EXUDE

President Orders OSHA To Develop Mandatory Vaccine Requirement for Large Employers

On September 9, 2021, President Biden announced that he ordered OSHA to develop emergency temporary standards (ETSs) that would require employers with 100 or more employees to mandate that employees either receive one of the three available COVID-19 vaccines or submit to at least weekly COVID-19 testing. Employers who do not comply with these requirements could be fined approximately $13,650 per employee. The President also announced the OSHA ETSs will require employers to offer paid time off to employees to receive the vaccine, as well as any time necessary to recover from a reaction to the vaccine.

The President also issued executive orders requiring federal executive branch employees to be fully vaccinated (i.e., no weekly testing option) and federal contractor employees under new or newly extended/newly optioned contracts to comply with vaccine safety protocols. He also announced (1) health care workers at certain facilities that receive Medicaid or Medicare funding must be fully vaccinated, (2) that the Department of Transportation will double its fines for individuals who refuse to wear masks on public transportation, and (3) increased testing availability for individuals either at home (through certain, chosen retailers who will sell the kits at cost) [1] and at pharmacies.

The pending OSHA ETSs, and approaches large employers (i.e., 100 or more employees) and small employer (i.e., fewer than 100 employees) can take to incentivize vaccines are the focus of this alert.

Background

On August 23, 2021, the U.S. Food and Drug Administration (FDA) approved the Pfizer-BioNTech COVID-19 vaccine, one of the three COVID-19 vaccines approved for emergency use in the United States. Due to this approval and the rampant spread of the COVID-19 Delta variant, employers recently began implementing different approaches to encourage individuals to receive the COVID-19 vaccine. Some implemented incentives for employees who are vaccinated, while others took a more aggressive approach by penalizing those not vaccinated with higher health insurance contributions or outright mandating the vaccine as a condition of employment.

[1] COVID-19 at-home testing kits are used to "diagnose" COVID-19 and, therefore, are qualified medical expenses under §213(d) of the Code. Thus, they can be paid for or reimbursed under a health FSA, HRA, HSA, or Archer MSA.

In the meantime, on September 9, 2021, President Biden announced that OSHA will issue ETSs mandating employers with 100 or more employees require employees to either be vaccinated or submit to weekly testing. At this time, these rules have not been implemented, so there are no details about how "employees" are defined, how employer size will be determined, whether there will be exceptions for employees who work remotely, when the mandate is effective, how employers are required to implement testing, whether traditional reasonable accommodation requirements apply for individuals with disabilities or sincerely held religious beliefs against vaccinations, and whether testing can be paid for through the employer's group health plan or whether it must be paid directly by the employer. We expect the OSHA ETSs will address these issues.

While the OSHA ETSs will likely provide significant cover for employers who mandate vaccines for employees, some large employers may still choose to incentivize employees to receive the vaccine in lieu of pursuing or implementing a potentially burdensome weekly testing requirement. Moreover, employers with fewer than 100 employees may still consider mandating vaccines for their workforce, or incentivizing employees to get vaccinated.

As discussed below, any of the above approaches may implicate one or more federal laws and may also implicate state or local laws and regulations.

Until guidance from OSHA is released, employers can rely on recent guidance from the U.S. Equal Employment Opportunity Commission (EEOC) – What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws – related to the COVID-19 vaccine.

Mandating the COVID-19 Vaccine as a Condition of Employment

Employers with fewer than 100 employees may choose to mandate that all employees receive the vaccine, while large employers will have to consider how they will implement the mandate. There are a few different approaches employers can take. They can: (1) contract with a provider to administer the vaccine onsite, (2) contract with a designated provider to administer the vaccine offsite, or (3) instruct employees to get the vaccine from a provider of their choice and provide proof of vaccination status to the employer.

Providing Vaccines Onsite or Through a Provider Contracted by the Employer

One key issue when administering a vaccine onsite or through an employer-contracted provider is whether the receipt of the vaccine itself amounts to a medical examination. According to the EEOC, it does not; however, the analysis does not end there. To administer the COVID-19 vaccine, a health care provider would need to familiarize themselves with employees' medical history through a series of prescreening questions to ensure the vaccine is medically appropriate. These pre-screening questions could elicit

information about a disability, which would implicate the ADA's provisions regarding disability-related inquiries and could violate Title II of GINA, which prohibits employers from using, acquiring, or disclosing an employee's or family member's genetic information, to the extent the screening questions ask about/require the employee (or family members) to provide any genetic information.

