

COVID-19 Vaccine May Pose New Challenges For Employers

By **Vin Gurrieri**

Law360 (August 26, 2020, 10:59 PM EDT) -- With numerous COVID-19 vaccine candidates in development and the Trump administration pushing for quick approval, virus-weary employers may soon have a tool to bring a sense of normalcy to their businesses. But any policy mandating inoculation for workers creates a minefield of legal risks, experts say.

If a vaccine or vaccines make it to market in the near future, employers face a range of legal and practical problems to work through, all with plenty of legal pitfalls. At the top of the list will be figuring out whether to make the vaccine mandatory for employees to help maintain a safe workplace or opt to strongly encourage workers to get it on their own without any requirement.

"Given what the country is going through right now, there will be a number of employers who will mandate it because, either for altruistic reasons [they] don't want people to get sick at their place of business or [they are] worried about liability ... and then others who will take a different tack and encourage it," said Janie Schulman, a partner at Morrison & Foerster LLP.

Others may not believe in mandates at all.

"It's not just employees who may be anti-vaxxers or strong believers in the freedom to choose, there may be employers who think that way as well," Schulman said.

EEOC Backs 'Encouragement' for Now

Two laws that feature prominently in any conversation about a vaccine in the employment context are the Americans with Disabilities Act and Title VII of the Civil Rights Act, both of which are enforced by the U.S. Equal Employment Opportunity Commission.

A decade ago, the agency issued a pandemic response guidance in response to the H1N1 virus, which it reissued this year with adjustments to account for the novel coronavirus. In it, the commission said that businesses covered by those two statutes can make employees take a vaccine during a pandemic, but they have to allow for exemptions if a worker has an underlying medical condition or registers an objection on religious grounds.

In those situations, businesses have to provide workers with a reasonable accommodation from taking the vaccine so long as the accommodation doesn't pose an "undue hardship" on employers, a legal benchmark that is lower under Title VII than it is under the ADA, the EEOC noted in its guidance.

Instead of a mandate, the EEOC said in the latest version of its guidance that employers should instead "consider simply encouraging employees" to get a flu vaccine, while also emphasizing that no vaccine is yet available for COVID-19.

Schulman said the EEOC's decision to add that addendum about the lack of a vaccine suggests the agency may revisit the issue if a vaccine is developed, guidance that she said would be "helpful" in an uncertain environment.

"I wouldn't be surprised if, now that the EEOC has said COVID-19 does pose a direct threat to the health and safety of [employees] and the general public, that employers can have a more stringent mandate for a vaccine," Schulman said. "But that remains to be seen. For now, clearly you have to consider reasonable accommodations under the ADA and under Title VII."

Kevin Troutman, chair of Fisher Phillips' health care practice and a former human resources executive who at one point oversaw nearly two dozen hospitals in five states, said the history of flu shots in the workplace may serve as a baseline for how employers approach the COVID-19 vaccination question.

"If you think about the flu shot, the framework essentially established that in most states, unless there's a state law that's contrary, employers can require flu shots," Troutman said. He pointed out that most hospitals mandate flu shots but have to account for employees who have medical or religious objections.

If a COVID-19 vaccine becomes available, Troutman said he believes "the same applicable framework" for assessing whether a vaccine can be made mandatory will be used.

"You can require a flu shot, [and] we think you'll be able to provide a COVID vaccine if and when one becomes available if you also provide for exceptions based upon medical or religious objections and possibly in some states even if relates to political activity," Troutman said.

But he added, "It's not something that is a one-size-fits-all plan, it's not something that can be done quickly. It's something that requires an individualized evaluation."

Tricky Assessments

If employers do go the route of mandating a vaccine, determining whether any particular worker qualifies for an exemption may prove complicated, attorneys say.

Robert Duston, a partner at Saul Ewing Arnstein & Lehr LLP, said the biggest challenge for employers in dealing with exemptions will be to figure out whether an unvaccinated person in the workplace poses an "undue safety burden" on other workers and whether there are any other precautions employers can take to minimize any safety risks, like social distancing, masks or teleworking.

