



Mandating the COVID-19 Vaccine: Lower risk of virus, higher chance of litigation

By Nina Nisanova and Christina Wunsch

While the introduction and administration of several COVID-19 vaccines have brought a newfound hope for a swift return to normalcy, they have also unlocked novel grounds for employee lawsuits in the workplace. Employers are so eager to return to business as usual that several are mandating their employees to obtain the COVID-19 vaccine prior to returning to the workplace. As expected by many, vaccine mandates are being met with the filing of increased numbers of employment claims. With an uptick in claim filings, it could be expected that Employment Practices Liability carriers will begin to attach specific COVID-19 exclusions. With the changing landscape of the modern workplace, now is the time for companies to review their Employment Practices Liability insurance policy to ensure it provides coverages against these new exposures.

UPDATED GUIDELINES FOR RETURN-TO-WORK COVID-19 VACCINATION MANDATES

On May 28, 2021, the Equal Employment Opportunity Commission (EEOC) issued updated guidelines to assist employers with the challenge of returning businesses to a state of normalcy.¹ For employers mandating COVID-19 vaccinations for employees, federal equal employment opportunity (EEO) regulations do not exclude employers from mandating vaccinations for any employee that is required to physically enter the place of business. This allowance is subject to the reasonable accommodation provisions of Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act (ADA), and other various EEO directives. An employee may be granted a reasonable accommodation and be exempt from the return-to-work vaccination mandate because of a disability and/or a sincerely held religious belief, practice, or observance so long as providing the reasonable accommodation does not pose an undue hardship on the employer or business. With a reasonable accommodation, a mandate-exempt employee may be allowed to wear a mask, maintain social distancing, be tested for COVID-19 periodically, or be reassigned instead of obtaining the vaccine. Additionally, EEO regulations do not hinder employers from requiring proof of vaccination from their respective employees; however, as with all medical information, such proof must be kept separate from the employees' personnel files to maintain confidentiality.²





Under the ADA, an employer is allowed to mandate vaccinations for all employees, even employees who maintain they cannot be vaccinated due to disability. Employers may also require employees with disabilities to meet the same standard as applied to all other employees, so long as the standard is both related to the job the employee completes and is consistent with business necessity. Should this safety-related standard remain unmet, an employer may not mandate compliance with a COVID-19 vaccination directive unless the employee would pose a direct threat to the health and safety of themselves and others or if this threat cannot be otherwise mitigated by reasonable accommodations such as the ones listed above.³

EMPLOYERS AT RISK

As a result of COVID-19 vaccine mandates, it seems likely that companies may be availing themselves to a new genre of employment claims. When implementing a vaccine directive, employers should be conscious of these prospective new exposures that are likely to create new inroads in employment litigation. There is also the potential for an increase in retaliation claims as a consequence of employees being subjected to adverse employment actions for opposing the vaccine directive that they in good faith believe to be unlawful. Notwithstanding these vaccine mandates, retaliation claims typically tend to be high. In 2020, retaliation remained the most frequently cited claim in filed EEOC charges, accounting for 55.8% of all charges filed.⁴ This poses a new opportunity to expand these claims, and given this new issue, employers should anticipate seeing more claims that may be more challenging to defend against.

The potential for wrongful termination litigation brought by employees who have been terminated or those facing the threat of termination resulting from their opposition to being vaccinated is additionally pertinent. In fact, several federal lawsuits have already been filed in relation to this issue. For example, in New Mexico, employees of a detention center are suing the County Manager and the facility for wrongful termination, alleging the issuance of a mandatory vaccination directive in early February 2021 violates federal law.⁵

Another wrongful termination suit filed by employees of a school district in Los Angeles, California, mimics the above allegations, targeting a vaccine requirement instituted in March of 2021.⁶ In considering the potential risk of wrongful termination litigation, employers should take into account their own state's regulations regarding such employment liability claims. Moreover, even if the employers win these cases, they are likely to incur significant defense costs. It is important for companies to proactively review their Employment Practices Liability insurance policy provisions to understand their policy defense provisions. In addition to mounting defense costs as a result of such litigation, employers may be subject to unwanted publicity given the controversy around this topic. Managing public relations needs to be considered in how this topic is approached. Given the current evolving risk, we recommend reaching out to your trusted broker advisor to ensure all avenues of possible coverage are explored.





RECOMMENDATIONS

Current circumstances present employers and businesses with unprecedented challenges regarding setting forth return-to-work requirements for their employees. Understandably, employers often seek to mitigate the risk for potential employment practices litigation and decrease possible resulting losses. An essential part of this mitigation process should include a review of a company's current practices and risks with legal counsel of their choosing. Further, companies may be well served by also reviewing their current Employment Practices Liability policy in order to assess the types and extent of protections possibly available for potential claims and then working with their broker advisor to address any additional risks which may have been identified during these reviews and to discuss any additional coverage that should be considered.

¹ <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

² <https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada#general>

³ Stahr, Julie Furer. "EEOC Updates Vaccine Guidance: Accommodation Confidentiality, Employer Incentives, and More.", National Law Review, 7 Jun. 2021, <https://www.natlawreview.com/article/eeoc-updates-vaccine-guidance-accommodation-confidentiality-employer-incentives-and>

⁴ <https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2020>

⁵ Gangitano, Alex. "First case against mandatory vaccination filed in New Mexico: report." The Hill, 2 Mar. 2021, <https://thehill.com/regulation/labor/541173-first-case-against-mandatory-vaccination-filed-in-new-mexico-dention-center>

⁶ Iafolia, Robert. "Vaccine Mandate Lawsuits Sparked by Shots' Emergency Status." Bloomberg Law, 7 Jun. 2021, <https://news.bloomberglaw.com/daily-labor-report/vaccine-mandate-lawsuits-sparked-by-shots-emergency-status>

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