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MEMORANDUM

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TO: National Grocers Association
FROM: Conn Maciel Carey, OSHA Practice Group
DATE: December 28, 2020
SUBJECT: COVID-19 Vaccines

Summary

As of this date, the US government has approved two COVID-19 vaccines on an emergency basis:

- Pfizer (FDA EUA 12/1/2020 <https://www.fda.gov/media/144412/download>)
- Moderna (FDA EUA 12/18/2020 <https://www.fda.gov/media/144636/download>)

It is reasonably anticipated that additional vaccines will receive EUA status in the US within the next 30-90 days.

While several recent public opinion polls indicate some erosion in public resistance and skepticism about COVID-19 vaccines, employers should be prepared to respond to worker objections to vaccination mandates.

This memo will address the following questions:

1. Who decides prioritization while vaccine supplies are limited?
2. May an employer mandate that some or all of their employees be vaccinated?
3. Should companies require contractors and temporary employees to be vaccinated?
4. May a worker claim an exemption from an employer's vaccine mandate for medical, religious or ethical reasons?

Note that the EEOC issued new COVID-19 vaccination guidance on December 16, 2020 that covers these and a number of related questions on testing, privacy, genetic information and other topics. For the detailed Q&A, see <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

1. Who decides prioritization while vaccine supplies are limited?

Prioritization in the allocation and distribution of vaccines requires a balancing of factors – morbidity, mortality and preservation of social functioning. It is likely that the supply of COVID-19 vaccines will be limited for next 30-90 days in most of the US.

In March 2020, the U.S. Department of Homeland Security (DHS) issued guidance on identifying essential critical infrastructure workforce (<https://www.cisa.gov/publication/guidance-essential-critical-infrastructure-workforce>); however, only 20 states adopted the DHS guidance outright in their COVID-19 vaccination plans. Some states made slight changes in designating priority groups, while other states adopted entirely different frameworks for prioritization.

The CDC made strong recommendations to the states regarding the initial prioritization of limited supplies of the COVID-19 vaccines for December 2020/January 2021, focusing on:

- health care workers “on the front lines,” meaning at very high risk for exposure to COVID-19 in their workplaces
- staff and residents of nursing homes,

during Phase 1a of vaccine distribution. Most state plans reflected that initial federal guidance.

The federal Advisory Committee on Immunization Practices issued new guidance on December 20, 2020 on who should be next in line for COVID-19 vaccinations as supplies become more available:

Phase 1b

- frontline essential workers (non-healthcare)
- people over 75 years of age

Phase 1c

- people ages 65-74 years old
- people ages 16-64 with high risk medical conditions
- essential workers not included in Phase 1b.

<https://www.cdc.gov/vaccines/acip/meetings/downloads/slides-2020-12/slides-12-20/02-COVID-Dooling.pdf>:

It is important to emphasize that (1) the states are not obliged to follow this federal framework and (2) the definitions of “essential worker” and “essential work” vary from state to state.

In fact, several states have already identified different priorities: people in other age groups with certain medical conditions, workers in other industries, people in particular ethnic groups. For example, in a few states, people aged 65-74 years old are being given a higher priority than some essential workers. In New York, emergency medical services providers, workers and residents of mental health, addiction and developmental disability facilities, funeral workers, coroners and medical examiners were recently added to Phase 1a, but these are in later phases in other states.

See state plan details at <https://www.ncsl.org/research/labor-and-employment/covid-19-essential-workers-in-the-states.aspx#Energy>

Individual companies and trade associations have been lobbying the federal government, governors and state legislators on this prioritization issue. We expect that many states will update their COVID-19 vaccination priority guidance in the coming weeks and months.

There are press reports about one clinic with several locations in New York allegedly providing the Moderna vaccine to persons not in the state-approved priority groups, resulting in public calls for a criminal investigation. In other states, politicians and public figures younger than 65 have been criticized for “pushing to the front of the line” to get the COVID-19 vaccine. And

there have been rumors of wealthy persons attempting to “skip the line” in exchange for large donations to local hospitals.

