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PRACTICE TIPS

BY: KAREN DAY WHITE,
Executive Counsel, Louisiana Municipal Association

Mandatory Employee Vaccinations: Complexities Abound

As someone who receives thousands of questions seeking technical assistance each year, I am keenly aware of how frustrating it can be when the response to a seemingly simple inquiry turns out to be a complicated flowchart of possible resolutions. Ancient philosopher and mathematician Pythagoras (yes, he of theorem fame) noted, "The oldest, shortest words – 'yes' and 'no' – are those which require the most thought." Attempting to answer questions about employer-mandated vaccines is perfect proof that our Greek friend knew what he was talking about.

Because the protection of fundamental employee rights - as articulated by a complex network of federal legislation - falls under their purview, the Equal Employment Opportunity Commission (EEOC) is generally the authority on the matter. On December 16, 2020, the EEOC issued revised pandemic guidance in which they conclude that employers generally can mandate that employees receive an FDA-approved vaccine. But that conclusion, as you will see, has a laundry list of caveats attached.

The most significant limitation on mandated vaccinations is the employer's obligation to properly consider the requests of employees who seek exemption from vaccination requirements due to medical conditions under the ADA or sincerely held religious beliefs under Title VII of the Civil Rights Act. In both cases, there are multiple tiers of analysis that must be performed on a case-by-case basis.

For example, after determining that an employee has a qualifying disability under the ADA, the employer must then embark on a series of inquiries, each of which requires careful examination of several factors. Would the unvaccinated employee pose a direct threat due to a significant risk of substantial harm to the health or safety of others? If so, is there a way to provide a reasonable accommodation that would eliminate or reduce that risk to an acceptable level? If not and the employer chooses to exclude the employee from the workplace, are there other federal protections that prevent termination or would require that they be allowed to work remotely?

Similarly, if an employee asserts that a sincerely held religious belief, practice, or observance prevents them from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act. While "religious belief" is broadly interpreted, the employer may request information to support the claim if they have an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance.

Another concern is whether the pre-vaccination screening questions would trigger the provisions of the ADA or the Genetic Information Nondiscrimination Act (GINA). Depending on how those questions are constructed, they may constitute "disability-related inquiries" regulated by the ADA or may elicit genetic information (such as family medical history) protected by GINA. The good news is that these concerns are irrelevant when the screening and vaccine administration are conducted by a third party not controlled by the employer, such as a pharmacy or healthcare provider. If you plan on administering the vaccine directly or through a contracted healthcare provider, be very careful about those screening questions.

An employer may ask an employee if they have already been

vaccinated and if the response is affirmative, the employer may also ask for proof of vaccination. If the response is "no," however, the employer generally cannot ask the employee why they have not received the vaccine without triggering ADA protections.

Given the complicated nature of a mandatory vaccine program, is it really worth it? With recent polls indicating that a significant percentage of Americans prefer not to receive the COVID-19 vaccine, employers who want to require employee vaccinations should be prepared to deal with substantial resistance. Many employers are choosing instead to dedicate their time and legal resources toward developing a vaccination incentive program to encourage voluntary participation. Similar programs have been developed to incentivize healthy eating habits, smoking cessation, and frequent exercise, and those programs have been largely successful.

Though the supply of vaccines is currently limited, and distribution is in the beginning stages, now is the time to consider your approach and carefully develop the necessary rules and processes, regardless of which strategy that your municipality intends to adopt.

Editor's Note: the information provided in this column is not a replacement for consultation with your own municipal attorney, and it should not be considered legal advice for any particular case or situation. This note was originally published in Volume 86, Issue 2 (February 2021) of the Louisiana Municipal Journal, and is reprinted with permission.



Karen Day White is Executive Counsel for the Louisiana Municipal Association. She joined LMA in 2004 as liability defense counsel, providing legal services for members of the LMRMA self-insurance fund and handling litigation from claims investigation to appellate work at the Louisiana Supreme Court. As Executive Director, she supervises LMA's Membership Services Department, including legislative advocacy, conferences, government and public relations, and education and training. Prior to her work at the LMA, Karen was an Assistant Attorney General at the Louisiana Department of Justice in the Gaming Division, specializing in litigation and compliance. She is a graduate of LSU Law School.

