

## Can Employers Require the COVID-19 Vaccine?

Before reaching a conclusion, however, employers should consider the legal concerns associated with requiring the vaccine. While it may be months before employers are required to make this decision, it is important to start thinking about the ramifications.

By **Shannon Kelly and Howie Waldman** | December 21, 2020



As the first doses of the COVID-19 vaccine are distributed to health care workers, many employers are grappling with whether to require their employees to receive the vaccine. Before reaching a conclusion, however, employers should consider the legal concerns associated with requiring the vaccine. While it may be months before employers are required to make this decision, it is important to start thinking about the ramifications.

As a general principle, Florida law permits mandatory vaccination by the government during a public health emergency. See Fla. Stat. Section 381.00315(1)(c)(4). Additionally, Florida courts have recognized that the “state interest in preventing the wide-spread danger to public health is great” in the context of compulsory medical vaccination. See *Public Health Trust of Dade County v. Wons*, 541 So. 2d 96, 101 (Fla. 1989).

Implementation of a mandatory COVID-19 vaccine may largely depend on the nature of the workforce. Guidance issued by the Equal Employment Opportunity Commission (EEOC) on Dec. 16, provides that employers may require employees to take the vaccine, provided that it is job-related, consistent with business necessity or justified by a direct threat. On this point, decisions of courts regarding the flu and other vaccines have determined that requiring vaccines is job-related for certain employers, such as hospitals and schools, but may not be for other types of employers. Due to the nature of

the COVID-19 pandemic, courts may take a broader view as to whether the vaccine is job-related.

Moreover, in Florida, public employees may challenge any mandatory COVID-19 vaccination policy on grounds that it amounts to a violation of the right to privacy as contained in the Florida Constitution. However, the right to privacy is not absolute and yields to a compelling government interest. To justify the governmental intrusion, public employers may argue that there is a compelling state interest in requiring their employees to undergo the COVID-19 vaccine, such as protecting the public health. Employers should also consider, whether their employees are represented by a union. In a unionized workforce, the National Labor Relations Board has held that a flu prevention policy is a mandatory subject of collective bargaining, unless clearly waived. See *Virginia Mason Hospital*, 358 NLRB No. 64 (2012).

While it is clear that private, nonunionized employers would have the easiest time requiring the COVID-19 vaccine, any employers that require the COVID-19 vaccine may be required to make accommodations in certain circumstances. For example, EEOC guidance states that employers may need to provide an exemption from mandatory vaccines to accommodate an employee's religious beliefs in accordance with Title VII of the Civil Rights Act, and an employee's disability as required by the Americans with Disabilities Act. Reasonable accommodations in lieu of a COVID-19 vaccine would likely include other infection control measures, such as requiring the employee to wear a mask or PPE in the workplace. The EEOC's Dec. 16 guidance further suggest that employers should also consider telework as an accommodation.

In addition to accommodations for religion and disability, employers should also consider workers' compensation laws. For example, if an employer requires that its employees take a vaccine and an employee is injured as a result of a side effect from the vaccine, the employee may have a viable workers' compensation claim against its employer. See *Monette v. Manatee Memorial Hospital*, 579 So.2d 195 (1991). However, employers who decide not to require vaccination may need to be concerned about workers' compensation or negligence claims as a result of employees contracting COVID-19 at work.

Also, employers who opt not to require vaccination, will need to consider whether this violates Section 5(a)(1) of the Occupational Safety and Health Act (OSHA), known as the general duty clause, which requires employers to provide a safe and healthy workplace and protect employees against workplace hazards that could cause an accident or illness that would most likely result in death or serious physical harm. Thus, employees may contend that employers who do not require vaccinations are putting their workforce at risk in violation of Section 5(a)(1). On the other hand, OSHA may protect employees who refuse to be vaccinated where an employee reasonably believes and can demonstrate that, as a result of receiving the vaccine, the employee could have side effects or suffer consequences that lead to serious injury or death.

While OSHA does not require that employees take the flu shot or other vaccines, in its guidance issued during the 2009 pandemic, it has stated that employers can require that employees do so. However, OSHA has cautioned that an employee who refuses vaccination due to a reasonable belief that they have a medical condition that creates a real danger of serious illness or death (such as an allergic reaction to the vaccine) may be protected under OSHA. So, this guidance would seem to protect a class of employees who may not be protected under the ADA, yet have a risk of significant reaction to the vaccine.

Based on current information, it appears that at least some employers will be permitted to require that their employees receive the COVID-19 vaccine. However, there are legal complexities associated with requiring employees to be vaccinated for COVID-19. Thus, before requiring the vaccine, employers should seek further guidance from their counsel.

**Shannon Kelly** is a shareholder and **Howie Waldman** is an associate with the Miami-based law firm *Allen Norton & Blue*, a statewide firm devoted to the practice of labor and employment law. Contact them at [skelly@anblaw.com](mailto:skelly@anblaw.com) and [hwaldman@anblaw.com](mailto:hwaldman@anblaw.com).