



EMPLOYER ALERT

COVID-19 Vaccine Mandates and Implications, Including for Directors & Officers

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Introduction

As the world continues to face the worst pandemic in a century, there is welcome news in the approval and distribution of a vaccine for COVID-19. This news does not come without challenges to employers who may now be grappling with balancing the health and safety of their workforce (and potentially customers or third parties) and compliance with federal, state and/or local employment laws. If an employee objects to a workplace vaccination mandate due to disability or religious belief, employers will need to consider a reasonable accommodation.

Can Employers Mandate Vaccination?

It depends. Employers may be able to require vaccination subject to “reasonable accommodation” obligations under federal, state and local laws.

The Americans with Disabilities Act (ADA)

The ADA allows an employer to have a qualification that includes a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.¹

However, if a safety-based qualification standard, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, the employer

must 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.

An employee may be entitled to an exemption from an employer’s vaccination directive based on a disability that prevents him or her from taking the vaccine. This would be a reasonable accommodation barring a showing of undue hardship by the employer.²

Religious Discrimination Protections and Title VII

Title VII of the Civil Rights Act prohibits employers from discriminating against employees or applicants because of religion. An individual is protected if they have “sincerely held” religious beliefs. Employers must make reasonable accommodation for an employee’s religious belief if an accommodation does not cause an undue hardship to the employer. Employers should engage in an interactive dialogue with the employee regarding the request for accommodation.

Other Employer Liability Considerations

Occupational Safety and Health Act (OSHA)

The whistleblower provision of OSHA may protect an employee who refuses to be vaccinated under an

¹ Based on guidance of the CDC and public health authorities as of March 2020, the COVID-19 pandemic meets the direct threat standard. The CDC and public health authorities have acknowledged community spread of COVID-19 in the United States and have issued precautions to slow the spread, such as significant restrictions on public gatherings. In addition, numerous state and local authorities have issued closure orders for businesses, entertainment and sport venues and schools in order to avoid bringing people together in close quarters due to the risk of contagion. These facts manifestly support a finding that a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time. At such time as the CDC and state/local public health authorities revise their assessment of the spread and severity of COVID-19, that could affect whether a direct threat still exists.

² Under the EEOC’s most recent guidance of December 16, 2020, if an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace. This does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities. The updated guidance and frequently asked questions can be found here: <https://www.eeoc.gov/wysk/what-you-should-know-about-COVID-19-and-ada-rehabilitation-act-and-other-eeo-laws>



employer vaccine program if there is a reasonable belief that a medical condition may cause a reaction to the vaccine resulting in serious injury or death. On the flip side, some employees could claim that an employer without a vaccine mandate failed to provide a safe and healthy work environment.

National Labor Relations Act (NLRA)

The NLRA protects all employees' rights to engage in "concerted activity" regarding conditions of their workplace under section 7 of the Act. If employees jointly protest an employer COVID-19 vaccine mandate or lack of one, and an employer takes any adverse employment action against those employees as a result, it could lead to allegations of violation of the NLRA. The right to engage in protected concerted activity applies to all employees not just those who may be part of a Union.

Employment Practices Liability (EPL) Insurance Implications

Employment Practices Liability Insurance includes coverage for claims alleging Wrongful Employment Actions as defined by the policy. The policies provide protection to employers for allegations of discrimination, harassment, wrongful termination and retaliation among other alleged adverse employment actions. These policies are an important part of an organization's toolkit and many policies also include access to risk management offerings as part of the program that insureds can take advantage of proactively and before a claim arises. Some of these offerings include a complimentary consult with designated labor and employment counsel or access to an employment law library with updates to federal, state and international laws. USI can assist clients in facilitating these loss mitigation offerings.

D&O Liability & Insurance Implications

All roads lead to the boardroom, meaning that the oversight and management of all critical areas of a company's operations and protocols is subject to the scrutiny of investors, shareholders, creditors,

customers, vendors, business partners, regulators, and employees.

Given the high-profile nature of the upcoming COVID-19 vaccination process, which could last the entirety of 2021 and beyond, organization leaders will need to be actively involved in key decisions that impact the organization's stakeholders, including engaging the advice of experts within and outside the organization, if needed.

Even those leaders that adeptly navigate the financial performance of their companies through this part of the COVID-19 pandemic response could be targets of litigation if the vaccination process creates adversity with employees or other stakeholders. D&Os have, for some time, faced the perils of event-driven litigation (EDL), which is essentially any shareholder suit that does not arise from an accounting-related issue (like a restatement) and alleges that a company concealed or misrepresented the risk of a major negative event. In this case, a major negative event could be the mismanagement of the COVID-19 vaccination process. Those stakeholders that suffer damage because of the alleged misleading statements will often target a company's D&Os. In addition to the distractions caused in responding to allegations, the costs to defend, or settle, could be substantial and implicate your D&O insurance.

Best Practices

Employers should consult with counsel to assess and monitor federal, state and local legislation or executive orders which apply to their workforce and may prohibit or limit employers from mandating employee vaccination for COVID-19. Employers may also want to consult with experts to prepare and train Human Resource personnel in responding to requests for accommodations as well as how to best engage an employee in the interactive process required under the ADA and Title VII. It is also important that organizations are mindful of claim reporting requirements in the policy to avoid technical and late notice defenses raised by an EPL insurer. Carriers' EPLI forms vary and contain discrete wording as to notice of claim obligations.



Company leaders and board members should have established protocols that demonstrate their oversight of the process, with clear steps to monitor the impact

on the company and any adverse situations that may develop. Utilizing proper experts as needed to guide decision making will be helpful in defending any claims that may arise.

How USI Can Help

USI's Executive and Professional Risk Solutions (EPS) Practice proactively reviews EPL and D&O insurance policies (including any risk mitigation features), identifies coverage gaps (intended or unintended) and keeps abreast of potential coverage enhancements in the marketplace to address evolving exposures.

For employers with workforces returning to the worksite, your USI account team can review your organization's current insurance program and provide benchmarking of limits and retentions (peer comparisons) and evaluate coverage for COVID-19-related claims. USI can discuss improvements to insurance policy language to expand the scope of coverage before each year's renewal.

Whether an insured can recover under an EPLI or D&O policy in response to a claim will depend on the specific wording of the policy (and its exclusions prohibiting coverage), the allegations set forth by the claimant, and the damages sought.

USI is continuously monitoring the COVID-19 pandemic. We have developed industry specific information including exclusive webinars and content to keep our clients informed during these uncertain times. Visit USI's STEER site at <https://www.usi.com/public-health-emergencies> for valuable resources.

Contact your USI consultant to learn more.

EPS's main objective is to ensure that companies and their leaders understand how to mitigate emerging risks, are comfortable with the risks that are retained, and have clarity on the risks that are transferred.

For more information, please contact your local USI consultant, or visit us at www.usi.com.