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Employers Should Consult With Their Attorneys Before Adopting COVID-19 Vaccine Policies

By Bruce F. Fain

It has been an incredibly challenging year for all Americans, including employers. In response to the novel coronavirus COVID-19 ("COVID-19") pandemic, the United States of America declared a public health emergency on January 31, 2020. State governors followed suit and entered their own emergency declarations, as well as executive orders that temporarily closed schools and non-essential businesses. Public health agencies, including the Centers for Disease Control and Prevention ("CDC"), issued guidance on COVID-19 safety protocols that have altered nearly every aspect of American life, including the workplace. Even in the face of those changes, COVID-19 has taken its toll on Montana, with over 94,000 diagnosed cases, 4,200 hospitalizations, and 1,200 deaths of our fellow citizens.

Despite all this darkness, many Americans now see a light at the end of the tunnel: COVID-19 vaccines. These vaccines were developed through a public-private partnership under Operation Warp Speed, approved by the FDA pursuant to an Emergency Use Authorization, and now are beginning to be distributed across the country. Many view the COVID-19 vaccines as a potential path toward pre-pandemic normalcy. And now, employers may be asking whether they can, and should, require or encourage their employees to receive COVID-19 vaccines.

As a general matter, employers can require employees to be vaccinated, especially if they are healthcare providers, which is the employment area where these issues are typically raised. However, that general rule is subject to various exceptions or other legal considerations established by federal and state law, which in turn depend on a careful analysis of facts specific to a particular workplace and workforce. Additionally, as the COVID-19 vaccines are released under Emergency Use Authorization, employers will need to further consider how to address issues implicated by such

authorization. For these reasons, Crowley Fleck PLLP encourages employers to consult with an attorney before adopting COVID-19 vaccination policies.

Applicable Regulatory Authority

The government's ability to require mandatory vaccinations as part of its "police power" has been long recognized. *See Jacobson v. Massachusetts*, 197 U.S. 11, 38 (1905) (mandatory small pox vaccination). While most employers are not impacted by constitutional analysis, *Jacobson* is a good primer on mandatory vaccinations in general and has been used to support the imposition of mandatory vaccination requirements in other contexts. However, *Jacobson* has recently been called into doubt by *Roman Catholic Diocese of Brooklyn, New York v. Cuomo*, 141 S. Ct. 63 (2020).

While generally not having to confront constitutional challenges, private employers will clearly have to consider several other laws when considering whether to require vaccinations for employees. Laws likely implicated by any employer vaccination program include:

- The Americans with Disabilities Act of 1990 ("ADA");
- Title II of the Genetic Information Nondiscrimination Act ("GINA");
- Title VII of the Civil Rights Act of 1964 ("Title VII") and similar state laws, like the Montana Human Rights Act ("MHRA"), the North Dakota Human Rights Act ("NDHRA"), and the Wyoming Fair Employment Practices Act ("WFEPA");
- The Occupational Safety and Health Act of 1970 ("OSHA"); and
- The Montana Wrongful Discharge from Employment Act ("WDEA").

Employer vaccination programs may also implicate other laws unique to your jurisdiction. Please consult with your local attorneys for additional guidance.

Anti-Discrimination Laws*

The EEOC has published helpful guidelines concerning how the ADA, Title VII, and GINA apply to COVID-19 issues. The EEOC's guidance can be found online. *See* https://www.eeoc.gov/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (updated December 16, 2020, and accessed January 26, 2021). Employers should regularly check this site for updates and information concerning COVID-19 issues. Notably, the EEOC guidelines presume that employers can require employees to receive COVID-19 vaccinations in certain circumstances. *Id*.

