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CLIENT ALERT
CONSIDERATIONS FOR EMPLOYERS
CONCERNING COVID-19 VACCINATIONS
by Andrew Fiske

As COVID-19 vaccinations begin, employers are considering whether they can – or should – require employees to be vaccinated. Based on [guidance](#) released this week by the Equal Employment Opportunity Commission (EEOC) and an early 20th-century Supreme Court decision concerning a smallpox pandemic, employers can likely enforce mandatory vaccination policies, with certain exceptions.

This does not mean employers must impose mandatory vaccination requirements or are limited to requiring vaccination for all employees. For example, some employers may identify specific subsets of employees whose responsibilities sensibly require vaccination, and others for whom existing protocols (such as remote work and existing workplace health and safety procedures) are sufficient to protect employees and the workplace. Other employers, in light of the logistical challenges of mandating vaccination, may choose to strongly encourage, or even facilitate, vaccination rather than mandating it. This path may provide an ideal balance of risk and reward for employers who desire to facilitate adoption of the vaccine without bearing the burden of enforcing a mandatory requirement.

This Alert describes the legal context for mandatory vaccination requirements and identifies relevant issues for employers to consider as they evaluate prospective workplace vaccination policies.

Background - Governmental Requirements to Mandate Vaccination

Employers must wrestle with how to address vaccinations because we do not anticipate federal or state-wide mandates requiring vaccination. Employers considering a vaccination mandate can find support in the case of *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), in which the United States Supreme Court upheld state and local laws requiring immunization against smallpox. Further, for Illinois employers, Illinois courts routinely uphold immunization requirements under state law, including the Illinois School Code and other authorizing statutes.

We anticipate the State of Illinois will strongly encourage vaccination rather than imposing a mandate primarily due to the difficulty of enforcing a mandate given the limited availability of vaccines. Further, throughout the pandemic, the existence of legal authority to act in response to a public health emergency has not precluded consistent (mostly unsuccessful) legal challenges to that authority. The State may decide to avoid the diversion of time and resources that legal

challenges create and instead implement a policy that strongly recommends State residents to receive the vaccine. The State will likely conclude that this type of policy may do more to encourage widespread vaccination than a statewide mandate.

The State will be the driver of vaccine distribution and administration. The Department of Public Health Act, 20 ILCS 2305/2, expressly authorizes the Illinois Department of Public Health (IDPH) “to order the administration of vaccines, medications, or other treatments to persons as necessary in order to prevent the probable spread of a dangerously contagious or infectious disease.” Further, the State’s current COVID-specific guidance provides that IDPH is responsible for the distribution of the vaccine throughout the state. IDPH distribution will be done on a per capita basis according to the population of each county (local health departments will then distribute the vaccine within their localities).

At the municipal level, we have not identified any definitive municipal authority to require vaccination in the absence of a federal or state mandate. While we have seen during the pandemic that municipalities have broad emergency powers, including the ability to declare quarantine under the Illinois Municipal Code, there is no express authority in State law authorizing municipalities to adopt mandatory vaccination requirements. Home rule municipalities have more leeway in support of a vaccination mandate, but given that state law concerning vaccination requirements places administrative responsibility at the state level, a home rule community adopting a vaccination mandate may face significant enforcement challenges.

Thus, in the absence of a federal, state, or local immunization mandate, Illinois employers will likely be left to make their own determinations about whether, and to what extent, they desire to require COVID-19 vaccinations for their employees.

EEOC Pandemic Guidance

EEOC’s guidance is not binding law but provides insight into how EEOC will interpret challenges to employer vaccination policies, and can provide persuasive authority to courts hearing challenges to workplace policies.

On December 16, 2020, EEOC updated its COVID-19 guidance to address vaccination requirements in the workplace. The guidance recognizes that employers may require employees to either be vaccinated by the employer or to provide the employer with proof of vaccination. However, employers must reasonably accommodate persons who refuse the vaccine due either to a disability under the Americans with Disabilities Act (ADA) or a sincerely-held religious belief pursuant to Title VII of the Civil Rights Act of 1964. An employer may not exclude those persons from the workplace unless it is impossible to identify and implement a reasonable accommodation that would not create a “direct threat” to other employees by exposing them to the virus.

