



Ep. 2: Employment Law: Can Employers Require Workers to Get Vaccinated?

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Music & Legally Qualified Intro Voiceover: Welcome to RumbergerKirk's Legally Qualified Podcast, where we answer important questions facing businesses today and discuss hot topics in the legal industry. From employment law to commercial litigation, product liability and everything in between, we've got it covered.

Sally Culley: Hi everyone. I'm Sally Culley. I'm a partner in RumbergerKirk's Orlando office, and my practice is in employment law and commercial litigation. With me today is my partner Chase Hattaway, who also practices employment law in RumbergerKirk's Orlando office.

Chase Hattaway: Hey Sally, great to be here.

Sally Culley: Today we'll be discussing employer's ability to require vaccination, particularly the COVID vaccine. Chase has been researching and writing quite a bit on this issue, and he's going to bring us up to speed on what the law is, what employers will want to consider when making decisions about the vaccine and suggestions for best practices. It's hard to believe that the pandemic has been ongoing for almost a year now. At the time of this recording, the rollout of the Coronavirus vaccine is still at its earlier stages with vaccines only going out to the most at risk populations. Including frontline workers in healthcare, first responders and those over 65. But we

hope and expect that that will change in the coming weeks and months. And as the vaccine becomes more readily available, businesses are going to have questions about what they can legally require of their employees. Chase, thank you for joining me today. Let's jump right in with the million dollar question businesses want to know. Can an employer legally require its employees to get the Coronavirus vaccine?

Chase Hattaway: So the short answer is most likely yes, but that comes with some caveats. First, it's worth noting that the COVID-19 vaccines were approved under an emergency use authorization or EUA, rather than full FDA approval. Under the EUA, recipients of the drug must be informed that they "have the option to accept or refuse administration of the product."

Now, some are arguing that this language precludes private employers from requiring employees to take the drug. But this language really seems to be directed at government entities, not private entities, and the statute doesn't actually state that employers can't terminate employees who refuse a drug approved under the EUA. So, while I think it's unlikely that the EUA precludes an employer from terminating an employee for refusing the vaccine, this hasn't been tested in the courts and so, I think, employers should at least be aware of the issue.

Setting that issue with the EUA aside, the real concern, I think, with respect to requiring employees to take the vaccine concerns discrimination claims. Fortunately, though, the EEOC recently issued guidance that says that employers can generally require employees to receive vaccinations for COVID-19. This right though isn't without limitations, though. And I think employers should be really careful in stringently enforcing policies that require employees to receive vaccinations.

The Americans with Disabilities Act which prohibits discrimination against disabled employees, and Title 7, which prohibits discrimination on account of religion and pregnancy, among other things, are still applicable to employers

seeking to require employees to receive vaccinations. And so employers need to keep those employees in mind when thinking about requiring employees to take the vaccine.

Sally Culley: Chase, you've mentioned the ADA, which as we know can require a business to provide reasonable accommodations for employees who have qualifying medical conditions. Are you saying that an employer may have to provide a reasonable accommodation for an employee who declines the vaccine for medical reasons?

Chase Hattaway: Yeah, I think that's true unless it imposes an undue hardship for the employer.

Sally Culley: So I thinking that through, one accommodation might be as simple as not requiring an employee with a qualifying medical condition to get the vaccine. Is that right?

Chase Hattaway: Yeah, releasing the employee from the obligation could be one accommodation, sure.

Sally Culley: Or maybe allowing unvaccinated employees to continue to work from home or work in a separate area in the office. For example, I've heard that hospital employees who opt out for certain reasons may be assigned alternate work conditions for the sake of safety. So ultimately applying the ADA analysis the key would be to think through if there are any accommodations that are reasonable and wouldn't pose an undue hardship for the employer.

Chase Hattaway: Yeah, I agree with that. And your example of the healthcare highlights something else that I think is important to keep in mind. If an employee declines to receive the COVID vaccine due to a health condition, the employer should consider whether that employee creates a direct threat to the health or safety of other employees or members of the public with whom the unvaccinated employee will come into contact.

The EEOC's guidance on this says that there are four factors that should be considered in doing this risk assessment. Number one, the duration of the risk. Number two, the nature and severity of the potential harm. Number three, the likelihood that the potential harm will occur. And then number four, the imminence of the potential harm. If there is a direct threat and a reasonable accommodation exists, like the hospital nurse who may be able to work in another area or have a change in duty, then that might resolve the matter.

