April 12, 2021

New Jersey Guidance Supports Mandatory Vaccination Policies

Faced with an unprecedented pandemic, and despite the fact that the availability of the COVID-19 vaccine has become more widespread, New Jersey employers have been largely unsure about whether they can mandate COVID-19 vaccinations as a condition of employment. In previous attempts to address such a question, answers have been elusive at best. For example, as we previously mentioned here, the U.S. Equal Employment Opportunity Commission (EEOC) supplemented its existing COVID-19 guidance to address the interplay between employer-mandated vaccination programs and various federal laws such as the Americans with Disabilities Act of 1990 and Title II of the Genetic Information Nondiscrimination Act of 2008. The EEOC's guidance, however, falls short of explicitly permitting the implementation of employer-mandated vaccination programs. Recently, the state of New Jersey has provided additional guidance on the matter.

The New Jersey Department of Health (NJ DOH) has issued guidance communicating that, under certain circumstances, employers may require their employees to obtain COVID-19 vaccinations as a condition of employment. The NJ DOH issued this guidance although approved COVID-19 vaccines have only received emergency use authorization from the U.S. Food and Drug Administration (FDA) rather than full FDA approval.

New Jersey employers that mandate employee vaccinations must ensure that they comply with federal and state employment laws, including Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act of 1990, the New Jersey Law Against Discrimination, and the New Jersey Conscientious Employee Protection Act. In accordance with such laws, the NJ DOH specified that employers may not require employees to receive COVID-19 vaccinations under three scenarios:

1. an employee whose medical condition prevents vaccination;
2. an employee whose physician advises against vaccination while the employee is pregnant or breastfeeding; or
3. an employee whose sincerely held religious beliefs prevent vaccination.

In such circumstances, employers must provide reasonable accommodations to applicable employees unless doing so would impose an undue hardship on the employer. A reasonable accommodation may include allowing the employee to work remotely, or to otherwise work in a manner that would reduce or eliminate the risk of harm to other employees or the public. Employers may also provide reasonable accommodations by supplying employees with personal protective equipment to mitigate the risk of COVID-19 transmission and exposure.

When evaluating whether a potential accommodation is reasonable, employers should consider the safety of their workers, clients, and customers. Such safety-hazard concerns must be based on objective, scientific evidence, including evidence reflected in policies and guidance from the Centers for Disease Control and Prevention as well as other federal, state, and local authorities, and not on unfounded assumptions or stereotypes.

In connection with requests for accommodation, employers generally may request medical documentation to confirm the existence of a disability or advice from a physician that the employee should not be vaccinated while pregnant or breastfeeding. Employers must treat such information as confidential employee medical records. Employers generally may not question the sincerity of an employee's religious beliefs, practices, or observance, unless the employer has an objective basis for doing so. In such cases, employers may make a limited inquiry into the facts and circumstances supporting the employee's request.

Despite the NJ DOH's guidance on the matter, there are a litany of unresolved concerns that employers must consider before mandating COVID-19 vaccinations. New Jersey employers are cautioned to recognize that, at the time of this article's publication, not all New Jersey residents are eligible to receive the COVID-19 vaccine. Even when eligibility for the vaccine becomes more prevalent, employers are urged to assess whether mandating COVID-19 vaccinations as a condition of continued employment will affect their staffing needs or employee morale. Additionally, New Jersey employers who plan on mandating vaccinations should also consider the interplay between other laws, their current policies, and any collective bargaining agreements.

For the reasons we previously mentioned here, even though the state of New Jersey permits employers to mandate that employees receive a COVID-19 vaccination as a condition of employment, employers are urged to use caution implementing such policies as there are numerous legal and business risks to doing so. Employers should also be cognizant that other states have not yet followed in New Jersey's footsteps. Accordingly, employers should consult with experienced employment counsel before enacting any policy mandating that employees receive a COVID-19 vaccination as a condition of continued employment.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

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