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CLIENT BULLETIN

PUBLIC EMPLOYERS CAN MANDATE COVID-19 VACCINATION BUT MUST BARGAIN OVER EFFECTS OF VACCINATION POLICY

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With the arrival of COVID-19 vaccines for mass distribution have come questions about the authority of public safety agencies to require employees to be vaccinated. The federal Equal Employment Opportunity Commission (EEOC) this month issued revised guidelines addressing vaccination requirements and exemptions under federal law. These guidelines, along with past court decisions and California law, mean public agencies can require their employees, with some exceptions, to be vaccinated, but must meet and confer over the effects of a mandatory vaccination policy.

Mandatory Vaccination Authorized under Emergency Powers

Throughout the COVID-19 pandemic the authority of state and local governments to restrict most civilian activity has been defended by the courts as a valid exercise of police powers necessary to protect the safety of the general public. Compulsory vaccination for COVID-19 is likely to be sustained for the same reason the U.S. Supreme Court over a century ago upheld laws requiring Massachusetts residents to be vaccinated against smallpox: when faced with great dangers, the government may restrain through reasonable regulation "the rights of the individual in respect of his liberty".

Exemptions from Mandatory Vaccination

Under the revised EEOC guidelines, an employee may be exempt from compulsory vaccination if the employee has a disability covered by the Americans with Disabilities Act (ADA) that prevents the employee from taking the vaccine. An employee also may be excused from vaccination if the employee has a sincerely-held religious belief, practice or observance that prevents the employee from receiving inoculation against COVID-19.

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An employee exempt from mandatory vaccination for reasons of disability or religious belief must be accommodated unless reasonable accommodation would create an undue hardship on the employer. The employer has to determine, e.g., whether the employee can work remotely or at another work site where there is no threat of exposure.

One exception to the duty to accommodate under the ADA are situations where reasonable accommodation would not eliminate or reduce the risk of a "direct threat" to the health and safety of other employees. Employers must consider the duration of the risk, the nature and potential severity of the harm, the likelihood the potential harm will occur, and whether the harm is imminent. In pandemic conditions, employers can readily meet this standard for any employee who refuses to be vaccinated.

Earlier this year, a federal appellate court applied these principles when rejecting the discrimination and retaliation claims of a firefighter who lost his job after refusing a TDAP vaccination. The firefighter objected to the vaccination on religious grounds but refused two different accommodations that would have allowed him to remain working. The case is likely to be a guide for future disputes over mandatory COVID-19 vaccinations.

Refusing Vaccination Can Get You Fired

A public employer may require an employee to get the COVID-19 vaccine (when available) as a condition of remaining at or returning to work. An employee who refuses *voluntary* vaccination is likely to be told, at a minimum, to stay home using personal leave until every other employee is vaccinated, but could be subject to termination because of the health risk to co-workers. An officer's flat refusal to be vaccinated against COVID-19, without a claim of disability or religious exemption, probably will be treated by the employer as insubordination if the employee has been ordered to be vaccinated. Whether a local agency makes vaccination voluntary or compulsory likely will depend on the availability and efficacy of the vaccine in the next few weeks as well as the number of employees refusing vaccination.

Employer is Required to Meet and Confer over Vaccination Policy

A vaccination policy is a mandatory subject of bargaining because it affects wages, hours and terms and conditions of employment for bargaining unit employees. Bargaining unit representatives should request to meet and confer over subjects such as vaccination costs, if any; whether vaccinations will be voluntary or mandatory; and the management of religious or medical exemptions and accommodations.