

Legal and Business Considerations for Employers Considering Mandating COVID-19 Vaccinations

Presented by:

Amy J. Adolay

Friday, January 22, 2021 – 10:00 am – 10:45 am

Disclaimer

The contents of this presentation should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your attorney concerning your situation and specific legal questions you have.

This presentation may constitute attorney advertising. Krieg DeVault LLP, Indianapolis, Indiana is responsible for this content unless otherwise noted.

About the Speaker



Amy J. Adolay
Partner

Krieg DeVault LLP
aadolday@kdlegal.com
317.238.6330

Amy Adolay focuses her practice on employment law counseling and litigation and school law. Ms. Adolay serves as the Chair of the firm's Labor and Employment Practice Group. She counsels employers on complex human resources issues that arise on a daily basis in the workplace and defends employers before administrative agencies and in state and federal courts.

Ms. Adolay handles a wide variety of types of claims, including discrimination, harassment, retaliation, family and medical leave, disabilities, unemployment compensation, wage and hour, and restrictive covenants. Ms. Adolay also routinely reviews, revises, and drafts employment related documents such as employee handbooks, employment policies and procedures, employment agreements, severance and retention agreements, and non-compete and non-solicitation agreements. Ms. Adolay's extensive employment law experience has included representing employers in collective actions and litigating complex claims relating to discrimination, restrictive covenants, and various other employment and contract disputes. She also regularly speaks and writes on important changes facing employers in employment law.

COVID-19 Vaccinations and the Workplace: Can We and Should We?

- Two very different questions with perhaps different answers
- Who would perform the vaccinations: the employer, a third party that contracts with the employer, or a completely unrelated third party?
- Who would be required to be vaccinated? Every employee or certain positions?
- What action can and will we take if an employee refuses to be vaccinated?
- Will our approach be different now and later?
- If not mandatory, can and should we encourage employees to become vaccinated?
- What are the legal risks to mandating and encouraging employees to become vaccinated?
- What safety precautions will remain in effect post-vaccination?
- Will we offer incentives?
- Should we get waivers signed by employees?

The First Question: Can We Require Vaccinations?

- Generally, yes, with some caveats
- Legal grounds for objection: religion and disability
- Public employers: added considerations under U.S. Constitution

Religious Accommodation Considerations

- Title VII of the Civil Rights Act: Employers cannot discriminate against employees based on religion
- Requires employers to accommodate the sincerely held religious beliefs of employees
- Employee may refuse vaccine due to sincerely held religious beliefs
- What reasonable accommodation is available?
- Limitation: Would the reasonable accommodation create an undue hardship (more than a de minimis cost or burden on the employer?)
- Documentation: What accommodation is needed and why?
- What if the employer has bona fide doubts about whether the religious beliefs are sincerely held?

Disability Accommodation Considerations

- ADA (and corresponding state and local laws) requires employers to provide reasonable accommodations to employees with disabilities
- Limitation: if the reasonable accommodation would create an undue hardship for the employer
- Request documentation from healthcare provider that need to be excused from vaccination requirement is medically necessary
- Engage in interactive process with employee to identify potential reasonable accommodations (EEOC has said look to CDC and OSHA guidance)
- Is there an effective accommodation/would it create an undue hardship, e.g., operationally?
- Is there any way to avoid the employee posing a direct threat to the health or safety of others, even through offering a reasonable accommodation?
- Direct threat analysis: duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm

Other Legal Considerations of Mandatory Policies

- Collective Bargaining Agreement
- Public employers and challenges under the U.S. Constitution (and perhaps state constitutions)
 - First Amendment: religious freedom
 - Fourteenth Amendment: certain liberties associated with our bodies

Additional Legal Considerations under the ADA and GINA

- ADA limits when employers can require medical examinations and make medical inquiries of employees
- EEOC has stated the COVID-19 vaccination is not a medical examination
- However, screening questions asked prior to administration of vaccine are medical inquiries under the ADA
- Under the ADA, medical inquiries by the employer (or a third party it contracts with to perform vaccinations) must be job-related and consistent with business necessity. To meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not receive a vaccination, will pose a direct threat to the health or safety of himself or others.
- Do not have to meet this standard if employer provides vaccinations that are voluntary
- Standard does not apply if vaccines are mandatory or voluntary and administered by third party without a contract with the employer
- ADA confidentiality requirement protects employee medical information from disclosure

Do We Want to Require COVID-19 Vaccinations?

- Employee morale
- Staffing shortages/disruption to operations
- Some remain uncomfortable/opposed
- Increase anxiety
- What are most employers doing?