But if there are no reasonable accommodations available without undue hardship, say for a nurse who works in a small medical office where there's no way to separate the nurse from in person patient care, then employers may be permitted to terminate the employees who cannot or will not receive the vaccine.

Sally Culley: So that answers my original question regarding whether an employer can terminate an employee for refusing to get the vaccine, at least under the ADA. What about employees who decline the vaccine for religious reasons?

Chase Hattaway: So the analysis is largely the same for religions exemptions under Title 7. Employers should look for a reasonable accommodation. For example, maybe the employee can work remotely, or maybe the employee can work in another location. Ultimately if no reasonable accommodation exists, then the employer may be permitted to terminate an employee who cannot receive the vaccine because of a religious objection.

Now that being said, I strongly recommend that employers try to avoid terminating an employee who declines the vaccine, whether for medical or religious reasons. Because there could be a strong risk of that employee bringing a discrimination claim.

Sally Culley: Can you explain that? What does this have to do with discrimination claims?

Chase Hattaway: Yeah, so if an employer fires employees because they refuse to get the vaccine, those employees may claim that they're being discriminated against because of their religion or because of their disability. Even if there's no factual basis for such claims, it's going to take time and money to defend them. And so termination really should be an option of last resort.

Sally Culley: But for employers who are having to decide what to do and whether to require the Coronavirus vaccine, is there any history of precedent that they can look to for guidance on how to make that decision?

Chase Hattaway: There is. While this feels new to everyone, it really isn't because the EEOC's guidance regarding the flu vaccine is basically the same. So looking at an employer's policies regarding the flu vaccine is a good place to start. Now that being said, as a practical matter, people generally look at the Coronavirus vaccine differently than the flu and for good reasons, right. The flu vaccine has been around longer and COVID-19 is perceived as being much more serious than the flu.

Sally Culley: I'm glad you mentioned that Chase. I would think that there may be employers who would want to require a COVID vaccine even if they haven't in the past required the flu vaccine. Can they do that?

Chase Hattaway: Yeah, I see no reason why they wouldn't be permitted to do that, especially given the seriousness of COVID-19.

Sally Culley: So if an employer requires its employees to get a vaccine, whether it's the flu vaccine, the COVID vaccine or any other vaccine, would you recommend a written policy?

Chase Hattaway: Absolutely. Every employer who requires its employees to get a vaccine should have a written policy specifically addressing that requirement. The policy should provide clear expectations about what's required, why it's required and when certain

exemptions may be given to employees for religious or health reasons. A little work on the front end can save a lot of hassle on the back end.

Sally Culley: And while we're talking about policies, I want to make sure that we mention that employers should always make sure to apply their policies consistently. That's a very important point I want to make sure doesn't get missed here.

Chase Hattaway: Yeah, that's right Sally. If an employer has a policy, it has to stick to it. Failing to stick to a policy may, again, actually open an employer up to discrimination claims. So be sure to keep enforcement of that policy consistent. For example, if you have a male employee and a female employee and you require the female employee to receive the vaccine but you let the male employee get away with not getting vaccinated just because he doesn't feel like it, that female employee might have a discrimination claim, right. She could say, hey, you're treating me, the female employee differently than the male employee.

And there may be other things going on and perhaps the employer can show it wasn't really discrimination. But why open yourself up to a claim like that? You can prevent claims like that by simply enforcing the policy and the exemptions to the policy consistently. Which may unfortunately mean requiring employees to get the vaccine who really don't want to get it.

Sally Culley: Let's talk about the potential consequences of enacting a policy that requires all employees to get the Coronavirus vaccine. I imagine that there could be some serious resistance from employees who don't want to get the vaccine or would like to wait to do so until they feel more comfortable. Given the studies showing that a lot of people don't want the vaccine, I saw one recently that found that 20% of adults are pretty certain they won't get it. An employer may find itself in a real predicament if a large part of the workforce refuses the vaccine even though they can't show that they are exempted for religious or medical reasons. What does an employer do about those employees, fire them all?

Chase Hattaway: I suppose they could fire them all, but I don't think that's the best approach. And I'd caution my clients against doing that. Depending on the business that the employer is in and the potential safety concerns, it may be better to simply encourage the employees to get the vaccine rather than requiring them to do it.

