Forcing the Shot: Mandatory COVID-19 Vaccination

Basketball coaches teach their players that, as a general rule, "forcing the shot" is a bad idea. Instead, each player is encouraged to "let the game come to you." The exception to this general rule is that, when the occasion requires it, "forcing the shot" may be necessary and advisable. Examples of such circumstances are when the shot clock or game clock is running down or when "forcing the shot" may result in an opposing player fouling out and having to leave the floor. The problem facing employers is having to decide whether "forcing the shot," i.e., the COVID-19 vaccine, upon their employees is necessary and/or advisable under the present circumstances.

Continuing the basketball analogy, the present COVID-19 "game" is well into the second half (college) or fourth period (pros). Whether a given "team" is leading, or trailing, on the scoreboard—at least with respect to the pandemic and its health effects—will vary from company to company, based upon industry and individual issues and circumstances. To the extent that its team is presently "leading" as the clock winds down, an employer should still consider whether to take steps that may better prevent the lead from slipping away, resulting in an "overtime" that no one wants. Regardless, in making decisions for its team, it is always good for the employer to know the rules and factors that could impact its efforts to run out the pandemic clock, if leading, or turn a potential loss into a win, if trailing.

Many employers (outside of certain businesses that had priority access to the COVID-19 vaccines, such as health-care providers and nursing homes) have not needed to consider whether to "force the shot" due to the previous unavailability of the vaccine for the majority of their employees who were "not old enough" or lacked underlying (health) risk factors to qualify. This is no longer the case. States are begging individuals to take the vaccines, which are presently sitting unused in storage. Now that the vaccines are universally available for all working-age individuals, employers should evaluate whether "forcing the shot" is a winning strategy for their team. In order to intelligently make this decision, employers must first be aware of the following "rules of the game:"

In general, private employers can require employees to get vaccinated for (against) COVID-19, as long as they comply with federal (and state) employment laws that prohibit discrimination. These include the Americans with Disabilities Act (ADA); Title VII of the Civil Rights Act (which prohibits discrimination on the basis of race, color, national origin, religion and sex, including pregnancy); the Age and Discrimination Employment Act (ADEA); and the Genetic Information Nondiscrimination Act (GINA). All of these federal statutes apply to employers with 15 or more employees. Similar Louisiana state laws apply to employers with at least 20 employees. Other laws are potentially implicated as well.

ADA

The ADA limits certain medical inquiries; requires an employer to accommodate employees with disabilities; and prohibits discrimination against disabled individuals.

To receive a vaccine, an employee may have to answer medical-screening questions. Such questions may require that the employee divulge information about disabilities or disability-related conditions. An employer mandating a vaccine can require an employee to provide this information only if the screening questions are "job related and consistent with business necessity." To meet this standard, an employer must have a reasonable belief, based on objective evidence, that an employee refusing to answer questions required to receive the vaccine will pose a direct threat to the health and safety of himself or to others.

"Direct threat" will become an issue if an employee either objects to providing the pre-screening information or to receiving the vaccine. In this circumstance, the employer must conduct an individualized analysis related to the specific employee by considering four factors: the duration of the risk; the nature and severity of potential harm; the likelihood that potential harm will occur; and the imminence of the potential harm. If the employer concludes that the unvaccinated employee will potentially expose others in the workplace to COVID-19, this does

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not end the inquiry. The employer cannot automatically exclude the employee from the workplace or take other action unless there is no way to provide a reasonable accommodation, absent undue hardship, that would reduce the threat. Remote work (when practicable) is an example of a possible reasonable accommodation. The ADA requires employers to engage in what is called an "interactive process," which includes talking with each objecting employee to determine whether there are accommodations that would allow the employee to safely work even if not vaccinated.

Remember, any medical information the employer receives as a result of a voluntary or involuntary vaccine program must be kept confidential and maintained in a secure file separate from other employment records.

TITLE VII

Title VII prohibits discrimination on the basis of religious beliefs and requires an employer to accommodate such beliefs. An employee may object to mandatory vaccinations based on a "sincerely held religious practice or belief." In this circumstance, the employer must consider and provide a reasonable accommodation unless doing so would pose an undue hardship. An accommodation analysis similar but not identical to that required by the ADA must be done for the employee who claims that religious beliefs or practices prevent him from receiving the vaccine.

