

SO YOU WANT TO IMPLEMENT A MANDATORY VACCINATION POLICY – WHAT SHOULD YOU KNOW?

by Shelly R. Pagac and Joseph L. Gordon

Many employers are considering implementing a mandatory vaccination policy. Can you? Yes. Should you? It depends on your business, and consideration of the following issues:

- 1. Accommodating Certain Employees**—Your company can implement a mandatory vaccination policy requiring all employees to be vaccinated before returning to the office. However, the policy must recognize that the company may need to make accommodations, if feasible, for certain employees who oppose getting vaccinated for religious or medical reasons.
- 2. Using Third Party to Administer Vaccine**—If your company retains someone to give the vaccine on-site, it must ensure that no confidential medical information is obtained in the process. When using a third party to administer the vaccine, the company can require proof from that third party that the vaccine was administered. But again, the company should not have access to the employee’s confidential medical information.
- 3. Employees that Refuse Vaccine**—Your company must be prepared for employees who refuse to get the vaccine for medical, religious or other reasons. If an employee refuses to get the vaccine, your company would have to engage in an interactive process to determine whether that employee being in the workplace without being vaccinated would pose a direct threat to other employees. In assessing that direct threat, your company would need to engage in an individualized assessment and consider the following four factors as to the unvaccinated employee:
 - (1) duration of the risk;
 - (2) nature and severity of the harm;
 - (3) likelihood of the harm; and
 - (4) imminence of the harm.

A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite. If an employer concludes an employee is a direct threat, the employer might have grounds to terminate the employee, but only after considering whether the employer is able to accommodate the employee working remotely. If the employer can accommodate the employee by allowing the employee to continue working remotely, it could not terminate the employee for refusing to get the vaccine. In these days where many employees have been working remotely, concluding an employee cannot work remotely may be a difficult burden, depending in large part on the nature of your business, and the nature of the employee’s work for your business.

- 4. Choosing Not to Require Vaccine**—If your company chooses not to implement a mandatory vaccination policy, you still have every right to highly encourage employees to obtain the vaccination

before they return to the office. In encouraging the employees to obtain the vaccination, you can consider the following:

- (1) develop and share vaccine education communications;
- (2) make the vaccine readily available to the employees;
- (3) cover the costs of the vaccine;
- (4) provide minor incentives for employees who get the vaccine (the extent of the amount of incentives is unclear because the EEOC has opined that an employer cannot incentivize wellness programs); or
- (5) provide paid time off to employees to get the vaccine and recover from any potential side effects from the vaccine.

5. Draft a Written Policy—If you choose to implement a mandatory vaccination policy, prepare a written policy to work through these and other issues your company may have, and to educate your employees about the policy. In drafting the policy, you may decide a mandatory policy is best for you, or you may conclude simply encouraging the vaccine is most beneficial for your company.

The bottom line is that we all want to get back to work in the safest manner possible, but only you can make that decision for what is best for your workplace. We are here to help you stay safe, and keep your employees safe.

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