As such, to satisfy the ADA, the employer would need to establish the vaccine is both "job-related and consistent with business necessity." In other words, the employer would need to reasonably believe, based on objective evidence, that failing to receive the vaccine would pose a direct threat to the health or safety of other employees or individuals. Given the contagiousness of the Delta variant, this may not be difficult for employers to establish.

Vaccines Administered by the Employee's Health Care Provider

If employees may choose the provider who administers the vaccine, such as their neighborhood pharmacy or own medical care provider, then the ADA's provisions regarding disability related inquiries is not implicated. Further, GINA is not implicated with this approach if the employer merely requires employees to provide proof of vaccination, because administration of an mRNA vaccine in and of itself does not involve the use of genetic information.

In this case, the employer could require an employee to show proof of receiving the vaccine by an independent pharmacist or medical provider, such as by providing a copy of their vaccine card or executing an affidavit confirming they received the vaccine[2], and this would not amount to a disability-related inquiry.

Note, however, similar to FMLA and ADA records, vaccine records are subject to general privacy protections, and must be stored separately from an employee's personnel records. Further, employees should be told not to provide any medical, disability, or genetic information in their documentation evidencing receipt of the vaccine, as receipt of that information may implicate the ADA or GINA.

Termination Decisions for Employees Who Refuse the Vaccine

While the employer may satisfy the ADA and/or GINA using one of the above approaches, additional analysis is required before making the decision to terminate an employee who does not receive the vaccine pursuant to the employer's mandate. These other considerations are discussed in detail below:

[2] Requesting a copy of the vaccine card would lessen the likelihood of fraud.

ADA Qualification Standards and Reasonable Accommodation

If an employee is unable to receive a COVID-19 vaccine due to a disability, then the employer would need to have a qualification standard to ensure an employee does not pose a direct threat to the health or safety of the workplace. In essence, the employer would need to show the individual's failure to vaccinate/be able to receive a vaccination due to such disability is a direct threat to other individuals because of a "significant risk of substantial harm to the health or safety of the individual or others that cannot be reduced or eliminated without reasonable accommodation." Therefore, before an employer could take any action, the employer would need to establish there is a direct threat by demonstrating:

- the duration of any risk;
- the nature and severity of potential harm;
- the likelihood that a potential harm will occur; and
- the imminence of the potential harm.

Even if a direct threat is found, the employer would still be required to determine whether a reasonable accommodation is possible, without undue hardship, which could eliminate or reduce the risk to the workplace.

It is possible an employer can exclude an unvaccinated employee from the workplace if there is a direct threat; however, this does not necessarily mean the employer can terminate the employee. Employees may have other rights under applicable EEO laws or other federal, state, or local laws. Further, when assessing the risk, employers need to consider the amount of their workforce that is unvaccinated, and the frequency or type of contact between vaccinated and unvaccinated employees or unvaccinated employees and customers or clients.

Outright termination without considering any reasonable accommodation could result in an ADA violation. Reasonable accommodation could include a telecommuting option for employees. This would likely need to be a consideration if the employee was previously telecommuting prior to or during COVID-19 shutdowns. If the employee's job is such that it can be performed remotely, employers may need to consider this option depending on the other facts and circumstances. Further, employers must consider CDC guidance when assessing whether an effective accommodation that would not pose an undue hardship is available.

Ultimately, if a reasonable accommodation cannot be made without undue hardship, then termination may be permissible. These determinations should be made on an individualized employee basis taking all facts and circumstances into consideration.

Sincerely Held Religious Beliefs Under Title VII

Employers also must consider whether religious accommodations may be necessary for employees who are not vaccinated. Under Title VII, an employer must reasonably accommodate an employee's sincerely held religious belief absent an undue hardship. Without an objective basis for questioning whether the employee's beliefs are religious in nature or sincerely held, the employer should not request supporting information or documentation regarding a sincerely held religious belief; however, even if the employee provides supporting information or documentation, the employer is not required to allow the employee in the workplace if a reasonable accommodation is not available or if accommodating the employee would cause an undue hardship to the employer. Specifically, an undue burden in this context means the burden is "more than a de minimis cost or burden."

