

Altshuler and Spiro

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To: Business Owner Clients of Altshuler and Spiro:

From: Bruce J. Altshuler

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Re: Memo on Vaccine Mandates in the Workplace

Greetings Business Clients and Professionals:

My most frequent legal question this year has been whether an employer can mandate vaccinations among their employees. Rather than provide individual advice, I decided to send a summary to everyone.

<https://abcnews.go.com/US/lawsuits-covid-19-vaccine-mandates-fail-experts/story?id=80438188>

The article (link above) reflects the employer vaccine mandates are being universally upheld by our courts. If you are receiving this notice by mail, the article is enclosed. Of late, many of my clients have asked me if they can impose a vaccine mandate or terminate and I have advised them they can force the issue if that is what they want, including termination or leave.

The following is the EEOC directive on the same issue:

COVID-19 Vaccinations: EEOC Overview:

“K.1. Under the ADA, Title VII, and other federal employment nondiscrimination laws, may an employer require all employees physically entering the workplace to be vaccinated for COVID-19? (5/28/21)

The federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA and other EEO considerations discussed below. These principles apply if an employee gets the vaccine in the community or from the employer.

In some circumstances, Title VII and the ADA require an employer to provide reasonable accommodations for employees who, because of a disability or a sincerely held religious belief, practice, or observance, do not get vaccinated for COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer's business.

The analysis for undue hardship depends on whether the accommodation is for a disability (including pregnancy-related conditions that constitute a disability) (see K.6) or for religion (see K.12).

As with any employment policy, employers that have a vaccine requirement may need to respond to allegations that the requirement has a disparate impact on—or disproportionately excludes—employees based on their race, color, religion, sex, or national origin under Title VII (or age under the Age Discrimination in Employment Act (40+)). Employers should keep in mind that because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others, some employees may be more likely to be negatively impacted by a vaccination requirement.

It would also be unlawful to apply a vaccination requirement to employees in a way that treats employees differently based on disability, race, color, religion, sex (including pregnancy, sexual orientation and gender identity), national origin, age, or genetic information, unless there is a legitimate non-discriminatory reason.”

In other words, if you are imposing a mandate, it has to be across the board and not just some.

So far, there has been little resistance among my clients' employees and only two resignations that I know of but one person has yielded and already asked for his job back. Some have imposed the restriction because they are working in government projects in California and their customers or the government entity insist. One client company had employees threaten not to return to work until everyone was vaccinated at work. So that did it for this client in WLA. We imposed the mandate for our law firm staff also.

One client simply gave a \$200 bonus to every employee who had already been vaccinated and to anyone getting vaccinated and that did not work so they imposed a mandate plus the bonus and that finally got the figure to 100% for 12 employees. I do not recommend paying folks to get vaccinated, but if you do so, don't just pay the holdouts.

I have one property owner who would not rent to any tenant until they show they have been vaccinated. These are high end apartments. LA Rent Control approved of the requirement. In fact, many applicants for this landlord (all 6 of his buildings) considered that a plus. They cannot make current residents vaccinate. I said 'no' because no judge would evict an existing tenant for that reason especially with the moratorium. It is different when there are employee layoffs as the sanction as the employer can impose a workplace mandate based on overwhelming authority.

I have heard that EDD has been turning down folks for unemployment who are discharged who won't vaccinate, lose their jobs and apply for unemployment. So, if you need to impose a mandate, you will have legal cover. If an employee is terminated for failing to vaccinate, make certain you oppose the unemployment application.

The *Jacobson v. Massachusetts case* in 1905 which mandated Small Pox vaccinations for Massachusetts' residents was upheld by the US Supreme Court for public safety more than a century ago and is the legal basis for vaccine mandates. A more difficult issue is a claim for a religious exemption. If every employee asserted a religious exemption, a mandate could be easily avoided. See attached article. A common claim is the fetal cell line objection, which components are used in most common medications including aspirin and Tylenol. If the employee uses those and other drugs listed in the article (including Tum's) the religious exemption claim cannot hold up. An employer may question a religious claim (see attached NPR article) to test their sincerity. All of them will surely fail the fetal cell objection because those components are everywhere.

A claim that one is allergic or is in jeopardy due to a Covid vaccine would require a medical doctor's confirmation.

I hope this memo guides all of you. If you have any questions just call me for advice.

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