

Vaccines: To Mandate, Or Not To Mandate

By Vanessa M. Kelly, Esq.

Clark Hill PLC

Princeton, NJ

vkelly@clarkhill.com

609.785.2926

As the COVID-19 vaccine deployment plan continues with states in various stages of completion, employers continue to struggle with their vaccination policies. Specifically, they ponder whether to make vaccination a mandatory condition to returning to the workplace for their employees. Federal guidance informs that COVID-19 is a direct threat to the safety and health of employees and thus, employers are justified in enacting policies designed to safeguard their employees in the workplace. A vaccine policy is one such precautionary plan. Further, the EEOC's Guidance on the intersection of the ADA, the Rehabilitation Act, EEO laws, and COVID-19 permits employers to mandate vaccination provided employers make reasonable accommodations for disabilities and sincerely held religious beliefs. New Jersey's Department of Health recently published FAQs that permit employers to condition re-entry to the workplace upon obtaining the vaccine. Again, reasonable accommodations must be made for disabilities, sincerely held religious beliefs, and if a health care provider advises against vaccination because of pregnancy or breast feeding. So the short answer is that employers may lawfully mandate vaccination as a condition to returning to the physical workplace. Of course, both federal and state guidance suggest continuation of social distancing, the use of PPEs, health screenings, and other measures implemented to contain the spread of the virus, even after vaccination.

The tougher question is whether employers should mandate vaccination. There are pros and cons on each side of this question. The pros are reducing spread of the virus, contributing to "herd immunity," improved attendance, the potential for increasing in-person attendance in the workplace, among others. The cons are diminished employee morale for those employees anxious about obtaining the vaccine, potential for discrimination or harassment suits, especially if accommodations are not made, potential for retaliation claims (for those who refuse to get the vaccine), loss of talent if employees quit over this issue, and more.

Many employers have opted to make obtaining the vaccine optional. Some are strongly encouraging vaccination and providing educational resources concerning the vaccination. Some employers are providing incentives for employees to obtain the vaccine. Caution should be employed when providing any incentives for what may be perceived as a "wellness plan," since those plans must be voluntary, and if the incentive is too rich, the risk is the plan will be deemed coercive and not truly voluntary. Some states, such as New York and California, have enacted paid sick leave laws specifically providing for up to four hours of leave to obtain each dose of the vaccination. Some larger employers are arranging for on-site vaccination or providing transportation to vaccination sites for their employees.

There is no one size fits all response to this question. Employers should carefully evaluate their unique workplaces to determine if a mandatory policy is warranted. Such factors weighing in favor of a mandate may include the inability due to the nature of workplace to consistently enforce social distance or use of PPEs, broad exposure to the public, or provision of services to infected persons. Conversely, the ability to successfully remote work and use social distancing in the workplace may away against the need for broad mandate. Whether companies implement mandatory or optional plans, all employers will benefit by creating a concrete policy and ensure that their accommodation policies are up to date and that managers are trained to refer requests for deferment on medical or religious to their HR team.

Links to Guidance and FAQs:

<https://covid19.nj.gov/faqs/nj-information/reopening-guidance-and-restrictions/can-my-employer-require-me-to-get-the-covid-19-vaccine-in-order-to-enter-my-workplace#direct-link>

[What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#)

<https://www.njoag.gov/about/divisions-and-offices/division-on-civil-rights-home/covid-19-faqs/>