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MEMORANDUM

January 28, 2021

TO: RICK TOMLINSON
CALIFORNIA STRAWBERRY COMMISSION

FROM: ANN M. GROTTVEIT
LEANNE C. BOLANO

RE: COVID-19 Vaccine and Employer Requirements and Considerations

BACKGROUND

The following memo addresses the requirement and utilization of the COVID-19 vaccine in the workforce as a condition of employment or hiring requirement. On December 16, 2020, the United States Equal Employment Opportunity Commission (EEOC) issued a guidance document which discussed the COVID-19 vaccination and employer responsibilities regarding the administration of the vaccine. The guidance discusses a variety of requirements and exceptions for employers to consider, should they decide to mandate their employees receive the vaccine. At a minimum, employers should encourage voluntary vaccination for their employees, but may mandate¹ the COVID-19 vaccine as a condition of hiring or employment, unless an exception applies due to religious beliefs or a disability.

Can Employers Require Vaccinations as a Condition of Employment?

While there is currently no authority directly addressing an employer's authority to require vaccinations, the available guidance strongly indicates that employers may require vaccinations as a condition of employment. This is due to the unprecedented nature of the virus, which is being routed for Emergency Use Authorization (EUA) under the United States Food and Drug Administration (FDA).² This EUA enables the FDA to authorize distribution of unapproved medical products to be used in an emergency to treat or curb the transmission of life-threatening diseases.³ The EEOC has determined that a COVID-19 vaccination hiring or employment requirement would not be considered a medical examination and not trigger the Americans with

² 21 U.S.C. § 360bbb-3.

³ *Id.*

Disabilities Act (ADA).⁴ While this guidance does not explicitly state that employers are empowered to mandate vaccines as a condition of employment, it does discuss exceptions, conditions, and requirements, should an employer decide to require the vaccine.⁵ For example, although the administration of a vaccination is not a medical examination, pre-screening vaccination questions may implicate the ADA's provision on disability-related inquiries. To avoid being deemed an unsafe or unhealthy workplace environment, employers should encourage vaccines on a voluntary basis.⁶

Direct Threat

Under the ADA, employers may rely on the qualification standard to justify requiring vaccinations for hiring or employment.⁷ The qualification standard allows employers to require their employees to avoid posing a direct threat to the health or safety of those in the workplace.⁸ This “direct threat” standard has been acknowledged by the EEOC and the Center for Disease Control (CDC) to include COVID-19. In assessing whether an unvaccinated employee poses a direct threat, the employer can consider: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.⁹

Union Concerns and Collective Bargaining

While employers can generally require employees to get vaccinated, this does not apply in union employment. Because a vaccine mandate may be interpreted as a term or condition of employment, it is subject to a proper collective bargaining procedure with union representatives.¹⁰ Accordingly, private employers should remain aware of the possibility for organized employees to be resistant to a new employment mandate.

Religious Exemption and Accommodations

If an employer is subject to Title VII of the Civil Rights Act or the California Fair Employment & Housing Act, they must provide reasonable accommodations to an employee who communicates a sincere religious belief that hinders them from accepting the vaccine.¹¹ Once the employer has been notified of the need for religious accommodation, general reasonable accommodations may include flexible work scheduling, voluntary substitutes, lateral transfers, changed job assignments, etc.¹² Specific to the COVID-19 pandemic, reasonable

⁴ *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, EQUAL EMPLOYMENT AND OPPORTUNITY COMM., <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws - K.2> (last updated on Dec. 16, 2020).

⁵ *Id.* at Section K. “Vaccines”.

⁶ *Id.* at Question K.5, per Occupational Safety and Health Administration (OSHA)/CalOSHA standards.

⁷ 42 U.S.C. § 12113(b).

⁸ 29 C.F.R. § 1630.10.

⁹ 29 C.F.R. § 1630.2(r); see *What You Should Know*, Question K.5.

¹⁰ 29 U.S.C. § 152 *et seq.*

¹¹ 29 C.F.R. § 1605.2; see *What You Should Know*, Question K.6.

¹² *Id.*

accommodations may include allowing the employee to work further away from others in the workplace, wearing a mask, working remotely, etc.¹³

Undue Hardship for Employer

The caveat to this requirement under the Civil Rights Act is if these accommodations are too burdensome on the employer's workforce or poses an "undue hardship."¹⁴ An undue hardship is something that would require more than a "de minimis cost", or costs similar to the regular payment of premium wages of substitute labor.¹⁵ If the accommodations for an employee refusing the vaccine causes undue hardship, the employer would have a valid defense to a discrimination allegation under the ADA.¹⁶

Disability / Health Concern

Before administering a vaccine, an employer is encouraged to ask pre-screening questions to confirm there are no medical concerns that would prevent the employee from receiving the vaccine safely. These questions are subject to the ADA and must be "job-related and consistent with business necessity".¹⁷ But if the employee is voluntarily receiving the vaccine, their answering of these questions must be completely voluntary. Lastly, if the employee is receiving the vaccine from a third party but pursuant to an employment requirement, the completion of these pre-screening questions is not required.

If someone has a legitimate disability-related concern with accepting the vaccine, then the employer cannot discharge the employee for failure to receive the vaccine, without potential liability under the ADA. However, the employer should still engage in the "direct threat" analysis aforementioned, to decipher whether the employee can be justifiably excluded from the workplace, absent an accommodation that would eliminate or reduce the risk of the unvaccinated employee's direct threat.¹⁸ In this situation, the employer may remain aware of any undue hardship.

California

Lastly, there are additional considerations related to the government authority of local health officials to prevent the spread of disease.¹⁹ Also, CalOSHA maintains the Aerosol Transmissible Diseases (ATD) regulations which require employers to protect their employees from applicable diseases, including SARS. Thus, CalOSHA could foreseeably attach a vaccine mandate to this existing authority, because COVID is a SARS virus, and the agency has already issued guidance for agricultural workers and other essential workers, regarding COVID safeguards.

¹³ *What You Should Know*, Question D.16.

¹⁴ 29 C.F.R. § 1605.2(e).

¹⁵ 29 C.F.R. § 1630.15(d).

¹⁶ *Id.*; see *What You Should Know*, Question K.7.

¹⁷ 42 U.S.C. § 12112(d)(4)(B).

¹⁸ *What You Should Know*, Question K.5.

¹⁹ Health & Saf. Code §§ 120140, 120175.