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COVID-19 Vaccine Policies For Oil and Gas Employers

By Annette Idalski and Brian Smith

The COVID-19 pandemic of 2020 and 2021 has presented numerous challenges for employers attempting to balance employee and customer safety and business operations. With the introduction of three vaccines that could greatly reduce or halt COVID-19 cases, the light at the end of the tunnel seems to be approaching. As employers contemplate reopening at full capacity and re-hiring employees, many must ask the question – “may we require employees to be vaccinated?” This is of particular importance in the oilfield, where many duties cannot be performed remotely.

The short answer is yes. Employers can mandate their employees be vaccinated as a requirement to return to work but must be mindful of various legal issues which may arise.

On December 16, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) issued “Technical Assistance” addressing questions regarding the administration of COVID-19 vaccines to workers. The “Technical Assistance” provides several key takeaways of use to employers: 1) “the vaccine itself is not a medical examination” for purposes of the Americans with Disabilities Act; 2) some “pre-screening questions may implicate the ADA’s provision on disability-related inquiries”; 3) employers can “request proof of receipt of a COVID-19 vaccine; and 4) employers must be prepared to engage in an individualized assessment of any employee’s disability-related concerns or sincerely held religious beliefs, and if necessary, offer a reasonable accommodation. In other words, employers may mandate the COVID-19 vaccination but must be careful with respect to any medical questions asked and be prepared to explore whether reasonable accommodations might be necessary for employees covered by Title VII and the ADA who refuse the vaccine.

What is reasonable accommodation? An accommodation is reasonable so long as it does not cause undue hardship for the employer. In the oilfield, reasonable accommodations may be challenging because “fieldwork” cannot be performed remotely in many instances, and safety concerns may prevent the constant use of face coverings or respirators. Thus, employers may encounter a situation in which a large number of employees refuse to be vaccinated, and no reasonable accommodation exists, which does not present an undue burden to the employer, leading to turnover.

In addition, mandatory vaccination policies may lead to increased litigation and potential morale issues. Recently, in *Horvath v. City of Leander*, the Fifth Circuit considered a case involving an employee who refused a mandatory tetanus and TDAP vaccine. In *Horvath*, the employee refused the vaccine mandate based on a religious objection, and following his refusal of several accommodations proposed by his employer, was discharged. The accommodations proposed included (1) reassignment to a position not requiring a vaccine or (2) the ability to remain in the employee’s current position but wear a respirator daily. The district court granted summary judgment to the employer, which was affirmed by the Fifth Circuit. In its ruling, the Fifth Circuit specifically noted that an accommodation need not be an employee’s preferred accommodation to be reasonable, and the employer did not violate the law for discharging an employee who refused a reasonable accommodation. While *Horvath* demonstrates the risk associated with mandatory vaccination policies, it also provides a preview of practices endorsed by the Fifth Circuit in the event an employee refuses vaccination.

Ultimately, just because available guidance indicates employers may mandate COVID-19 vaccination, employers should consider carefully if the needs of the business justify the risks associated with such a policy. Alternatives, such as voluntary vaccination or encouragement of vaccination, are also available to employers and should be strongly considered.

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