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Client Alert

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EMPLOYERS CAN MANDATE COVID-19 VACCINATIONS

With increased availability of FDA-approved vaccines and companies contemplating re-opening of their worksites, many employers are wondering whether they can mandate that workers be vaccinated before they return to the workplace. The federal Equal Employment Opportunity Commission (EEOC) previously offered some guidance on the issue, suggesting that employers may require vaccinations absent a disability or sincerely held religious belief, practice or observance.

Last month the California Department of Fair Employment and Housing (DFEH) issued its own similar guidance, providing that employers may require employees to receive an FDA-approved COVID-19 vaccination so long as the employer: (1) does not discriminate against or harass employees or job applicants on the basis of a protected characteristic; (2) provides reasonable accommodations related to disability or sincerely-held religious beliefs or practices; and (3) does not retaliate against anyone for engaging in protected activity (such as requesting a reasonable accommodation).

Reasonable Accommodation of Disabled Employees

The FEHA requires employers to reasonably accommodate employees' known disabilities. The same principle applies when it comes to the COVID-19 vaccine. If an employer requires employees to be vaccinated, and an employee objects on the basis of a disability, the employer must engage in the interactive process with the employee and provide a reasonable accommodation.

If the employer can demonstrate that the accommodation creates an undue hardship, the employee is unable to perform his or her essential job duties even with a reasonable accommodation, or the employee cannot perform the essential duties in a manner that would not endanger the employee's health or safety or the health or safety of others even with the accommodations, the employer may then exclude the employee from the workplace.

Determining whether a reasonable accommodation exists is fact-specific. Some things to consider are whether teleworking is possible or whether reasonable safeguards could be implemented at the worksite to enable the employee to work without endangering others.

Reasonable Accommodation Based on Sincerely-Held Religious Belief or Practice

If an employee objects to being vaccinated based on a sincerely-held religious belief or practice, the employer must engage in the interactive process outlined above and provide a reasonable accommodation. In the context of religious belief, such accommodation is one that would eliminate the conflict between the belief or practice and the vaccination requirement. This could include job restructuring, job reassignment, or modification of work practices. Note that segregating the employee from others or the public is *not* considered reasonable.

Although employers may discipline employees who refuse to become vaccinated absent a disability or sincerely held religious belief, employers are prohibited from retaliating against employees for engaging in any protected activity.

General Fear or Distrust of the Vaccine

If an employee does not have a disability-related or sincerely-held religious reason for objecting to the vaccine, the employer is not legally required to reasonably accommodate the employee under the FEHA.

Proof of Vaccination

Where employers require workers to be vaccinated against COVID-19, they may require employees to provide proof of vaccination as this is not considered a disability-related or religious creed-related inquiry, nor is it considered a medical examination. Nevertheless, in that such documentation could include disability-related or medical information, employers can instruct employees to omit medical information from the documentation.

Employers should ensure that any record of employee or applicant vaccination be maintained as a confidential medical record, separate from an employee personnel file.

Conclusion

While the DFEH allows mandatory vaccination policies in the workplace, it has expressly stated that it offers no guidance on whether or to what extent employers *should* mandate the COVID-19 vaccination. The DFEH notes that employers may wish to encourage employees to become vaccinated. An employer who elects to adopt a mandatory vaccination policy should proceed with caution so as to avoid claims of discrimination and retaliation by employees who refuse the vaccine.