The EEOC guidance makes clear that administering the vaccine is not a medical exam for purposes of the ADA or GINA, as the act does not involve information about an individual's possible impairments or current health. However, employers should be aware that pre-vaccination screening questions may implicate the ADA or GINA. Accordingly, an employer should consider offering vaccines to employees by using a third-party contractor with whom the employer does not have a contract to avoid these legal issues. If an employer does ask employees preliminary screening questions, those questions must carefully be tailored to be "job related and consistent with business necessity," in regard to the ADA and should avoid areas concerning genetic information, including family medical history. An employer that has offered the vaccination on a *voluntary basis* may refuse to provide the vaccine to an employee that refuses to provide answers to the questions but may not take any adverse action for the refusal to provide answers. Additionally, in regard to those which do provide the information, all of it must be kept confidential.

The EEOC has also opined that simply asking for proof of a vaccination does not implicate the ADA or GINA—as long as the employer does not ask why no vaccination was received. The best work around for this is to have the employee provide proof of vaccination from the provider or pharmacy but ensure that the information provided only confirms the vaccination was received.

Exemptions

An employer's right to require employees to receive COVID-19 vaccinations must be balanced against the legal rights of its individual employees. Before implementing COVID-19 vaccination policies, employers should consider how they would respond to employees who can establish they are unable to receive the vaccine because of: (1) a disability; or (2) a sincerely held religious belief, practice, or observance. As a general matter, employers should not terminate these individuals, but instead should work with these employees to identify and implement reasonable accommodations.

Most employers would provide some type of accommodation to anyone whose medical issues make vaccination a dangerous proposition that could result in serious risk of injury to an employee. In the unusual event an employer refuses an accommodation under these circumstances, the employer would need to show that an unvaccinated employee would pose a direct threat because of "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." A strong case could be made for direct threat due to possible exposure of fellow workers and customers, but then the employer must consider whether a reasonable accommodation is possible before excluding the employee from the workplace. If such an accommodation cannot be made without causing an undue hardship (a semi-flexible standard), the employer can exclude the worker from the workplace, but must still determine whether remote work is possible.

Title VII, the MHRA, the NDHRA, and the WFEPA all prohibit discrimination based upon religious beliefs. Religious objections to vaccinations have become more prevalent in recent years. Unless there is an objective basis for questioning a religious exemption, an employer generally should not attempt to question the sincerity of the employee's religious beliefs.

If an employee requests an accommodation, it must be provided unless the accommodation would cause an "undue hardship" to the employer, which has been defined as having more than a "*de minimis* cost or burden on the employer." Factors relevant to undue hardship analysis may include the type of workplace, the nature of the employee's duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will, in fact, need a particular accommodation.

Costs to be considered are not limited to direct, monetary costs, but also the burden on the conduct of the employer's business. For example, courts have found undue hardship where the accommodation diminishes efficiency in other jobs, infringes on other employees' job rights or benefits, impairs workplace safety, or causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work.

To prove undue hardship, the employer will need to demonstrate how much cost or disruption a proposed accommodation would involve. An employer cannot rely on potential or hypothetical hardship when faced with a religious claim, but rather should rely on objective information. Simply being concerned of more religious requests alone is not generally evidence of undue hardship. Again, even if an "undue hardship" standard is met, one should consider whether or not the work can be performed remotely.

The MHRA and the WFEPA have one protected class, which is not present in Title VII—"creed." The only known Montana case addressing this issue is *McCoy v. Riverstone Health Foundation et al*, Montana Human Rights Bureau, 0102014268 *(July 7, 2011). This matter involved an employee who refused a mandatory influenza vaccination due to a belief that questioned the appropriateness and safety of influenza vaccines. Ultimately, the hearings officer ruled on behalf of Riverstone on various grounds, including that Ms. McCoy's overall distrust of vaccinations and shifting justification demonstrated "political, sociological, and philosophical beliefs," and not a belief more akin to an "article of faith," or "religious" belief.

The rise and current prevalence of the so called "anti-vaxxer" community, nine years after *McCoy*, may lead to further use of the "creed" protections under the MHRA. As a result, employers should continue to analyze these issues under the same procedure as religious discrimination claims.