Takeaway: It is important for employers to understand the prioritization policies in each of the states where they have employees located, so that their vaccination plans and policies reflect the most recent applicable guidance, particularly while vaccine supplies remain limited.

2. May an employer mandate that some or all of their employees be vaccinated for COVID-19?

Mandatory vaccinations in the US workplace are not new and have been particularly prevalent among healthcare providers for decades. Some variability exists under federal and state law and among regulatory agencies, but for the most part, mandatory vaccination programs are permissible, so long as employers consider religious accommodation requests under Title VII of the Civil Rights Act of 1964 (Title VII) and medical accommodation requests under the Americans with Disabilities Act (ADA) and similar state statutes which are discussed below.

Federal OSHA has long taken the position that employers can require employees to take influenza and other vaccines but emphasizes that employees “need to be properly informed of the benefits of vaccinations.” The CDC has recommended that all healthcare workers get vaccinated for influenza including all workers having direct and indirect patient care involvement and exposure. Some states laws require healthcare employers offer vaccines or ensure that employees receive it (with certain exceptions).

Although two COVID-19 vaccines have been made available under the Emergency Use Authorization process without long term safety data, the US government has nonetheless recently advised that employers may mandate that some (but not necessarily all) employees be vaccinated for COVID-19. That said, such a practice is not without limitations, nor is it always recommended.

Takeaway: When the availability of COVID-19 vaccines expands significantly, employers should consider which of their employees need to be vaccinated based upon risk factors, community spread in order to maintain a safe workplace. If an employer decides to mandate COVID-19 vaccinations for all employees, they must consider accommodations for religious and medical reasons as discussed below.

3. Can companies require contractors and temporary employees be vaccinated for COVID-19?

Our advice is that companies should consider the same risk factors and prioritization criteria for contractors and temporary workers as they do for their own employees. Mandatory vaccines may be appropriate for construction sites and “turn around” projects where a large number of workers are deployed to work in close proximity for a special project and social distancing and other measures may not be practical.

Note that while an employer would be shielded by workers compensation statutes from employee personal injury claims for harm from a vaccine, that does not apply when the injured worker is employed by a third party (employment agency or general contractor).

Takeaway: If a company determines that certain contractors and temporary workers must be vaccinated for COVID-19 (or any other disease) based upon the location and risks of the work, these issues should be specified in the contract with the agency or general contractor with

appropriate indemnifications, insurance certificates and job descriptions. Special projects should include COVID-19 aspects in the contractor's health and safety plans.

4. May a worker claim an exemption from a vaccine mandate due to medical, religious or ethical reasons?

Pursuant to federal and state guidance, employers must have a process to consider medical and religious objections to any vaccine mandate for their workplaces. Companies should review their existing forms and policies and integrate COVID-19 issues as appropriate.

Medical Exemptions/Disability Claims

There have been isolated reports of severe allergic reactions to both the Pfizer and Moderna vaccines. And some workers may have pre-existing medical conditions such that they would be advised by a medical professional to decline the COVID-19 vaccine for legitimate health reasons. Under some circumstances, this could be viewed as a disability issue triggering both state and federal legal protections.

Generally speaking, employers may require that an individual not pose "a direct threat to the health or safety of individuals in the workplace." However, if a safety-based qualification standard screens out or tends to screen out individuals with a disability, the employer has the burden to show that an unvaccinated employee would pose a direct threat due to a "significant risk of substantial harm" to the health or safety of that person or others. See 29 C.F.R. 1630.2(r). Even after this determination is made, the employee may not be terminated automatically for refusing the COVID-19 vaccination. Next the employer must determine if the employee is entitled to any accommodations. This is the same step that employers take when physically excluding employees from a worksite due to a recent exposure to a person with COVID-19 diagnosis, current symptoms or a positive COVID-19 test: some workers may be entitled to telework or, if not, may be eligible to take leave under the Families First Coronavirus Response Act, under the FMLA, under the employer's policies, or EEO rights relating to pregnancy.

There may be situations where an accommodation is just not possible. When an employer makes this decision, the specific facts about the worker's job duties, necessary proximity to other workers, use of shared equipment and tools, and overall workplace conditions are particularly relevant and these should be carefully documented contemporaneously with the decision to terminate the employee.

