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## **COVID-19 Vaccines: Legal Issues to Consider for Employers**

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*Light at the end of the tunnel!* Employers have been adjusting to the impact of the COVID-19 pandemic for almost a year and we are starting to see some relief as vaccines roll out to the general public. As with so many of the issues that employers dealt with during the pandemic, the vaccine also creates new confusion for employers. Can we mandate the vaccine? Should we mandate the vaccine? What are the laws covering vaccines? One thing is for certain, the faster the United States gets to herd immunity, the faster some normalcy will return. Here are a few considerations for employers when considering vaccinating employees.

First, the U.S. Equal Employment Opportunity Commission has confirmed that a vaccine is not an illegal medical examination under the ADA. However, the pre-screen questions required prior to administering the vaccine may qualify as an examination. Therefore, the pre-screen questions must be job-related and consistent with medical necessity. There are two exceptions to this requirement: if the vaccine is voluntary, or if the vaccine is administered by a third-party not connected with the employer (pharmacy, health clinic, etc.). Therefore, for most employers, the requirement that the pre-screen questions be job-related and consistent with medical necessity is unnecessary. In all cases, the responses provided to the pre-screen questions must be maintained as confidential medical information.

Second, if an employer decides to make receiving the vaccine a mandatory term or condition of employment, discrimination laws would be implicated. Under the ADA, it is lawful to exclude an employee from the workplace if the employee is a “direct threat” to the safety of the employee or others. In order to determine whether an employee is a direct threat, the employer must consider 1) the duration of the risk, 2) the nature of the risk and the severity of the potential harm, 3) the likelihood that the potential harm will occur, and 4) the imminence of harm. If an employer determines that an unvaccinated employee will be a direct threat, the employer may not automatically exclude the employee from the workplace. It is necessary for the employer to engage in the interactive process of the ADA to determine whether there is a reasonable accommodation that may be provided to the employee, such as a leave of absence.

Additionally, employers will need to address whether an accommodation to a mandatory vaccine needs to be provided to employees with sincerely held religious beliefs that prevent the employee from being vaccinated. In the case of religious accommodations, employers are required to provide an accommodation unless the accommodation results in an undue burden. An individual analysis must be conducted to determine whether the accommodation of having an unvaccinated employee in the workplace results in an undue burden. Employers should also consider whether incentives provided to employees to get vaccinated could result in discrimination against employees who are unable to be vaccinated (and therefore not receive the

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incentive) due to a disability or religious reason. Litigation on this topic is already being pursued by employees throughout the country.

Finally, once an employee has received the vaccine, if the employee is subsequently exposed to someone with COVID, is it necessary for the vaccinated employee to quarantine? The CDC has provided guidance that it is not necessary if: 1) the employee has been fully vaccinated 2) the last dose was administered within the last three months, and 3) if the employee remains asymptomatic. Anytime any employee has symptoms of COVID-19, vaccinated or not, that employee should not be permitted to report to work. The CDC has also indicated that anyone who has received the vaccine should continue to follow the CDC's guidance for wearing masks, social distancing, frequent handwashing, and symptom monitoring.

Over the past year, employers have also had to deal with workers' compensation issues associated with COVID-19. The Ohio Bureau of Workers' Compensation recently reported the filing of workers' compensation claims related to adverse reactions to the vaccine. In order for a compensable workers' compensation claim to be established in Ohio, the employee must prove that the injury was incurred in the course of and arising out of employment. Therefore, if an employee has an adverse reaction to a vaccine, a workers' compensation claim may be compensable if the vaccine was mandatory and the employee has evidence that an injury resulted with a condition causally connected to the employee's receipt of the vaccine.

Wide-spread vaccination against COVID-19 will relieve many of the problems businesses have had to deal with during the pandemic. Paying attention to the legal issues associated with vaccines will go a long way to preventing the vaccine from becoming a poison pill.

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