

ANDERSON KILL EMPLOYMENT LAW INSIDER

ALERT

The COVID-19 Vaccine: Can An Employer Require Its Employees To Get It?

By Bennett Pine and John P. Lacey Jr.

Last month, the U.S. Food and Drug Administration (“FDA”) granted emergency use authorization for Pfizer’s and Moderna’s COVID-19 vaccines. Emergency use authorizations for the Johnson & Johnson, AstraZeneca and other such vaccines are expected shortly.

As COVID-19 vaccines become widely available, many employers have inquired whether they can require employees to get the vaccine before returning to the workplace. The short answer is yes, with certain restrictions and exceptions.

Thus, while employers mull over whether to require employees to get the vaccine, it is important for every employer to understand the potential legal implications as they consider whether and to what extent to require employees returning to the work place to first receive the vaccine.

Early Guidance Suggests Employers Can Require Employees To Get Vaccinated.

Under local, state, and federal law, employers are required to maintain a safe workplace for their employees. To that end, the Centers for Disease Control (“CDC”) and the Occupational Safety and Health Administration (“OSHA”) have been instrumental to employers in providing practical and legal guidance regarding the implementation of measures to keep the workplace safe amid the pandemic.

Early guidance suggests that in order to further the goal of keeping the workplace safe, nothing prevents employers from requiring employees to take the vaccine. However, there are exceptions for employees who are pregnant, disabled, allergic, or who object to taking the vaccine on the basis of a sincerely held religious belief.

EEOC Issues Guidance to Employers

On December 16, 2020, the Equal Employment Opportunity Commission (“EEOC”) issued guidance to employers regarding whether they may implement a mandatory vaccination program. The EEOC determined that no law

ANDERSON KILL
1251 Avenue of the Americas
New York, NY 10020
(212) 278-1000

ANDERSON KILL
1760 Market Street, Suite 600
Philadelphia, PA 19103
(267) 216-2700

ANDERSON KILL
1055 Washington Boulevard, Suite 510
Stamford, CT 06901
(203) 388-7950

ANDERSON KILL
1717 Pennsylvania Avenue, NW, Suite 200
Washington, DC 20006
(202) 416-6500

ANDERSON KILL
One Gateway Center, Suite 1510
Newark, NJ 07102
(973) 642-5858

ANDERSON KILL
Wells Fargo Building
355 South Grand Avenue, Suite 2450
Los Angeles, CA 90071
(213) 943-1444

www.andersonkill.com





who's who

Bennett Pine is a shareholder in Anderson Kill's New York and

Newark offices and is chair of the firm's employment & labor group. Mr. Pine has broad-based labor and employment law experience and regularly plays a hands-on role offering preventative maintenance advice and counseling to employers in the full range of legal issues affecting the workplace.

bpine@andersonkill.com

(212) 278-1288 (NY)

(973) 642-5006 (Newark)



John P. Lacey Jr. is an attorney practicing in Anderson Kill's New Jersey office. John focuses his practice on insurance recovery

and corporate litigation.

jlacey@andersonkill.com

(973) 642-5867

ANDERSON KILL NEWSLETTERS & ALERTS

TO SUBSCRIBE PLEASE VISIT:
[www.andersonkill.com/
publications_subscribe.asp](http://www.andersonkill.com/publications_subscribe.asp)

TO UNSUBSCRIBE PLEASE EMAIL:
unsubscribe@andersonkill.com

prevents employers from requiring employees to be vaccinated, or showing proof of vaccination, before returning to the workplace.

Generally, employers should be aware of two exceptions to any mandatory vaccination program: employees who refuse to be vaccinated on the basis of a recognized disability or on the basis of a sincerely held religious belief.

The EEOC governs workplace anti-discrimination laws, including the Americans with Disabilities Act ("ADA") and Title VII of the Civil Rights Act ("Title VII"). Before implementing mandatory vaccination programs, employers should generally be aware of how the ADA and Title VII interact with a mandatory vaccination program, and in some cases conflict with one.