OSHA

The U.S. Department of Labor ("DOL") has taken the position that OSHA requires employers to work to prevent "occupational exposure" to COVID-19. *See* https://www.osha.gov/coronavirus/standards (last accessed January 27, 2021). To comply with OSHA, employers should perform a risk assessment of the workplace, which certainly includes analyzing potential hazards to workers due to possible exposure to COVID-19 in the workplace. OSHA does not require vaccinations, but has noted in particular that health care providers should conduct full risk assessments and "encourage" employees to obtain influenza vaccinations. OSHA Interpretation Letter, November 9, 2009. Additional OSHA guidance concerning COVID-19 can be accessed at www.osha.gov/coronavirus/faqs. While no specific OSHA COVID-19 standards have been formally adopted, the DOL has interpreted OSHA's "General Duty Clause" to require employers to provide a "safe place to work," and applied PPE and respirator standards when issuing citations. *See* https://www.osha.gov/SLTC/covid-19/covid-citations-guidance.pdf (last accessed February 1, 2021).

On January 29, 2021, OSHA issued new guidance to protect workers from COVID-19 exposures. *See* https://www.osha.gov/coronavirus/safework (last accessed February 1, 2021). The new guidance requires employers to implement COVID-19 prevention programs, which in addition to incorporating current standards concerning PPE and respiratory protection (as applicable to COVID-19 issues), also sets out sixteen separate suggestions on the development of a COVID-19 prevention program. Employers should review and implement applicable OSHA guidance as a method to ensure compliance with the General Duty Clause.

WDEA

Montana employers evaluating mandatory vaccination policies should also consider how such a policy might implicate the WDEA. *See* Mont. Code Ann. §§ 39-2-901 through 39-2-915. A non-probationary employee has three grounds for asserting a wrongful discharge:

- Retaliation for employee's refusal to violate public policy or for reporting a violation of public policy;
- Lack of good cause; or
- Violation of the express provisions of its own written personnel policy.

See Mont. Code. Ann. § 39-2-904(1).

The most likely claim arising under the WDEA would be one that a mandatory vaccination policy would not qualify as a "legitimate business reason." Given this, before an employer implements a vaccination policy it should engage in a thorough analysis of the justifications for implementing a mandatory vaccination policy in order to prospectively defend against wrongful discharge claims.

Employers must also remember that a "wrongful discharge" claim may also be asserted under a "constructive discharge" theory where an employee resigns on the basis that "a situation created by an act or omission of the employer, which an objective reasonable person would find so intolerable that voluntary termination is the only reasonable alternative." Mont. Code Ann. § 39-2-903(1). Significantly, the statute excludes from this definition "voluntary termination because of . . . terms and conditions of employment." These types of claims typically can be defended against due to the requirement that the precipitating event or omission must be intolerable to a reasonable person.

Conclusion

Whether or not an employer should impose a mandatory vaccination policy is a complicated question, one which implicates various federal and state laws and requires careful consideration of the underlying facts. Although employers do have some options to require or encourage employees to be vaccinated, employers should approach this decision with caution. Ultimately, there are no easy answers to whether an employer should impose a mandatory vaccination requirement.

If an employer does choose to institute a mandatory vaccination requirement, the employer should certainly consider the appropriateness of exemptions for medical and religious/creed exemptions and be prepared to offer such exemptions and reasonable accommodations except in the case of undue hardship to the employer. We expect this area of law to rapidly evolve in the coming months, and employers should pay close attention to any changes.

Finally, although beyond the scope of this article, employers also should keep informed of any state or federal legislation limiting the liability of business, health care providers, and manufacturers of products sold or distributed as COVID mitigation equipment or supplies. These types of legislation are expected to be enacted into law, and may have important implications for business owners.

For Employers with Additional Questions

For employers with additional questions, Crowley Fleck PLLP has an experienced team of attorneys who can assist with all manner of employment questions, including questions related COVID-19 vaccinations. If you would like more information, please contact Crowley Fleck's Employment Practice Group.

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*The MHRA, NDHRA, and WFEPA are patterned after Title VII so EEOC guidance should be applicable to analysis of state law claims as well.

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