In recognizing the ability of employers to require COVID-19 vaccinations, EEOC's new guidance goes beyond EEOC's earlier guidance concerning the 2009 H1N1 pandemic, in which EEOC recognized the ability of employers to require vaccination but ultimately recommended that employers encourage flu vaccines rather than require them. Key to the EEOC's current analysis is its existing determination that COVID-19 meets the ADA's "direct threat" standard, meaning that EEOC has determined that a significant risk of substantial harm would be posed by having someone present in the workplace infected with, or having symptoms of, COVID-19.

EEOC's COVID-19 vaccination guidance will likely encourage broader implementation of workplace mandatory vaccination programs, as the guidance more strongly supports mandatory vaccination than some observers anticipated, and goes beyond EEOC's more limited recommendation during the 2009 H1N1 pandemic.

Practical Questions to Consider in Crafting a Workplace Vaccination Policy

The attorneys at Elrod Friedman are ready to assist our clients in evaluating whether and to what extent COVID-19 vaccination policies are appropriate in their workplace. As employers begin their own assessments, they should consider the following key questions:

Should Vaccination Be Mandatory or Voluntary?

- Are there specific aspects of the workplace, or certain job requirements, that justify either requiring vaccination or strongly recommending it?
 - The necessity for vaccination may be less immediate in workplaces that transitioned effectively to remote work environments, whereas workplaces or jobs that optimally require work on-site or in close proximity with other employees may derive the most benefit from vaccination requirements.
- What will the impacts and consequences be if employees refuse to comply with a mandatory requirement and are therefore prevented from coming to work?
 - If the workplace dynamic is such that multiple employees may refuse to comply with a mandatory policy, will a voluntary policy – coupled with existing workplace safety policies – be a better approach to ensure that the workplace operates smoothly?

What Employees will be Subject to Vaccination Requirement?

- What about collective bargaining issues? Employers must be mindful of collective bargaining requirements when mandating vaccinations, and take care to reopen negotiations and adopt new agreement provisions where necessary to authorize vaccinations.

- Will a “one size fits all” approach work, requiring vaccination of all employees, or are there certain limited positions for which vaccination should be mandatory?
 - For example, local government employers have already designated essential personnel to maintain government operations during the COVID-19 pandemic – typically including first responders, among others.
 - If vaccination will only be required for specific employees, the employer should identify the unique aspects of the employee responsibilities or work environment that make vaccination necessary.

Will the Employer Have Any Role in Administering the Vaccine?

- Particularly for mandatory vaccination policies, consider whether the employer will offer to administer the vaccine itself to assure compliance, whether through its own employees or a third-party contractor, or if it will instead solely rely on employees providing proof of off-site vaccination.
- Note that the EEOC guidance requires employers administering the vaccine to limit pre-screening questions to vaccine recipients to those that are job-related and consistent with business necessity. An employer satisfies this standard by showing that an employee who refuses to answer pre-screening questions, and thus does not receive the vaccine, poses a direct threat to their own safety or the safety of others in the workplace
- For voluntary policies, will the employer take any steps on-site to encourage compliance, such as offering the vaccine on-site, offering to pay for the vaccine, or other steps?

How Will the Employer Maintain Existing Workplace Processes and Protections?

- Until the applicable guidance changes to reflect some critical mass of implemented vaccinations throughout the population, the emergence of COVID-19 vaccinations should not dissuade employers from continuing to maintain existing safety protocols (masks, social distancing, hand-washing, cleaning of surfaces, etc.) regardless of whether vaccinations are mandatory or voluntary.

Reasonably Accommodate Disability and Religious Exemption Requests

- Employers should conduct an individualized assessment to reasonably accommodate persons who refuse the vaccine on disability or religious grounds.
- While an employer can refuse access to the workplace for these employees if no reasonable accommodation exists that will not directly threaten other employees with exposure to the virus, given the scope of workplace adjustments throughout the

pandemic (such as remote work), it may be challenging to demonstrate that an employer cannot reasonably accommodate a person who refuses the vaccine on disability or religious grounds. These will all be fact-specific determinations.

We will provide updates on these issues as local, state, and federal authorities continue to address mandatory and other vaccination policies.