

Mandated COVID-19 Vaccines – Is this the New Norm?

By Kimberly A. Alley, Esq.

On August 19, 2021, Massachusetts Governor Charlie Baker issued an executive order requiring all Commonwealth Executive Department employees to provide proof of COVID-19 vaccination on or before October 17, 2021. This policy applies to all employees regardless of whether they work remotely. Employees with medical contraindications and sincerely held religious reasons may obtain an exemption. Those without an exemption will face disciplinary action, including and up to termination.



Likewise, on September 9, 2021, President Biden announced regulations and a federal executive order that mandates vaccinations for employees of private employers with at least 100 employees, healthcare facilities and federal contractors. As part of this directive, the Occupational Safety and Health Administration (“OSHA”) has been directed to issue rules governing proof of vaccination or negative test results on at least a weekly basis. The OSHA rule will be implemented on an emergency basis and provide for paid time off for the vaccination and recovery of any illness resulting from vaccination. The Centers for Medicare and Medicaid Services (“CMS”) will formulate a similar rule for healthcare facilities that participate in Medicare and Medicaid. Unlike the anticipated OSHA rule, the policy governing healthcare workers is unlikely to allow weekly testing as an alternative to vaccinations. Federal contractors will also be required to provide proof of vaccinations to obtain federal contracts.

The recent executive orders by Governor Baker and President Biden reflect the new norm that is likely to permeate workplaces: mandatory vaccinations. Public health policies have long required vaccinations for children in schools. Similarly, mandating vaccinations in the workplace is rapidly becoming well-accepted. This trend leaves employers who do not meet the criteria for government mandated vaccines asking whether they should require the COVID vaccination.

If an employer chooses to require vaccinations, it can expect legal and governmental support in implementing the policy. In December of 2020, the Equal Employment Opportunity Commission (“EEOC”) issued guidelines for mandating vaccinations.

The EEOC enforces federal workplace discrimination laws and recognizes that employers are not only entitled, but required, to ensure a safe workplace. For this reason, an employer may prohibit an unvaccinated employee from physically entering the workplace if the individual poses a potential threat to anyone by failing to comply with a vaccine mandate.

The EEOC requirement of providing a safe workplace includes ensuring that "an individual shall not pose a direct threat to the health or safety of individuals in the workplace." For this reason, the EEOC has determined that a vaccination mandate does not violate the Americans with Disabilities Act ("ADA"). A vaccination mandate is unlikely to violate other equal protection laws.

The ADA and Title VII of the Civil Rights Act of 1964 recognize only two exceptions to an inoculation mandate: 1) disability or 2) "sincerely held" religious beliefs. An employee who qualifies for either of these exemptions may request an accommodation. If an accommodation is requested, the employer must determine if the accommodation sought is reasonably possible in achieving the same level of safety as the vaccine without imposing an "undue hardship" on the employer. An undue hardship is one that poses a "significant difficulty or expense". A case-by-case review of each accommodation request will be necessary. An employee who cannot legitimately demonstrate qualification for either of these two exceptions is unlikely to find employment protection under the law. Recent challenges to vaccine mandates have failed in both Texas and the Seventh Circuit Court of Appeals.

Even if a company chooses not to require vaccinations, there are several things it can do to align with vaccination mandates. First, an employer should encourage and facilitate vaccinations for all employees. Employers who do not outright mandate vaccinations are opting to adopt policies that strongly recommend and enable vaccinations. Such policies often provide paid time off for obtaining vaccinations and additional time off if the employee gets sick from the vaccination. Second, employers can educate employees concerning the risks of COVID and benefits of vaccinations. Third, all employers should require unvaccinated employees and customers to wear masks and socially distance within the workplace.

Employees who fail to comply with vaccination policies will ultimately face the choice of employment. Most employment is "at will" meaning that either the employer or employee can terminate the employment for any non-discriminatory reason. An employer has the right to set health and safety working conditions, including a COVID vaccination. As recent cases and the executive orders demonstrate, vaccinations are rapidly becoming the new norm.

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