

MSF CLIENT ALERT

Meister Seelig & Fein LLP | 125 Park Avenue New York, NY 10017 | 212.655.3500 | meisterseelig.com

Considerations for Mandating Employee COVID-19 Vaccinations

Following the U.S. Food and Drug Administration's ("FDA's") grant of emergency use authorization for the first COVID-19 vaccination, the U.S. Equal Employment Opportunity Commission ("EEOC") released guidance regarding employer mandates related to COVID-19 vaccinations for its workforce. Employers who are considering whether to require employee vaccination should review the potential legal, administrative and practical implications of such a decision.

December 29, 2020

Can Employers Mandate Employee Vaccinations?

Employers can mandate employee vaccination subject to medical and religious exceptions.

Employers faced with employee exemption requests must address each individual request through the established legal framework under the Americans with Disabilities Act ("ADA") and Title VII of the Civil Rights Act ("Title VII"). If an employee identifies a proper religious or medical exception, an employer must strive to provide the exemption for the employee or provide a reasonable accommodation for the employee. The employer must engage in an interactive dialogue with the employee to determine whether a reasonable accommodation can be achieved. Some examples of reasonable accommodations may include permitting the unvaccinated employee to work remotely, wear PPE and maintain social distancing, or take a leave of absence until the remainder of the workforce is vaccinated. If no reasonable accommodation can be achieved, employers can prevent the employee from coming to work without a vaccine but cannot automatically terminate the employee without determining if the employee may be subject to other legal rights, such as federal, state or local leaves of absences.

Medical Exceptions

Individuals with established medical contraindications to the vaccine may be exempt from a vaccination mandate. For this type of disability-related exception, employers should do a case-by-case analysis to determine whether the inoculated employee would pose a direct threat to the workplace. If such a threat exists, employers must first look to provide a reasonable accommodation, as described above, before excluding the individual from the workplace. As the vaccines become more widely distributed, the medical community will become more knowledgeable about the legitimacy of contraindications to the vaccines. At the moment, contraindications may include severe allergic reaction or anaphylaxis to another vaccine or injection.

Religious Exceptions

Individuals with a strongly held religious belief, practice or observance against getting the vaccination may be exempt from a vaccination mandate. Employers must similarly try to accommodate an employee's religious belief, practice or observance as long as it does not pose an undue hardship on the business.

Based on the current legal framework, employees seeking an exemption from mandatory vaccination due to a

MSF CLIENT ALERT

Meister Seelig & Fein LLP | 125 Park Avenue New York, NY 10017 | 212.655.3500 | meisterseelig.com

generalized anti-vaccination stance or distrust of this particular vaccine will not likely qualify for an exemption as Title VII does not protect social or political philosophies or strong preferences. However, given the unprecedented nature of the COVID-19 pandemic and the FDA's expedited authorization of the vaccines for emergency use, employers should be on the lookout for future guidance that may be issued addressing requests for exception based on an anti-vaccination stance.

How to Determine Whether to Mandate Vaccinations for Your Workforce

Weighing in Favor of Mandatory Vaccination

- **Workplace Safety for High-Contact Worksites.** Worksites with significant contact among employees and/or between employees and customers may be particularly inclined to ensure all employees are vaccinated to protect employees and customers and promote workplace safety. These types of worksites may include restaurants or other hospitality venues and healthcare facilities.
- **Staying Open.** Mandating vaccinations may make a workplace more likely to reopen and remain open. As many businesses have experienced this year, a single positive COVID-19 test from an employee present at the worksite can cause an employer to partially or fully stop operations or transition to remote operations for a period of time. Mandatory vaccinations may reduce the positivity rate among employees.
- **Potential Reduction of Absences and Medical Costs.** A mandatory vaccination approach may make it less likely that employees will require leaves of absence and short-term or long-term medical care associated with a COVID-19 diagnosis.

- **Potential Reduction of COVID-19-related Liability.** Civil liability resulting from the contraction of COVID-19 in the workplace is an emerging legal trend. Several states have enacted legislation limiting or shielding businesses from liability related to COVID-19 in the workplace, but nonetheless businesses may have real exposure to COVID-19 related liability. Businesses may be able to invoke a mandatory vaccination program as a legitimate defense to any such litigation or threat of litigation.

