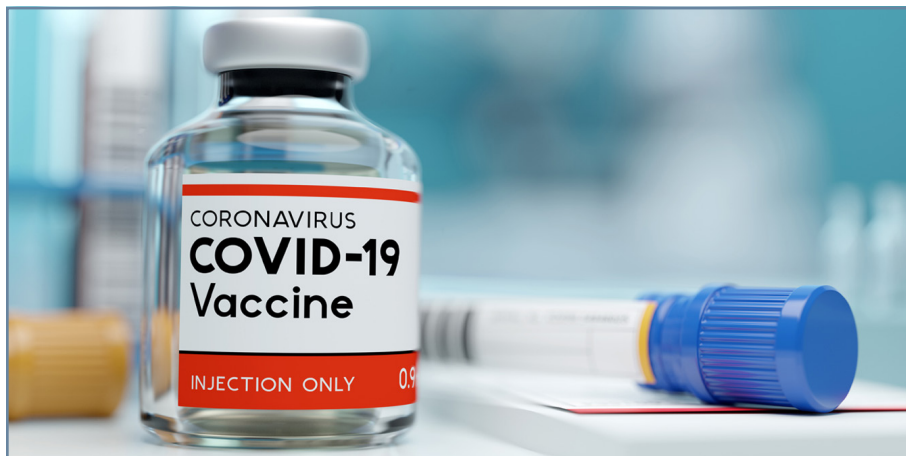


LEGAL

KEEPING YOUR EMPLOYEES SAFE – THE COVID-19 VACCINE



Unfortunately, COVID-19 continues to infect people throughout the U.S. As vaccines become more widely available, integrated marketing communication firms have many questions about what that will mean for their workforces. Can we now safely return to the office (if still working remotely)? Can we mandate employee vaccinations prior to each employee's return to in-person work? And what happens if an employee refuses to take the vaccine? This article will help answer those questions.

The Equal Employment Opportunity Commission (EEOC) issued [guidance](#) in December that discusses the legal issues surrounding the intersection of the COVID-19 vaccine and federal anti-discrimination laws. In general, these laws do not prohibit employers from requiring vaccines for their employees, so long as employers provide reasonable accommodations for disabilities and sincerely held religious beliefs and otherwise comply with their legal obligations.

Employer Considerations

Firms need to consider not only their legal obligations, but also morale and other practical concerns when considering whether to require all employees to be vaccinated. Will employees be upset that the company is requiring

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them to take a medical treatment? Can and will employees work remotely, so that vaccinations may not be critical because employees will not physically be in each other's presence? Are the current precautions (daily screening; mask-wearing; social-distancing) working, so it is not necessary to require each employee to get the vaccine? All of these should be taken into account prior to a firm's decision to implement a vaccine mandate.

Although the EEOC guidance is important and helpful, it is not the final word in two key ways. First, the EEOC may change its guidance significantly given the imminent change of administration. Second, states and cities may have their own laws and requirements (as seen last summer regarding stay-at-home orders) that employers must follow. It is critical that employers stay informed and continue to monitor federal, state and local health department announcements and guidelines regarding COVID-19.

Firms entertaining a COVID-19 vaccination mandate must keep in mind certain high level legal issues and how those issues apply to individual employees in their workforces. These are summarized below.

The Americans with Disabilities Act (ADA)

The ADA generally prohibits discrimination on the basis of an employee's disability and requires employers to provide reasonable accommodations to employees with a disability, unless doing so would cause an undue hardship. The ADA permits a firm to require vaccination (even for disabled employees) in certain situations. Specifically, the firm must be able to show that an unvaccinated employee would pose a direct threat due to a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." Employers who require vaccination should conduct an individualized assessment of four factors to determine whether a direct threat exists:

1. the duration of the risk;
2. the nature and severity of the potential harm;
3. the likelihood that the potential harm will occur; and
4. the imminence of the potential harm.

If a firm determines that an employee who cannot be vaccinated due to a disability poses a direct threat at the workplace, the employer still may not exclude the employee from the workplace or take other adverse action unless there is no reasonable accommodation that would eliminate or reduce this risk. Examples of reasonable accommodations could be allowing the employee to work remotely entirely or enforcing pre-existing protections (daily questionnaires; social distancing; mask mandates; etc.). If a direct threat cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean that the employer may terminate the worker.

The ADA also prohibits employers from making disability-related inquiries and requiring medical examinations of current employees unless those inquiries or exams are "job-related and consistent with business necessity." Disability-related inquiries and medical examinations are permitted where an employee will pose

a direct threat if he or she has a specific medical condition. Because the EEOC has declared that COVID-19 poses a direct threat, employers have more (but not unfettered) leeway to require exams related to COVID-19 and to require vaccines, subject to their other obligations.

The EEOC has stated that a vaccine itself is not a medical examination because the employer is not seeking information about an employee's health. However, if the employer administers the vaccine itself or through a third party, test screening processes, which may include the need to gather medical information from each employee, could result in the disclosure of medical and/or family history information. Such disclosure may implicate the ADA, as well as the Genetic Information Nondiscrimination Act (GINA), which prohibits discrimination on the basis of genetic information.

Addressing Religious Concerns

Some employees may refuse to take a vaccine on the basis of a sincerely-held religious belief. Under The Civil Rights Act, firms must provide reasonable accommodations for employees' sincerely held religious beliefs, unless doing so would pose an undue hardship. These reasonable accommodations may be the same as those listed above with respect to the ADA.

As is the case with disabilities, if the employer cannot provide a reasonable accommodation without undue hardship, then the employer may exclude the employee from the workplace and may ultimately terminate the employee's employment, after considering and providing any other rights the employee may have under applicable law. If an employee requests a religious accommodation, and an employer has an objective basis to question the nature or sincerity of a particular belief, the employer would be justified in requesting additional information.

In sum, firms can indeed implement a mandatory vaccination policy but they need to do so with care and in consultation with legal counsel to ensure they do not give rise to claims for certain affected employees under the American Disabilities Act, laws designed to protect religious freedom or other applicable law.