Sally Culley: Can you give us some examples where it would make more sense to encourage employees to get the vaccine rather than mandating it?

Chase Hattaway: Yeah, so if you're a small business with employees working in individual offices and no interaction with the public, or if you can make other accommodations, like having employees work from home, you may not need to require your employees to get vaccinated. And the resistance you'll get from employees who don't want to get the vaccine may not be worth it.

Now on the other hand, if you're in the medical field or have employees that have to interact with the public, so I'm thinking schools, restaurant, retail, for example, you may decide that it's really necessary for your employees to receive the vaccine. But the bottom line is that if an employer decides that it doesn't need to require vaccines and/or suspects that it won't go over well with employees, that employer may be better off just encouraging employees to take the vaccine rather than requiring them to do it.

Sally Culley: Let's talk about this encouragement. How can an employer encourage its employees to get the COVID vaccine?

Chase Hattaway: A lot of employers have implemented programs to encourage employees to get the flu vaccine, and they can do the same types of things to encourage that Coronavirus vaccine. Once the vaccine is available, employers will hopefully be able to make arrangements for a nurse to come into the workplace and administer the vaccine, so it is convenient and easy for employees to get it.

Also gift cards can be a good incentive or covering the cost of the vaccine or providing a catered lunch to those who are getting the vaccine. Even just providing information about the vaccine from the CDC can be helpful to employees who are uncertain or nervous about taking the vaccine. Encouraging employees to receive the vaccine doesn't implicate the ADA or Title 7 like a vaccine mandate does.

Sally Culley: I'd like to switch gears now and talk about liability concerns. Another issue that employers may be worried about is that if they require the vaccine and an employee develops a severe side effect or has a bad reaction to it, can the employer be held liable for that?

Chase Hattaway: An employee who is required to take the vaccine and then has a medical issue as a result might file Workers' Compensation claim to recover their medical bills and lost wages. I don't think it's necessarily settled as to whether that type of claim would work. Fortunately though severe side effects seem to be relatively rare. Those who have had reactions have complained about feeling under the weather for a day or two. But there haven't been widespread issues requiring vaccinated people to seek medical treatment and incur medical bills. So hopefully this isn't an issue.

Sally Culley: Okay, so what about the flip side of that coin? Let's say an employer does not require vaccinations, but relies solely on encouragement for their employees to get them. Is there any potential liability there?

Chase Hattaway: I think that's really unlikely. There doesn't seem to be a strong reason to believe that courts would impose a legal duty on employers to require employees to get vaccinated. The EEOC doesn't require it, and the CDC doesn't require it. So it doesn't seem like a court would require it either. That said, businesses and employers should obviously comply with EEOC and CDC guidelines. And so, for example, businesses should continue to socially distance and mandate face masks where appropriate, et cetera.

Sally Culley: Well, we've covered a lot today. Let's put this all together. What's the takeaway? How do employers figure out what's the best thing to do for their businesses and go about determining a plan that also works for their employees?

Chase Hattaway: So first, I think employers need to figure out if they really need to require employees to take the vaccine. A small office where employees work in separate offices and don't come into contact with the public may not need to require employees to receive the vaccine. On the other hand, a medical office where employees work closely with one another and have face-to-face contact with patients, may be a situation where a vaccine is really needed.

Ultimately though I think the first step is figuring out if a vaccine requirement is really necessary. Second, consider your workforce. If it isn't absolutely necessary to require employees to receive the vaccine, then think about how this is going to go over with your employees. Even if you can require employees to receive the vaccine, that's probably not the best approach if you know that your employees are going to be really upset with the rule. In that situation an employer may be better off simply encouraging employees to receive the vaccine, rather than requiring them to take it.

And then third, if you ultimately determine that you need to require employees to take the vaccine, prepare a written policy. And again, it should be detailed about what's required of employees and when employees will be exempted. And you've got to give the policy to employees and then apply it consistently and uniformly.

Sally Culley: Thank you Chase. This has all been really informative. I appreciate and I'm sure everyone listening today appreciates your assistance with weeding through this issue that's certainly going to be on the minds of all employers in the coming months.

Chase Hattaway: Yeah, I agree. This is certainly an important topic for employers to consider, and I really appreciate the opportunity to talk with you about it.

Sally Culley: For all of our listeners out there, thank you for spending some time with us today. If you have more questions about requiring vaccinations or any other employment concerns, you can email us at info@Rumberger.com.

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