Weighing Against Mandatory Vaccination

- **Emergency Use Authorization.** Because the COVID-19 vaccines have been approved for emergency use authorization, which is different than approval under FDA vaccine licensure, the FDA has an obligation to ensure that recipients of the vaccine are informed of the known and potential benefits and risks of the vaccine and that the recipient has the *option* to accept or refuse the vaccine. As a practical matter, this disclosure may be contradictory to an employer requiring an employee to be vaccinated. In fact, at this early stage, many prominent health officials, including the U.S. Surgeon General, have advised that employers should hold off on requiring employees to get the vaccine and instead should encourage vaccination.
- **Administrative Hurdles.** Employers seeking to require vaccination may face challenges related to the timing and accessibility of the vaccine for all employees. As of today, the vaccine is only generally available to health care workers and nursing home residents. As the vaccines become more widely accessible, employers seeking to mandate vaccines will have to ensure that employees have access to the vaccine, as well as any vaccine booster shot, at the time the mandate

MSF CLIENT ALERT

Meister Seelig & Fein LLP | 125 Park Avenue New York, NY 10017 | 212.655.3500 | meisterseelig.com

goes into effect. Employers will also have to establish a procedure for verifying that employees have received the vaccine and vaccine booster shot, if necessary. At this time, there is no publicly accessible central database documenting who has received a COVID-19 vaccine.

- **Potential Increased Exposure to ADA and Title VII Liability.** Employers' denial of requests by employees seeking an exception to a vaccination mandate may give rise to increased exposure to liability under the ADA and Title VII, as well as similar state and local laws. Employers will need to carefully review and document all exemption requests and, if a legitimate medical or religious exception exists, closely follow the laws related to reasonable accommodations to avoid liability.

Evaluate Your Specific Employee Culture

In addition to the considerations listed above, employers should evaluate their individual company's culture to determine whether a mandatory vaccination program will improve or hinder employee morale and employee retention. Many contact-heavy industries may find that employees are comforted by a vaccination requirement, while other businesses, especially those that allow for more remote working environments, may find that employees appreciate their individual right to choose whether to be vaccinated. At this early stage, employers may want to start gauging employee opinion on the subject (through focus groups, employee surveys or conversation with key staff) with the understanding that employees' views may change as the vaccines become more widely distributed and the benefits and risks become better understood.

Tips for Implementing Mandatory Vaccination

Administer a Mandatory Vaccination Plan

In advance of mandating vaccination, employers should create a plan to implement the requirement. Employers will need to decide whether they want to be responsible for administering vaccinations – either themselves or through a third-party – or whether they want to require employees to obtain vaccination on their own. Employers must also consider who will bear the administration cost of the vaccination if it is not fully covered by insurance (some states, like New York, have mandated that insurers provide the vaccine at no cost). If an employer is concerned about employee buy-in, employee morale may be enhanced by the employer handling the administration of the vaccination and bearing any costs. If an employer does not administer or provide for the administering of the vaccine or if an employer allows employees to be vaccinated by an outside resource, employers will need to create a protocol for confirming proof of vaccination.

Processing Exception Requests

In advance of mandating vaccination, employers should also devise a process for fielding requests for exceptions to the vaccination mandate. Supervisors, managers and/or human resource professionals should be prepared to report and address exemption requests in accordance with the legal requirements outlined above. While employee requests for exceptions should be evaluated on an individual basis, employers should consider potential accommodation options for groups of similarly situated workers in advance of the mandate in order to process requests more efficiently and uniformly.

Other Considerations

- **Labor Law Issues:** Prior to imposing a vaccine mandate, employers should review potential requirements under the federal, state and local labor laws. In New York, if employers mandate vaccination, employers will

MSF CLIENT ALERT

Meister Seelig & Fein LLP | 125 Park Avenue New York, NY 10017 | 212.655.3500 | meisterseelig.com

likely be required to compensate an employee for any time spent getting vaccinated. Such compensation is likely to be subject to penalties under the New York Labor Law if it is not properly and timely paid.

of an employee's medical or genetic information. Pre-vaccination screening questions and requests for exceptions from the mandate are likely to elicit protected information. Employers mandating vaccination must be conscious of record-keeping and confidentiality requirements for employee medical information.

- **Privacy Issues:** Mandating vaccination may raise privacy issues related to the disclosure

Please contact an attorney in MSF's Employment or Hotel & Hospitality Groups if you need assistance with respect to this information.



Andrea B. Neuman
Partner | Chair, Employment
(212) 655-3513 | abn@msf-law.com



Christy L. Reuter
Partner | Chair, Hotel & Hospitality
(646) 755-3174 | clr@msf-law.com



Gregg M. Kligman
Counsel | Employment
(646) 273-8209 | gmk@msf-law.com



Samantha Frenchman
Associate | Employment
(212) 655-3580 | slf@msf-law.com



Cassidy Mara
Associate | Employment
(646) 273-8204 | cm@msf-law.com