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COVID-19 VACCINES AND THE WORKPLACE: TO MANDATE OR NOT TO MANDATE?

As the one year anniversary of COVID-19's massive impact on American life approaches, we at JAH are encouraged by improvements in testing and especially by the deployment of COVID-19 vaccines. Despite some early challenges, we have every reason to believe that the initial glitches in vaccine distribution will be worked out, and that other more easily transported and delivered vaccines will soon be available. When these vaccines do become readily available to the general public, what does this mean for employers and employees? Can employers require employees to be vaccinated before returning to the workplace? Should they?

We expect that COVID-19 vaccines will expedite a return of some semblance of normalcy in the workplace in the coming year, and hopefully in the coming months. When a sufficient number of vaccines have been given and the community is approaching "herd immunity" (70 to 85% of population), employers, to the extent they have not done so already, will no doubt begin requiring more and more employees to physically return to the workplace.

Employers have broad discretion when it comes to making rules to protect the health, safety, and welfare of their workers. That discretion extends to requiring employees to receive COVID-19 vaccinations as a condition of employment. In December 2020, the Equal Employment Opportunity Commission (EEOC) clarified that employers may, subject to existing laws, require employees to receive COVID-19 vaccinations. If that's the case, why wouldn't employers require all employees to be vaccinated?

There are valid reasons why many employers have elected thus far not to impose a blanket COVID-19 vaccination mandates. These include:

- Vaccines are not currently available to all persons.
- Some employees have valid medical reasons to object to vaccination, and still others may have sincerely held religious objections. In such cases, employers may or may not have to accommodate these employees, but federal law requires employees to at least consider accommodation requests on case-by-case basis and to take into account whether accommodating the request poses an unreasonable threat to health and safety.
- Since the vaccines are still so new, the risks associated with them may not be fully known. Employers may therefore be reluctant to mandate the vaccine—particularly when many if not most of their employees plan to be vaccinated voluntarily.

For these and other reasons, many employers—at least for now—are mandating vaccinations only for certain employees, such as front-line health care workers who have close physical contact with patients or members of the public. Certainly, this situation could change depending on many factors, including greater access to vaccines, greater knowledge of the vaccine’s risks and side effects, and changes in the contagiousness or lethality of the virus.

Some employers have used vaccine incentive programs to encourage voluntary compliance rather than imposing strict vaccine mandates. We urge caution before implementing such incentive programs. For one thing, employees who are vaccinated to obtain a benefit (or not to lose a benefit) aren’t likely to consider the vaccination to have been voluntary if they suffer an adverse reaction. Similarly, an incentive program may encourage at-risk employees who should not be vaccinated to get vaccinated. So vaccine incentive programs may not be the middle ground employers are looking for. The bottom line is that each employer must take into account its own unique circumstances before deciding whether to mandate vaccinations for some or all of its employees. Call or email the JAH **Employment Practice Group** if we can help you to navigate through the maze of legal issues you are dealing with in the face of COVID-19. We can help you make the right decisions for your business and for your employees.