Ways to Encourage Vaccinations

- Lead by Example
- Educate
 - Find credible resources for employees
 - Indiana State Department of Health (e.g. COVID-19 Vaccine FAQs)
 - CDC's Vaccination Communication Toolkit
 - Consult with experts
 - Offer a Q&A
- Offer paid time off to receive vaccination
- Make it personal/offer stories
- Consider offering incentives

Offering Incentives to Employees Who Become Vaccinated

- Once again, questions about what employers can and should offer
- Possible incentives:
 - Bonus
 - Gift card
 - Extra paid time off

Legal Considerations when Offering Vaccination Incentives

- Is the vaccine being administered by the employer/a party with whom the employer has contracted?
- Is the vaccine being administered by a non-contracted third party of the employee's choosing?
 - The employer is not collective employee medical information
 - Employer can ask for proof of vaccination without implicating ADA standards regarding medical inquiries of employees
 - Incentives not limited by ADA

Vaccination Incentives if Employer-Provided Vaccine

- If vaccine is provided by the employer/the employer's contracted third party
- Medical information is being collected by the employer due to pre-vaccination medical screening questions
- Potentially a wellness program governed by ADA standards. ADA applies to employer-sponsored voluntary wellness programs that include a medical examination or disability-related inquiry.
 - The program must be reasonably designed to promote health or prevent disease, is not overly burdensome, and is not a subterfuge for discrimination
 - The program cannot be a “gateway plan”, requiring employees to submit to a medical examination or inquiry in order to access an enhanced benefits package
 - The program must offer reasonable accommodations to persons for whom it is medically inadvisable to participate
 - Participants must be provided with a notice informing them of why their information is being requested, how it will be used, and how it will be protected
 - Incentives must be limited

Requirements that Wellness Program Incentives be Limited

- 2016 EEOC regulations: incentive can be up to 30% of the cost of self-only coverage under the employer's health plan
- Challenged in a lawsuit by AARP, 2016 regulations struck down by a federal court
- January 7, EEOC announced new proposed rules that would limit incentives offered in connection with a participation-only wellness program (one where participants are only required to submit to a medical exam or inquiry but not required to have any particular outcome) to a "*de minimis*" standard
- Examples of "*de minimis*" in the proposed regulations include a water bottle or gift card of modest value
- Will take comments on proposed regulations for 60 days
- All could change as Biden administration takes over
- Different rules apply if Wellness Program is part of employee benefit plan

Requiring Waivers from Employees Who Refuse Vaccine

- Enforceability
 - Public policy
 - Workers compensation
- Employers' obligation to create safe workplace under OSHA requirements
 - Cuts both ways:
 - Can you create a safe workplace without mandatory vaccination?
 - What are you going to do to create a safe workplace without mandatory vaccination?
 - Those who refuse may have different safety requirements (masks, social distancing, remote work)

New Challenge to Mandatory Vaccination: Proposed Legislation

- Indiana Senate Bill 74: Prohibits an employer from requiring, as a condition of employment, an employee or prospective employee to receive **any immunization** if the immunization is medically contraindicated for the employee or receiving the immunization is against the **employee's religious beliefs or conscience**. Allows for a civil action against an employer for a violation.
- Much broader than Title VII and ADA protections
 - “Conscience” undefined
 - No reasonable accommodation provisions
 - No direct threat defense
 - No undue hardship component
- Opposed by Indiana Chamber

More Proposed Legislation in Indiana: Possible Immunity for Businesses

- Indiana considering legislation that would make businesses immune from liability if someone claims to have contracted COVID-19 at a store or company
- Would only protect businesses that have followed safety rules and not those that have been negligent
- Largely, protection from customers
- Two versions introduced, one in the House and one in the Senate
- Senate: 3-page bill. Provides civil immunity if someone is exposed to COVID-19 at a business or other location (schools/local government) that is providing a service
- House: 6 times longer. Protects healthcare workers from certain professional discipline.
- Unclear what final piece of legislation will look like.

Status of Vaccination Rollout in Indiana

- Indiana Department of Health COVID-19 Vaccine Allocation Plan
 - Phase 1-A: Healthcare settings
 - Phase 1-B: Vulnerable populations
 - 80 and older
 - 70 and older
 - 60 and older
 - Currently evaluating who will be eligible under Phase 1-B after we expand eligibility to age 60, following the same data driven approach of preventing hospitalizations and deaths, looking at other risk factors such as underlying health conditions that put someone at risk for severe COVID-19 illness
 - Phase 2: Mitigate spread
 - Phase 3: General public vaccination
 - Information about eligibility: ourshot.in.gov

Questions?



Amy J. Adolay
Partner

Krieg DeVault LLP
aadolay@kdlegal.com
317.238.6330

DISCLAIMER: The contents of this presentation should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general informational purposes only, and you are urged to consult your own attorney concerning your situation and specific legal questions you have.