

MAY YOU REQUIRE YOUR EMPLOYEES TO TAKE THE COVID-19 VACCINE?

By Thom K. Cope

As I write this, COVID-19 vaccines are being distributed nationwide on a limited basis. Once the vaccine is widely available, are you able to force employees to get the vaccine as a condition to keeping their job? The short answer is yes, but.

The EEOC has ruled that employers may mandate that employees must take the flu vaccine. It is expected to rule the same way for the COVID-19 vaccines. But the caveat is that some employees may not be required to take the vaccine because of sincerely held religious beliefs or because they suffer from a disability.

Once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than de minimis cost" to the operation of the employer's business, which is a lower standard than under the ADA). Title VII of the Civil Rights Act requires employers to then engage in an inter-active process to find that accommodation.

So too under the ADA. Employers must engage with the employee who claims their disability makes it impossible to take a vaccine. Again, an inter-active discussion must occur to find a reasonable accommodation absent undue hardship (significant difficulty or expense).

One thing that may give employees pause about taking the vaccine is that the Food and Drug Administration is going to allow vaccines under an "emergency use authorization" (EUA). That means the drug is approved for use even though the FDA did not have all the usual evidence that the drug is safe and effective. But this may be cleared up before the vaccine reaches the entire population. For instance, Tucson is slated to shortly receive 11,000 doses of a vaccine under the EUA. It is important to

remember that all refusals to take the vaccine must be tied to a sincerely held religious belief (Title VII) or a medical condition requiring an ADA reasonable accommodation.

In any event, the issue is individual with each employee. You must determine that the employee has a sincerely held religious belief (a relatively low standard) and/or actually has a disability recognized under the ADA that makes taking the vaccine problematic to them performing the essential functions of their job.

Also, employees may not refuse to come to work because one or more of their fellow employees fail to get or refuses a vaccine.

Finally, when it comes to vaccine mandates, you have every right to mandate vaccines to continue the operations of your business (subject to the above caveats). But another thought is rather than have a Draconian order, perhaps you could provide incentives (a day off with pay, small cash bonus, etc.), run a “contest” for your employees (first 10 employees to bring in proof get...). In other words, try to make this a company event, much like a toy drive or a blood bank drive, if that is at all feasible until the absolute mandate is necessary. For more information, contact one of our employment lawyers at employment lawyers at Mesch Clark Rothschild at (520) 624-8886.