

# **COVID-19 Vaccinations and Employment Considerations:** *Vaccine requirements may be a shot in the dark*

By: Michael A. Palombo, Esq., David E. Mitchell, Esq., and Joshua C. Hausman, Esq.

In December, the Food and Drug Administration issued Emergency Use Authorizations (“EUAs”) for two (2) COVID-19 vaccines which are now being distributed nationwide. These vaccines, and others which will follow, are important life-saving breakthroughs and their rapid development are remarkable achievements in the field of medical science. However, the question of whether employers can require that their employees receive the vaccine is a complicated one. From what we know now, EEOC guidance indicates an employer can implement policies requiring their employees be vaccinated against COVID-19, but there are a host of considerations—both legal and practical—about which employers must be aware.

## **A. Inquiring about Vaccination Status**

Whether or not an employer decides to require employee vaccinations, employers must first understand what they are entitled to know about the vaccination status of their employees. The EEOC in December advised that employees could be asked to show proof of COVID-19 vaccination without implicating the Americans with Disabilities Act (“ADA”). Employers who are not mandating vaccinations should phrase any vaccination status questions narrowly to avoid opening the door to unnecessary medical discussions.

## **B. Mandating Vaccines and Responding to Employees Who Do Not Become Vaccinated**

The EEOC’s guidance suggests that an employer could, consistent with the ADA and Title VII of the Civil Rights Act of 1964 (“Title VII”) as it relates to religious nondiscrimination, require employees to become vaccinated against COVID-19. However, this is subject to important caveats. While an employer would not be required to accommodate personal non-religious or political objections to a vaccine, an employee with a disability that precludes vaccination may not be excluded from the workplace or subject to adverse employment action unless the individual poses a “direct threat” which cannot be reduced or eliminated absent undue hardship. While the EEOC indicates that the direct threat analysis may be met in circumstances where the individual would expose others to COVID-19, an employer must engage in the ADA’s interactive process to determine if a reasonable accommodation which would eliminate or reduce the risk is available.

Employers must engage in a case-by-case analysis to determine whether reasonable accommodations may be available which do not present an undue hardship to the employer. As part of the undue hardship analysis, the EEOC suggests that the “[t]he prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown,” are relevant considerations. Reasonable accommodations may in appropriate circumstances include accommodations which have become familiar throughout the pandemic—such as teleworking, job restructuring, or other mitigation efforts, and employers may rely on CDC recommendations in evaluating possible accommodations. Further, the EEOC cautions that while it may be lawful to exclude an employee from the workplace who poses a direct threat that cannot be reduced or eliminated by reasonable

accommodation, it does not mean the employee may automatically be terminated. Employers are encouraged to determine whether other rights under the EEOC laws or federal, state, or local authorities may apply.

Employers must also be prepared to respond to employees claiming religious exemption from a vaccine requirement. Employers generally must provide a reasonable accommodation for a sincerely held religious belief, practice, or observe under Title VII, unless it would pose an undue hardship, which is defined as one imposing more than a de minimis cost or burden on the employer. The employee's belief must be religious, and not non-religious or philosophical in nature, to be protected under Title VII. As with the ADA analysis, the key for employers will be to engage in an interactive discussion with employees who object to being vaccinated based on disabilities or religious beliefs, and to carefully consider potential accommodations.

### C. Bargaining Obligations

The Pennsylvania Labor Relations Board has never addressed the issue of whether a vaccination requirement is a mandatory subject of bargaining, and employers may risk an unfair labor practice in unilaterally adopting a policy which requires employees to be vaccinated and sets out penalties for non-compliance. Even in the event of a finding that mandating the vaccine is a managerial prerogative, there may be impact bargaining obligations concerning matters such as the consequences of a refusal.

### D. EUAs and Possible Challenges

The only COVID-19 vaccinations available at the time of this writing have been distributed pursuant to Emergency Use Authorizations (EUA) issued by the Food and Drug Administration ("FDA") under the Food, Drug, and Cosmetic Act ("the Act"). The Act requires that an individual be advised that he/she may refuse a vaccine with EUA approval. It is silent on the impact of that refusal. At present, the Department of Health and Human Services and the courts have not yet addressed the issue of whether an employee could challenge a vaccine mandate based upon the EUA approval status of the vaccines.

### E. Practical Concerns

Employers must also resolve practical considerations, such as polling data which indicates that a substantial portion of the population will refuse any COVID-19 vaccine when deciding whether to mandate vaccination. Considering the percentage of the population refusing vaccines, it does not appear practical to terminate a large percentage of the workforce for not becoming vaccinated, even if courts or arbitrators would uphold such terminations. In addition, until the pandemic subsides, the CDC guidance currently indicates that social distancing and masking should continue as it is unclear whether a vaccinated individual can still spread the virus.

### F. Review and Vaccine Policies

Campbell Durrant attorneys are available to review all these vaccine issues with you and assist in the drafting of a vaccine policy. Please stay tuned for additional details of a virtual training session next month sponsored by the Pennsylvania Municipal League.