The ADA limits an employer's ability to make disability-related inquiries or require medical examinations at the workplace. Disability-related inquiries and medical examinations must be job-related and consistent with business necessity. Notably, the EEOC determined that neither a vaccine nor requiring an employee to show proof of vaccination constitute a "medical examination" or "disability-related inquiry," and thus would not violate the ADA's prohibition on certain disability-related inquiries. However, the EEOC cautions employers that certain pre-screening vaccination questions may implicate the ADA's prohibition of disability-related inquiries.

The EEOC advises employers to conduct an individualized assessment of any employee claiming a "disability" exception to determine whether said employee's presence at the workplace would present a safety threat to other employees, or in any way render the workplace unsafe. The EEOC indicates that an employer must provide said employee with a reasonable accommodation (absent undue hardship), whether that be remote work or other such measures. While employers can prevent employees from coming into work, employers cannot automatically discharge employees who have refused to get vaccinated on the basis of a disability.

Under Title VII, employees are protected from discrimination on the basis of, among other things, race, national origin, sex, pregnancy, and religion. If an employee indicates he will not receive a vaccination based on a sincerely held religious belief, an employer must provide said employee with a reasonable accommodation, absent undue hardship. The EEOC advises employers to presume that, when an employee invokes a "sincerely held" religious belief, the religious belief is indeed "sincere." However, if there is an objective basis on which an employer may indeed question the sincerity of an employee's religious belief, an employer is usually justified in requesting additional information from their employee.

Employers May "Encourage" Employees To Get The Vaccine, Rather than Require it.

Employers may decide not to implement a mandatory vaccination program. In that case, employers may find a voluntary vaccination program is a more effective alternative.



Employers that decide to roll out a voluntary vaccination program should consider paying for vaccinations, whether directly or indirectly through their employee health insurance plan, if available. In addition, employers should determine how they can otherwise incentivize employee participation in a voluntary vaccination program, including reimbursing employees for any related costs, as doing so will likely increase employee participation in the program. Employers implementing a voluntary vaccination program should also be sure to keep abreast of the latest developments concerning the vaccine, and its potential side effects, as a voluntary vaccination program may lose favor if employers are not transparent.

Steps Employers Can Take Now, Before Rolling Out A Vaccination Plan

Even before COVID-19 vaccines become widely available, employers should consider whether and to what extent they will require or encourage their employees to get vaccinated. Employers should first establish a group, whether management, human resources, or otherwise, to develop and strategize an employee vaccination program. Employers should be sure to consult their existing policies and procedures before making any decisions, particularly to prevent against vaccination programs running counter to current policies and procedures. Should employers decide to make the return of employees to the workplace contingent upon being vaccinated, employers must be careful to establish guidelines that comply with applicable law, especially in the event a given employee is disabled or refuses to take the vaccine on the basis of a sincerely held religious belief.

Recommendation

Recent studies show that as many as 30% to 40% of employees do not wish to obtain the COVID-19 vaccine. Thus, although employers may legally require employees to obtain the COVID-19 vaccine, doing so will likely result in significant dissension and discord in the workplace.

Therefore, we strongly suggest that if an employee refuses to obtain a vaccine, that employee should be directed to work from home, and not be terminated if at all possible. In such circumstances, employers should make every effort to respect an employee's refusal to take the vaccine but, at the same time, also take into consideration the safety of the rest of their workforce. Terminating an employee based on their refusal to take the vaccine could lead to unnecessary legal exposure. The importance of establishing clear guidelines cannot be overstated, and could make all the difference in preventing against future legal exposure.

To that end, it is also imperative that employers continue to monitor current and future guidelines from the Centers for Disease Control and the Occupational Safety and Health Administration, as well as other local, state and federal authorities relating to workplace safety, applicable law, and in particular, evolving issues regarding the implementation of COVID-19 vaccines. If employers are prepared and are able to effectively organize a vaccination strategy, employers will have a much easier time rolling out their vaccination programs once the vaccine becomes widely available. ▲

This publication was prepared by Anderson Kill P.C. to provide information of interest to readers. Distribution of this publication does not establish an attorney-client relationship or provide legal advice. Prior results do not guarantee a similar outcome. Future developments may supersede this information. We invite you to contact the editor, Bennett Pine, at bpine@andersonkill.com or (212) 278-1288, with any questions.