Again, this is facts and circumstances specific, and an employer should not automatically terminate an unvaccinated employee without considering whether an accommodation is possible or necessary. Per the EEOC, if an employee cannot receive the COVID-19 vaccine because of a sincerely held religious belief, practice, or observance, then the employee may be excluded from the workplace if there is no available or possible reasonable accommodation.

Mandating COVID Vaccine as Condition of Health Coverage Eligibility

While there have been no reports of companies taking this approach, some companies have inquired whether this would be a possibility. This option is the most easily analyzed of the options, as it clearly is addressed by HIPAA nondiscrimination rules. Specifically, under HIPAA nondiscrimination requirements, benefits must be available on a uniform basis for all "similarly situated individuals" and benefits cannot be limited or excluded based on a participant's health factor, which includes "receipt of health care." Thus, an employee's status as COVID-19 vaccinated or not vaccinated is a health factor. Accordingly, an employer cannot exclude an employee from participating in the health plan because he or she did not receive the COVID-19 vaccine.

Excluding Claims Incurred by Unvaccinated Participants

Some employers have questioned whether a group health plan could exclude COVID-19-related claims for an unvaccinated participant. This approach is generally prohibited under HIPAA's rules prohibiting restrictions based on the source of the injury. Under HIPAA, if a group health plan provides benefits for a type of injury, the plan may not deny benefits otherwise provided for treatment of the injury if the injury results from a medical condition (including both physical and mental health conditions). For example, a plan that otherwise covers hospitalization may exclude benefits for self-inflicted injuries or injuries sustained in connection with attempted suicide; however, if the self-inflicted injury was

the result of a medical condition (depression), then the plan must cover the injury. A plan may also deny hospital coverage if the participant engaged in certain dangerous recreational activities (e.g., bungee jumping); however, given that receipt of the COVID-19 vaccine is a health factor under HIPAA, excluding COVID-19-related hospitalization benefits for an unvaccinated participant on the basis that not receiving the vaccine is an inherently dangerous activity is not supportable based on existing guidance. It may also violate the ACA's prohibition on preexisting conditions.

Employer-Provided COVID-19 Incentives

Despite the mandate, some large employers may still consider incentivizing employees to receive the vaccine to minimize the burden and cost of weekly testing requirements. Further, some small employers may choose to incentivize vaccines for the safety of their workforce and customers/clients.

There are generally two approaches employers take with vaccine incentives: (1) providing monetary or other incentives to employees who show proof of receiving the vaccine, such as $100 bonuses, $50 gift cards, additional paid time off, or other items of value, or (2) increasing premium cost of coverage for employees who are not vaccinated. For example, news sources reported that Delta Airlines intends to impose a $200 surcharge on health insurance premiums for employees who are not vaccinated. Under either approach, employers must consider implications under ERISA and regulations governing wellness plans (HIPAA, ADA, and GINA).

HIPAA Nondiscrimination Considerations

As discussed above, HIPAA nondiscrimination rules prohibit employers from limiting or excluding benefits based on a participant's health factor. Thus, employers cannot deny coverage to individuals based on whether they receive the vaccine, but they can incentive employees to receive the vaccine or charge a different premium amount to vaccinated employees if offered via a bona fide wellness program. A bona fide wellness program must be reasonably designed to promote health or prevent disease.

Under applicable DOL wellness program regulations, there are two types of wellness programs, participatory and health contingent. A participatory wellness program does not condition receipt of a reward on achievement of a health standard. Health-contingent wellness programs condition receipt of an award on an individual's satisfaction of a standard related to a health factor or attaining or maintaining a specific health outcome. Health-contingent wellness programs are divided into two categories, activity-based (i.e., individuals are required to perform or complete an activity that is related to a health factor before the individual can obtain a reward) and outcome-based (i.e., individuals must attain or maintain a specific health outcome to obtain a reward).

In addition to meeting other requirements[3], health contingent wellness programs must offer a reasonable alternative standard for employees to satisfy the requirements under the program for all outcome-based programs, and for individuals for whom it is unreasonably difficult to satisfy the original standard due to a medical condition or for whom it is medically inadvisable to try to satisfy the original standard for activity-based programs.

