During President Trump’s speech at the Republican National Convention on August 28, 2020, he promised a COVID-19 vaccine “by the end of the year, or maybe even sooner.” This raises the question of whether or not an employer may require mandatory COVID-19 vaccinations of its employees to avoid infecting other employees, if and when a vaccine becomes available. Subjecting employees to mandatory COVID-19 vaccines could expose the employer to potential lawsuits. As an example, several months ago, a North Carolina nurse filed a lawsuit accusing a hospital of firing her for refusing a mandatory flu shot. The similarities between a mandatory influenza vaccine and a mandatory COVID-19 vaccine cannot be ignored. These issues will likely implicate the Americans with Disabilities Act (42 U.S.C. § 12101, et seq. (“ADA”)) and Title VII (42 U.S.C. § 2000e) which are both enforced by the U.S. Equal Employment Opportunity Commission (“EEOC”). The ADA and Title VII apply only to employers with 15 or more employees. Under California laws such as the Fair Employment Housing Act (“FEHA”), which makes it unlawful for an employer (with 5 or more employees) to discriminate against or treat an employee less favorably based on protected categories such as disability, employers may be required to provide reasonable accommodations unless doing so would cause undue hardship. Accommodations may include allowing employees to wear a mask or providing a transfer to a different employment position with less public exposure.

EEOC Enforcement

In 2009, in response to the H1N1 virus, the EEOC issued a technical assistance document to guide employers under the ADA. That document was re-issued on March 19, 2020, to incorporate updates regarding the COVID-19 pandemic. In that document, the EEOC took the position that an employer may make influenza vaccinations mandatory; however, the EEOC has not issued an opinion specifically addressing the forthcoming COVID-19 vaccine. Under the ADA the employee may be entitled to an exemption from the mandatory vaccines based on an ADA disability that prevents him from taking the influenza vaccine. This exemption would be a reasonable accommodation unless it would cause undue hardship to the employer’s business.
MANDATORY COVID-19 VACCINES POSE POTENTIAL PITFALLS FOR EMPLOYERS

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A reasonable accommodation under the ADA is a modification or adjustment in a job, employment practice, or work environment that allows an individual with a disability to have an equal employment opportunity. (29 C.F.R. Pt. 1630, App. (see discussion under “Section 1630.2(o) Reasonable Accommodation”); see also U.S. Airways, Inc. v. Barnett, 535 U.S. 391, 416 (2002). The ADA’s approach to mandatory influenza vaccinations will likely be analogous to its approach with regards to mandatory COVID-19 vaccinations.

Under Title VII, once an employer receives notice that an employee’s sincerely-held religious belief, practice or observance prevents them from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII. This was reconfirmed on March 5, 2020, through an informal discussion letter, where the EEOC advised that employees may be entitled to refuse a mandatory flu vaccine based on disability, religion or pregnancy. Similarly, employees will have another defense to employers mandating COVID-19 vaccines.

The EEOC’s conclusion in 2009 was that ADA and Title VII-covered employers should simply consider “encouraging” employees to get the influenza vaccine rather than requiring them to take it. Although there was no COVID-19 vaccine at the time the EEOC re-issued its H1N1 guidance pursuant to the COVID-19 pandemic, there is no reason to believe that the EEOC will depart from its influenza vaccine conclusion with regard to the COVID-19 pandemic. Employees with underlying disabilities or medical conditions, as well as employees with sincerely held religious beliefs, practices or observances, can likely be exempt from any COVID-19 vaccine employment requirement. For employees who do not fall into either of these categories, there could be potential claims of violation of privacy, organization under the National Labor Relations Act (“NLRA”), or adverse reactions to a vaccine that was mandated by the employer.

**Employer Liability for Adverse Reactions to Vaccines**

Employers should consider the risks associated with employees who do not ask for an exemption and end up having adverse reactions to the vaccine. If an employer requires an employee to have a shot or other vaccination, any resulting injury is likely to be work-related. The outcome is less clear when the vaccination is voluntary. Even when optional, the employer still runs the risk of liability for a workers’ compensation claim. The Workers’ Compensation Board will consider factors such as whether the activity: (1) directly or indirectly benefited the employer; (2) was within terms, conditions, and customs of the employment or permitted by employer; (3) serves both a business and personal purpose; (4) was employer or employee created; (5) was reasonably reckless or created excessive risks; and (6) occurred on the premises of the employer.
The Board might also consider the nature of the illness, whether employees were permitted to have the shot on work time, whether the employer provided costs, or whether the employer benefitted from the shots or made it available for the employees.

If employers do consider mandating vaccines, they may ask their employees to inform them if the employee has a history of adverse reactions to certain vaccines that may qualify them for a medical exemption. Robinson v. Children's Hosp. Boston, No. 14-10263-DJC, 2016 WL 1337255, at *8 (D. Mass. Apr. 5, 2016). Identifying when the employer has a duty to employees or customers regarding their safety and determining whether a vaccine mandate is necessary to fulfill that duty requires an understanding of the risks posed by the disease and those posed by the vaccine. Only by carefully weighing the risks can an employer decide whether a mandate makes financial and legal sense. Outbreaks at the workplace may motivate some employers to consider mandatory vaccinations, particularly if the severity of the outbreak increases to a point where there is risk for serious financial loss to the business. For example, when Disneyland had a measles outbreak, the Disney Corporation required employees to prove that they had been vaccinated for measles before they were allowed to return to work.

COVID-19 poses many challenges for employers. Employers should assess their risks when implementing health-related initiatives such as vaccines. If you have further questions about your potential risks, feel free to email me at stoothacre@ferrisbritton.com.