In order to deny a religious accommodation, the cost or burden of the accommodation must be more than de minimis. Be aware that, under Title VII, the definition of religion is broad and protects beliefs, practices and observances with which the employer may be unfamiliar. An employer may require additional information about the employee's religious beliefs, only if there is an objective basis for questioning the belief or practice.

Title VII also prohibits pregnancy-related discrimination. (Some pregnancy-related medical conditions may also be considered disabilities under the ADA). Pregnant employees may question the safety of the vaccine during pregnancy or may have been advised not to have the vaccine. Title VII, as amended by the Pregnancy Discrimination Act (PDA), requires that pregnancy-related medical conditions be treated in the same way that other medical conditions are treated. This means that the employer must conduct an individualized inquiry about whether accommodation is available to the pregnant employee who does not want to receive the vaccine.

GINA

The The Genetic Information Nondiscrimination Act (GINA) prohibits the use of genetic information in making employment decisions. Neither requiring vaccination nor requiring proof of vaccination implicates the provisions

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ADEA

Finally, the Age Discrimination and Employment Act (ADEA) prohibits employment discrimination against employees 40 years or older. According to the CDC guidelines, those 65 years or older are at higher risk of severe illness from COVID-19. Nonetheless, employers may not exclude older workers from the workplace because they are at higher risk. Additionally, an older worker must be treated in the same way as other employees as it relates to vaccines. Consequently, unless an older worker objects to the vaccine because of a disability or religious belief, the employer can require the employee to be vaccinated.

Other laws that must be considered by employers, include:

NLRA, Section 7

Section 7 of the National Labor Relations Act gives employees the right to engage in protected concerted activities for the purpose of collective bargaining or other mutual aid or protection and protects employees from interference or retaliation with respect to their exercise of these rights. Section 7 is applicable regardless of whether a union has been certified as the representative of the employees as long as at least two employees are involved. Employee protests against a mandatory vaccine policy, discussions about vaccines or expressing concern about a potential vaccination mandate likely would be considered to be protected activities under Section 7. Additionally, in a unionized workplace, the implementation of a mandatory vaccination policy may require bargaining with the union, in advance. If implemented by a company without first bargaining, a "meritorious" unfair labor practice charge could be filed by the union. Since the vaccines were expedited and are subject to "emergency use authorizations" only, rather than "full" FDA approval, neither the FDA nor the CDC require or mandate vaccination. Consequently, employee resistance and/or objections to mandatory vaccines will likely be considered reasonable and protected under Section 7.

OSHA

In the event that an employer requires its employees to take the COVID-19 vaccine, any adverse reaction is "recordable" on the employer's OSHA 300 log, if: (a) it led to the employee missing more than one day of work; (b) required medical treatment beyond first aid; or (c) resulted in restricted work or transfer to another job. An employee who refuses to be vaccinated for COVID-19 because of a "reasonable belief" that he or she has a medical condition that creates a real danger of serious illness or death (such as a serious reaction to the vaccine) may also be protected from retaliation under Section 11(c) of OSHA, OSHA's "whistleblower" anti-retaliation protection(s).

WORKERS' COMPENSATION

An employer-mandated vaccine would be considered part of the work (as a work requirement). Any adverse reaction to the vaccine may be covered by workers' compensation, as would likely any injury sustained in a car accident on the way to the vaccination site. If the vaccination is required and administered at the worksite, any adverse reaction may be considered even "more compensable" and covered by workers' compensation.

CONCLUSION

The "game clock" may be winding down on the COVID-19 pandemic, as the case numbers, hospitalizations and deaths (certainly in Louisiana) are on a downward trajectory. If COVID-19 vaccines had been available earlier in the game (mid-2020), the pressure on employers to "force the shot" would have been much greater—and the decision to require employees to be vaccinated, as a condition of employment, more easily justified. At this point, most employers may elect not to "force the shot" and, instead, run out the clock, unless circumstances change for the worse, due to new variants, etc. Of course, circumstances could change, requiring employers to reassess whether "forcing the shot" would (then) be a winning strategy. In that event, it is permissible for them to do so as long as they follow the rules of the game.

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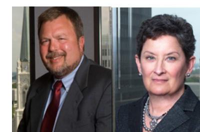

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