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Q&A

Employer-Mandated COVID-19 Vaccinations



With the broad release of the COVID-19 vaccine, many employers are considering whether or not to mandate the vaccine as a condition of employment. It is essential that employers understand the risks associated with employer-mandated vaccines. Our defense counsel partners at Lindner & Marsack, S.C. have prepared a questions and answers document to aid in the decision-making process.

Can an employer require its employees to receive a COVID-19 vaccine that has been approved or authorized by the FDA as a condition of continued employment?

On May 28, 2021, the Equal Employment Opportunity Commission (EEOC) issued updated and expanded guidance related to mandatory COVID vaccination programs by employers. The guidance makes it clear that EEO laws do not interfere or prevent an employer from following CDC guidelines or other federal, state or local public health authorities' guidelines and suggestions with respect to COVID-19. Once a vaccination has been approved or authorized by the Food and Drug Administration (FDA), an employer is permitted to require employees to receive a COVID-19 vaccination as a condition of employment, subject to the obligation to reasonably accommodate individuals who are unable or unwilling to be vaccinated because of a disability or sincerely held religious belief, practice or observance.

It is expected that formal FDA approval of the COVID vaccine may be provided as early as the end of August 2021. Until then, employers considering instituting

a mandatory vaccination program should carefully consider all of the potential legal, as well as personnel-related implications of such a decision. Although official numbers are difficult to ascertain, it is estimated that less than 5% of employers currently have a mandatory COVID vaccination program.

Is the administration of a COVID-19 vaccine to an employee by an employer (or by a third party with whom the employer contracts to administer a vaccine) a "medical examination" for purposes of the ADA?

No. The EEOC explained that a vaccination itself is not a medical examination, as a medical examination is "a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual's physical or mental impairments or health." If a vaccine is administered to an employee by an employer for protection against contracting COVID-19, the employer is not seeking information about an individual's impairments or current health status and, therefore, it is not a medical examination.

If the employer requires an employee to receive the vaccination from the employer (or a third party with whom the employer contracts to administer a vaccine) and asks screening questions, are these questions subject to the ADA standards for disability-related inquiries?

Yes. Pre-vaccination medical screening questions are likely to elicit information about an employee's disability. This means that such questions, if asked by the employer or a contractor on the employer's behalf, are "disability-

related” under the ADA. Thus, if the employer requires an employee to receive the vaccination, administered by the employer, the employer must show that these disability-related screening inquiries are “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 answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others.

The EEOC has clarified that there are two circumstances in which disability-related screening questions can be asked without needing to satisfy the “job-related and consistent with business necessity” requirement. First, if an employer has offered a vaccination to employees on a voluntary basis (i.e., employees choose whether to be vaccinated), the ADA requires that the employee’s decision to answer pre-screening, disability-related questions also must be voluntary. If an employee chooses not to answer these questions, the employer may decline to administer the vaccine. Second, if an employee receives an employer-required vaccination from a third party that does not have a contract with the employer, such as a pharmacy or other health care provider, the ADA “job-related and consistent with business necessity” restrictions on disability-related inquiries would not apply.

Is asking or requiring an employee to show proof of receipt of a COVID-19 vaccination a disability-related inquiry?

No. Simply requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry. However, subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be “job-related and consistent with business necessity.” If an employer requires employees to provide proof that they received a COVID-19 vaccination from a pharmacy or their own health care provider, the employer may want to warn the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA.

If an employer requires vaccinations when they are available, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a disability?

The ADA requires employers to provide reasonable accommodation to employees with a disability as long as the accommodation does not create an undue hardship. If an employee indicates that he/she is unable or unwilling to receive a COVID vaccination because of a disability, the employer should engage in the interactive process to determine if a reasonable accommodation exists.

The ADA also allows an employer to have a qualification standard that includes “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.” However, if a safety-based qualification standard, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat due to a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: (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. A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite. If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.

If there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean the employer may automatically terminate the worker. Employers will need to determine

if any other rights apply under the EEO laws or other federal, state, and local authorities. For example, if an employer excludes an employee based on an inability to accommodate a request to be exempt from a vaccination requirement, the employee may be entitled to accommodations such as performing the current position remotely or being placed on a leave of absence as a reasonable accommodation.

If an employee claims they have a sincerely held religious belief that prevents them from receiving a COVID-19 vaccination, what should an employer do?

Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act.

As a general rule, employers should assume that requests for religious accommodations are based on sincerely held beliefs. However, if an employee requests an accommodation and an employer has an objective basis for questioning the sincerity of that religious belief or practice, the employer can request supporting information from the employee. This supporting information could be a first-hand explanation from the employee or verification from a third party, including clergy. However, third-party verification does not necessarily have to come from a religious official or member of the worker's religion.