Religious Exemptions

Some COVID-19 vaccinations were developed, tested and/or may contain material that is objectionable for one or more religious reasons (i.e. animal cruelty, fetal tissue or animal products).

When a worker provides notice to an employer of their sincerely held religious belief, practice, or observance that prevents them from receiving a particular vaccination, the employer must provide a reasonable accommodation, unless it would pose an undue hardship under Title VII of the Civil Rights Act. Courts have defined "undue hardship" under Title VII as having more than a *de minimis* cost or burden on the employer. EEOC guidance is that the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief because the definition of religion is quite broad and protects beliefs, practices, and observances with which the employer may be unfamiliar.

If an employer has an objective basis for questioning either the religious nature or the sincerity of a person's religious objection, the employer may request documentation (such as a statement from a religious leader). We advise employers to exercise discretion and caution in challenging any person's religious beliefs.

For example, a few religious leaders including the Pope and the US Conference of Catholic Bishops have opined on the acceptability of the COVID-19 vaccines manufactured by Pfizer and Moderna even though they were developed using fetal tissue, some individual Catholic clergy members in the US have publicly disagreed. Similarly, while mainstream Jewish and Muslim religious leaders have stated in the past that other vaccines with pork contents are not religiously objectionable and publicly encouraged vaccinations, even though other clergy members advised to the contrary.

One organization "The Healthy American" is selling a "RELIGIOUS EXEMPTION INFORMATION CARD" for a "donation" of \$12, that "can be used in every state in the USA and purports to be signed by a "Pastoral Representative" bearing a gold seal with a cross. The seller's website claims that the "bearer of this card is exempt from wearing masks or cloth face coverings," from "having temperature taken, viral testing and vaccinations"; that "[y]our right to shop mask-free is protected by state and federal civil law, which defends your religious freedom."

As different COVID-19 vaccine products receive government approvals and become generally available, an appropriate accommodation for a religious objection to one vaccine may be to offer a different formulation without the objectionable contents.

Ethical Objections

A worker who is not religious but has a political objection to vaccines may attempt to assert an ethical objection. There is no federal guidance on this issue yet.

If an employee is younger than 18, state laws require advance written parental consent for all vaccinations. While some states allow parents to refuse consent to mandated childhood vaccinations based upon medical, religious, or ethical objections, we have not seen any state guidance yet related to parental objections to employer-mandated COVID-19 vaccinations.

Takeaways:

Employers who decide to mandate COVID-19 vaccinations should

- *train managers and supervisors to recognize a request for an accommodation*
- *provide standard forms and a process for workers to formally notify the employer of request for a medical or religious exemption to a vaccine mandate*
- *conduct an individualized assessment to determine whether a direct threat exists from a worker who refuses to be vaccinated for COVID-19*
 - o *the duration of the risk*
 - o *the nature and severity of the potential harm*
 - o *the likelihood that the potential harm will occur; and*
 - o *the imminence of the potential harm*
- *engage in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship to the employer*
- *document any situation where there is an undue hardship*
- *remind managers and supervisors that it is unlawful*
 - o *to disclose that an employee is receiving a reasonable accommodation or*
 - o *to retaliate against an employee for requesting an accommodation.*

- seek legal advice before deciding whether to terminate an employee for refusal to be vaccinated for COVID-19
- seek parental consent for vaccination of any employee younger than 18 years old.

In closing, we recommend that all employers who are considering a mandate that workers be vaccinated for COVID-19:

- *while COVID-19 vaccine supplies are limited, identify high-risk locales, departments, and/or worksites, where alternative and similarly effective means of limiting the contagion are not viable*
- *prepare in advance to review and administer numerous requests for accommodations, and create separate exemption request forms and medical and religious certification forms*
- *document the company's decision-making related to COVID-19 vaccinations in order to support a viable legal defense to discrimination or wrongful discharge claims related to dismissal or reassignment after worker refusal to be vaccinated*
- *remember that governmental advisories are frequently updated or changed based upon evolving medical and public health knowledge about the spread and treatment of SARS-Cov-2 virus.*