"You're going to have to go through that analysis if you want to say, 'Either get vaccinated or you're going to lose your job,'" Duston said. "So I think a lot of employers when faced with mandatory vaccination and having to go through that case by case with anybody who resists it, there's going to be a whole lot of practical issues."

For example, employers may also be on the receiving end of legal claims if they mandate a vaccine and an employee gets health complications from it. That possibility may prompt businesses to follow the EEOC line and simply recommend a vaccine, which Duston believes is the path most employers will choose.

"If an employee has an adverse reaction to a vaccine that the company required, then you're going to see litigation over that," Duston said. "Which is why it's safer to start with 'strongly encouraging' vaccinations and leave the decision of which one to the employees and their doctors. The bottom line on all of this is you can probably require [vaccination] for employees so long as you make it available to have exemptions."

Practical Problems

Besides having to do individual assessments for swaths of their workforce who claim they should be exempt from vaccination, employers also face a host of other logistical and practical questions if they institute a mandatory vaccine policy.

A sampling offered to Law360 by from management-side attorneys: Is a vaccine effective? Which one should they require if more than one come to market? Who should pay for a worker's inoculation? How long will it last before a worker needs to be vaccinated again? How widely available will any particular vaccine be?

Issues like that will be part of the mix as employers try to craft an approach toward vaccines, according to Barry Hartstein, co-chair of Littler Mendelson PC's EEO and diversity practice, particularly given the "incredible rush" by pharmaceutical companies to be the first to develop a vaccine and the likelihood that there will be a lag before a vaccine is widely available after it is approved.

"All those issues are going to come into play versus employers who want a quick fix because we want to get back to normal," Hartstein said. "There is an enormous amount of hope out there that the vaccination will be the quick fix. But on the other hand, I think because of all these other ... evolving issues dealing with vaccinations, employers are actually going to continue to struggle with these issues."

Contention Abounds

Also looming in the background of the vaccination debate is the politically charged climate. Vaccines were already a fraught issue before the pandemic, and the public discourse will likely get even more heated if mandates are laid down by either the government or employers, lawyers say.

If an employee refuses to be vaccinated entirely on ideological grounds, employers would have wide leeway to fire them, attorneys say, although the question of whether to take that rigid a stand is another matter.

Hartstein said a key question will be whether there is any legal protection in place for political beliefs and, relatedly, how any such protections bleed into the vaccination issue. He noted that some states have such protections in place, but that they are often aimed at politics as opposed to "broader perspectives."

"From a practical perspective we know full well there are enormously strong views just in general about the vaccine movement versus no vaccines. And how is that going to play out in the workplace?" he said.

"I anticipate that there will be some litigation. Where employers come out — I anticipate that in many states employers would probably prevail, [but] I think there are a handful of jurisdictions where I think it may be tougher."

Fisher Phillips' Troutman offered a similar perspective, noting that federal courts have held that if employees raise a "purely secular" objection to a vaccination as opposed to one based on a "sincerely held religious belief," then the objection isn't protected under federal law.

"That might not be the case if you're in a state where there's a statute, let's say, that protects your outside political activity," Troutman said. "But even there, if an outside political activity affects the workplace, I think the employer is still going to have a pretty good basis to say, 'Well ... your political belief away from work is fine.' ... But while you're at work, particularly where there's a compelling safety reason for [employers] to require [a] vaccine, I don't think the employee is going to have a real strong case there."

Another potential problem is whether employees will discriminate against or harass colleagues who avail themselves of ADA or Title VII exemptions to sidestep a mandatory vaccination policy, according to Duston.

He noted that similar problems arose during the pandemic that involved stereotyping against Asian people and harassment of people who didn't wear masks.

"There is a risk of those who do not get vaccinated for whatever reason — if they are outed or there is a list [that says] 'These people are fine; others, you need to avoid them.' — That's going to be a discrimination fight," he said.

--Editing by Brian Baresch and Emily Kokoll.