As is the case with accommodating disabilities under the ADA, if there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean the employer may automatically terminate the worker.

Can an employer be held legally liable for failing to require a COVID-19 vaccination of all of its employees?

If a mandatory vaccination policy is not imposed, employees may allege that the employer has failed to provide a safe and healthy work environment. It would be breaking new ground to hold employers liable for not requiring a vaccination. However, if a public health

authority (such as the CDC) issues guidance providing that all employers should not permit unvaccinated employees back into the workplace, one might imagine this issue being a factor in tort litigation over whether appropriate safety protocols were followed by an employer.

What does an employee need to prove to establish a compensable work-related injury if they become infected with the COVID-19 virus?

A COVID-19 infection may be compensable depending on the facts of each particular case. The compensability of viral infections under Wisconsin's Worker's Compensation law is determined by "a preponderance of the probabilities or inferences drawn from the established facts." In other words, the inferences are such as to constitute substantial evidence to sustain the findings that the employee contracted the virus at work. If there are no other employees at the claimant's facility who are positive for the virus, then the claim is likely not compensable. It can be presumed that the claimant contracted the virus outside of work. However, if the claimant works in an area where coworkers, patients, or customers have tested positive, then the facts would likely support a compensable COVID-19 claim.

If an employer mandates the COVID-19 vaccine for its employees, is the employer responsible for any side-effects caused by the vaccine?

Yes, if the employer mandates that their employees undergo a COVID-19 vaccination and as a result of the vaccine, they have complications, those complications would be compensable under the Wisconsin Worker's Compensation Act under the positional risk doctrine. Liability will be found when the obligation (mandated vaccine) or circumstances of the employment places the employee in the particular place where, and at the particular time when, he or she is injured by a force not solely personal to him or her.

Can an employer offering a COVID vaccination also offer a financial incentive for employees to be vaccinated?

Yes, employers that are administering vaccines to their employees may offer incentives for employees to be vaccinated, as long as the incentives are not coercive. Because vaccinations require employees to answer

pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information.

Can an employer offer financial incentives to employees to provide documentation or other confirmation of vaccination obtained from a third party?

Yes, federal laws do not prevent or limit employers from offering incentives to employees to voluntarily provide documentation or other confirmation of vaccination obtained from a third party (not the employer) in the community, such as a pharmacy, personal health care provider, or public clinic. If employers choose to obtain vaccination information from their employees, employers must keep vaccination information confidential pursuant to the ADA. 🇺🇸



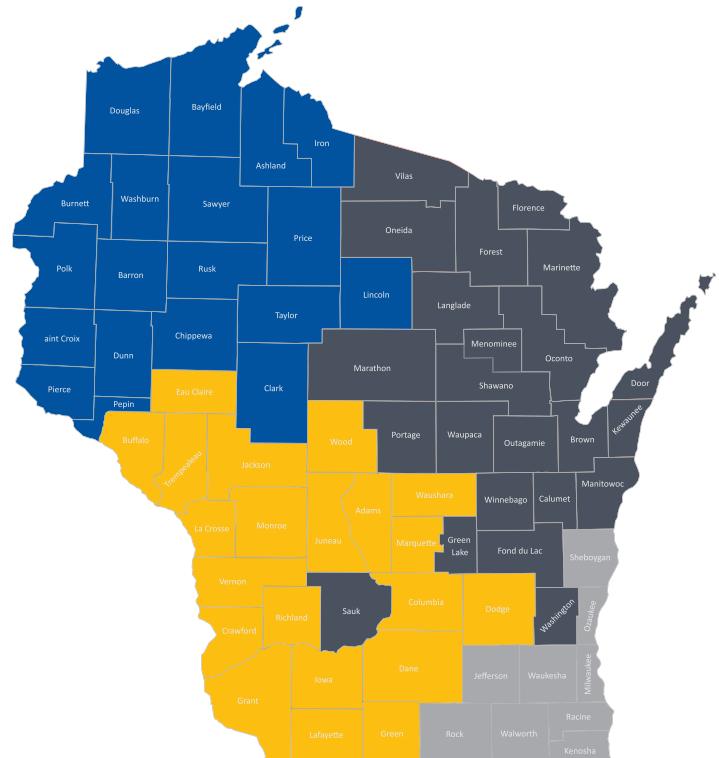
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About Attorney Oyvind Wistrom

Oyvind Wistrom is a Shareholder and President of the Board of Directors of Lindner & Marsack, S.C., and has practiced his entire legal career in the field of labor and employment law. His current practice is focused primarily on the litigation of employment claims, equal employment matters, and the development and oversight of personnel policies and procedures for private companies and government. He frequently speaks on employment-related topics and is actively involved in numerous human resource organizations.

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