ADA Wellness Program Considerations for COVID-19 Vaccines

Wellness programs that are subject to the ADA (i.e., those that include a medical exam or disability related inquiry) must, in addition to offering a reasonable alternative standard, where applicable, be "voluntary." This means, the reward for participating in a wellness program must not be so great as to compel someone to participate. Further, for a health-contingent wellness program, the reward cannot exceed 30% of the cost of employee-only coverage (if 30% of the cost of the family coverage if spouses and dependents can participate). Rewards include financial rewards (e.g., premium discounts, rebates, or modifications of otherwise applicable cost-sharing amounts such as copays, deductibles, or coinsurance) and non-cash rewards (e.g., gift cards, electronic devices, etc.). If tobacco use prevention is part of the program, the reward may be as high as 50% of the cost of coverage. (Note that the reward for the non-tobacco use portion of the program cannot exceed 30% of the cost of coverage.)

For purposes of the COVID-19 vaccine, some employees are not eligible to receive the vaccine because they have certain health risks or other health factors. In such case, the employer must offer a reasonable alternative standard for employees to meet. Furthermore, if the employer intends to ask employees why they are not receiving the vaccine, this would be a disability related inquiry and the program must be "voluntary" for employees. Whether a program is "voluntary" is a facts and circumstances determination and should be made in on an individualized basis. Moreover, if the employer intends to apply a premium differential for employees who are not vaccinated, the program will have to comply with the 30% cap (or 50% if the program also includes tobacco cessation).

Other Considerations

In addition to the above, GINA wellness program regulations may also be implicated if an employer receives too much information when substantiating that an employee received the vaccine, or employees must explain that they are not eligible to receive a vaccine due to health or risk factors. Like under the ADA wellness program rules, wellness program participation must be "voluntary," under GINA, which means the employer's incentives for

[3] Health-contingent wellness programs must meet several different requirements; however, this memorandum is not intended to fully address all compliance requirements for wellness programs. If an employer has concerns about the design of a wellness program, they should work with counsel to ensure it is properly designed.

receiving the vaccine must not be so great as to make the employee feel compelled to participate.

Unfortunately, at this point, it is unclear what amount of incentive would make participation involuntary given the EEOC's recent withdrawal of the proposed wellness regulations, which limited incentives for certain wellness programs to a de minimis amount. Until new regulations are implemented, if the ADA and/or GINA are implicated, employers should take a reasonable approach in evaluating their program to ensure the program is truly voluntary for employees.

Additionally, religious exemptions under Title VII may also apply if an employee must explain why they are declining the vaccine.

For applicable large employers (ALEs), for purposes of the Affordable Care Act ("ACA") a wellness incentive or surcharge may impact affordability, as wellness incentives (other than solely related to tobacco use) are treated as unearned for purposes of determining whether coverage is "affordable" under the Affordable Care Act, and employees are treated as having to pay the surcharge for "affordability" purposes.

Finally, employers should consider any state or local privacy or other laws that may prohibit, limit, or impact any vaccine mandate or incentive program offered by the employer.

Conclusion

Large employers should be on the lookout for the OSHA ETSs and, in the meantime, discuss how they intend to implement the mandate once effective – whether the employer will offer a vaccine and testing blended approach to accommodate employee preference, or whether the employer will outright mandate the vaccine for all employees (taking into consideration any necessary, reasonable accommodations). Small employers may continue to evaluate the approach they intend to take, if any.

If large or small employers intend to implement incentives, they should consider the EEOC's guidance, applicable federal, state, and local laws, and any potential employee relations issues they may face as they evaluate their options.

For purposes of a mandate, employers should be mindful of the ADA, Title VII, GINA, and applicable state or local laws, and should engage in an individualized analysis of the facts and circumstances of each unvaccinated employee with counsel. Further, small employers should ensure any vaccine requirements serves some business purpose. For example, if an employer has a mostly remote workforce and remote employees do not engage in business travel or directly engage with clients, requiring the vaccine would not likely serve a business purpose.

If employers choose to incentivize receipt of the vaccine, either with cash or other gifts or by creating premium differentials for individuals who show proof of receiving the vaccine, they should ensure the program, or any incentives offered for receiving the vaccine, complies with all applicable laws and regulations and are offered through a bona fide wellness program meeting all wellness program regulations.

We recommend employers work directly with counsel when designing or implementing wellness programs or making employment termination decisions (for those implementing a mandate).

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