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Employers' COVID Update: To Mandate Or Not To Mandate?

Legal Alert

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Employers are growing accustomed to facing unprecedented decisions in every phase of this pandemic. As with many of the other situations employers have confronted over the past several months, whether to require employees to get the COVID vaccine as a condition of working on site presents novel issues that differ from mandates for the flu or other approved vaccines.

Before we get into the specifics of the COVID vaccine, it is important to note, generally, employers are permitted to mandate employees are up to date on vaccinations in the interest of maintaining health and safety in the workplace. Employers who opt to mandate vaccinations must also make reasonable accommodations for employees who cannot be vaccinated due to certain health conditions or deeply held religious beliefs. Mandatory vaccine programs must follow carefully coordinated protocols to comply with anti-discrimination laws and mitigate risks to employers arising from potential bias and retaliation claims. These steps include developing a system that limits pre-screening requirements to avoid conducting a medical examination, evaluating the risks of an employee's opt-out, and determining whether alternate work assignments are available.

In addition to these general rules, the COVID vaccine adds another layer of complication because it is not currently FDA-approved. Unlike a mandatory flu vaccination program, a COVID vaccine mandate requires an employee to receive a vaccine that is only available to the public under an Emergency Use Authorization, a less stringent standard than full FDA approval. As a result, employers who impose vaccine mandates before FDA approval open themselves up to a range of potential liabilities. In particular, employers may put themselves at risk if they terminate employees or refuse to hire candidates who raise public health concerns about the vaccine or a mandatory vaccination program, when the FDA has not approved its use.

Additionally, current polling suggests up to 35% of the U.S. population may be unwilling to be vaccinated for COVID under the current circumstances, and certain workers are not authorized to receive it (e.g., workers under the age of the applicable Emergency Use Authorization for a specific vaccine formulation). Those operational impediments to implementation of a mandatory vaccination program might hinder recruitment and retention efforts, and, on top of the legal risks described above, pose additional challenges for employers who want to adopt a COVID vaccine mandate.

Savvy employer takeaway: For now, employers should, at a minimum, conduct vaccine education programs, encourage vaccination of employees, and, where possible, facilitate vaccination. Employers who are considering implementing a vaccine mandate should do so only after careful consideration and consultation with counsel and after adopting protocols for vaccination.

The attorneys at Flaster Greenberg are following developments related to the COVID-19 Pandemic and formed a response team and to work with businesses to keep them up-to-date on developments that impact their business. If you have any questions on the information contained in this alert, please feel free to reach out to Adam Gersh, or any member of Flaster Greenberg's Labor & Employment Practice Group.

ATTORNEYS MENTIONED

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