, subject to the accommodations: religious objections and a disability

Occupational Safety and Health Administration (OSHA)

- Employers have a duty under the laws (Occupational Safety and Health Act) to take steps to ensure the workplace is safe
- Enforced by OSHA

Should you mandate?



Thoughts on whether to mandate?

- It is not an easy decision
- Fraught topic – national politicizing of the virus, safety measures, shutdowns
- Society is divided on whether vaccines are efficacious and safe despite the science
- Companies – employees could be divided
- What would mandating do to morale?

Thoughts on whether to mandate?

- What industry are you in?
- What contact do you have with the public?
- Are employees able to work remotely?
- If you mandate, what number will object or refuse? Are you able to accommodate?
- Are you able to act under a “mandatory” vaccination scenario?
- Vaccines do not offer complete protection

Thoughts on whether to mandate?

- Look at your company's culture
- Employees are required to come to work in person (manufacturing, restaurant, hospital) – possible mandate
- Employees able to work remotely – employees decide for themselves

Thoughts on whether to mandate?

- If you do not mandate
 - Educate on why it is important to get the vaccine (there is a lot of misinformation)
 - Communicate reasons why you are not mandating/the value of personal accountability/employees make decisions
 - Encourage and assist employees get the vaccine
 - Incentives
 - Be a role model: CEO, owner, senior management

Potential Liabilities

- If adverse reaction and required by employer, then workers comp issues
- Does your workers' comp cover it? Check with carrier
- Unknown, potential long-term health consequences. If require, liable should consequences arise in the future?
Possible legal immunities?
- Retaliation

Mandating under EUA

- Under the Emergency Use Authorization each individual must be informed “*of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of the benefits and risks*”
21 U.S.C. §360bbb-3(e)(1)(A)(ii)(III)

Mandating under EUA

- Legal uncertainty
- Ethical argument that products are still experimental and should not be mandated
- What is meant by “consequences” should you refuse the product? (health, employment, access to education, use of public transportation, shop in stores)

Takeaways

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Questions?

Thank You!