



Municipal Excess Liability Joint Insurance Fund

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BULLETIN – URGENT

TO: All Members

FROM: Fred Semrau, Fund Attorney

DATED: January 14, 2021

RE: Mandatory Vaccination of Employees

In response to the dissemination of COVID-19 vaccines, we anticipate several policy decisions as to whether or not vaccinations should be a mandatory requirement.

In view of very important policy consideration for each member, we have consulted with the MEL Safety Director, Executive Directors of our Member Funds and Labor expert, Matthew Giacobbe, Esq.,

We hereby enclose an important legal memorandum outlining critical information including important legal considerations for our members relating to vaccinations and we encourage that you forward a copy of this memorandum to your legal counsel for advice, consideration and direction.

The MEL Safety Institute will be scheduling a webinar for further discussion regarding vaccines policy considerations and its impact on our members.

Again, we urge that you forward this critical legal information to your legal counsel so that they can advise you in a manner to protect the interest of your public entity.

To: Member Entities

From: Matthew J. Giacobbe, Esq. and Nicholas DelGaudio, Esq.

Re: Mandatory Vaccinations of Employees

Introduction

The following is guidance on whether a public employer is permitted to mandate that its employees receive a COVID-19 vaccine when such vaccines becomes widely available to the general public.

The most prudent course of action for municipalities is to defer to the State and/or Federal government on the topic of mandatory vaccinations in order to avoid potential legal claims. Municipalities are strongly encouraged to share and review this memorandum with legal counsel. In addition, before instituting any vaccination policy and before taking any action against any employee with regards to the issues discussed herein, it is important to consult with your labor and/or general counsel, and review all applicable ordinances, collective bargaining agreements, and policies.

To date, there have not yet been any state or federal laws or regulations passed specifically governing the issue of employer-mandated COVID-19 vaccinations. Presently, there is a state law empowering the New Jersey Commissioner of Health to require vaccinations against infectious disease during a public health emergency. N.J.S.A. 26:13-14. At this time, the Commissioner has not exercised such power.

However, if you are considering mandating the COVID-19 vaccine, the following are some significant legal issues that must be carefully considered.

Legal and Constitutional Issues Concerning Mandatory Vaccinations

Guidance recently issued by the Equal Employment Opportunity Commission (“EEOC”) on its website¹ regarding COVID-19 vaccinations, as well as prior guidance that the EEOC has issued²

¹ <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

on mandatory vaccinations, indicates that employer-mandated vaccinations are generally permissible, subject to exceptions for disability and religious purposes. The EEOC explained that if an employer can show that unvaccinated employees would pose a direct threat to the health or safety of individuals in the workplace, then a vaccine may be mandated for attendance at the workplace and unvaccinated employees may be excluded from the workplace.

Medical Exceptions to Mandatory Vaccinations

It is anticipated that many employees will indicate that they cannot receive such vaccine due to a disability. Pursuant to the Americans with Disabilities Act (“ADA”) and the New Jersey Law Against Discrimination (“LAD”), an employee with a medical condition preventing them from safely receiving the COVID-19 vaccine may qualify for a reasonable accommodation. Similarly, pursuant to Title VII of the Civil Rights Act of 1964 (“Title VII”), an employee who has a sincerely-held religious belief or practice that prevents them from receiving the vaccine may also qualify for a reasonable accommodation, subject to certain restrictions.

As it relates to an employee with a disability, pursuant to the ADA, LAD and EEOC guidance, the employer may deny an accommodation request and exclude an employee with a disability from the workplace if granting the accommodation would cause an undue hardship on the employer or if the unvaccinated employee would pose a direct threat due to a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” 29 C.F.R. 1630.2(r).

The EEOC advises employers to make an assessment of four factors in determining whether a direct threat exists: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm. The EEOC goes on to explain:

A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite. If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.

If there is a direct threat that cannot be reduced to an acceptable level through reasonable accommodation, then the employer can exclude the employee from entering the workplace. As the EEOC notes, this does not mean the employer can automatically terminate the worker, as the worker may be protected under other laws, including leave laws. In addition, even if the employee is excluded from the physical workplace due to an inability to accommodate a request to be exempt from a vaccination requirement, the employee may still be entitled to accommodations like performing their work remotely.

² <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

The EEOC explains that employers and employees should engage in an interactive process to identify any accommodations:

Employers and employees should engage in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship (significant difficulty or expense). This process should include determining whether it is necessary to obtain supporting documentation about the employee's disability and considering the possible options for accommodation given the nature of the workforce and the employee's position. The prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration... Employers may rely on CDC recommendations when deciding whether an effective accommodation that would not pose an undue hardship is available.

There are additional concerns under the ADA when an employer decided to administer the vaccine to its employees itself or through a third-party contracted by the employer. EEOC's recent guidance provided that such employers are not considered to be conducting a medical examination within the meaning of the ADA. The guidance specifically states that "[i]f a vaccine is administered to an employee by an employer for protection against contracting COVID-19, the employer is not seeking information about an individual's impairments or current health status and, therefore, it is not a medical examination." However, the pre-vaccination screening questions may elicit information about a disability. As the EEOC explains:

This means that such questions, if asked by the employer or a contractor on the employer's behalf, are 'disability-related' under the ADA. Thus, if the employer requires an employee to receive the vaccination, administered by the employer, the employer must show that these disability-related screening inquiries are "job-related and consistent with business necessity." To meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others."

Simply requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry. The EEOC advised that "[i]f an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own health care provider, the employer may want to warn the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA." Similarly, if the employer requires employees to provide proof of vaccination from their own health care provider, the employer should warn the employees not to provide genetic information as part of the proof, in order to avoid violation of the Genetic Information Nondiscrimination Act (GINA), which prohibits employers and other entities from requesting or requiring genetic information of an individual or family member of the individual.

Religious Exceptions to Mandatory Vaccinations

A similar analysis to the above for employees with disabilities will apply for employees that seek exemption or reasonable accommodation from the vaccine requirement due to a sincerely-held religious belief, practice, or observance. Just as with employees with disabilities, the EEOC advised that employers determine whether there is a reasonable accommodation that will allow the employee to continue to perform the essential functions of their position despite their inability or unwillingness to vaccinate due to their religious beliefs, unless it would pose an undue hardship under Title VII (which is more than “de minimis cost” to the operation of the employer’s business, a lower standard than the ADA’s undue hardship standard).

It is important to note that each employee’s accommodation request is fact-specific and employers need to work with the employees regarding potential exemptions for disability or religious reasons. As discussed above, some of the factors that the employer needs to consider when deciding whether to grant an accommodation and whether or not to allow an unvaccinated employee into the workplace include the nature of the workforce and the employee’s position, the prevalence in the workplace of employees who have already received a COVID-19 vaccination, and the amount of contact with others whose vaccination status could be unknown.

The employer should generally assume that an employee’s request for religious accommodation is based on a sincerely-held religious belief. If the employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer may request additional supporting information from the employee. However, public employers should use caution and not delve too far into an employee’s stated religious beliefs or require that the beliefs be from a particular religious organization in order to avoid violations of the Establishment Clause.

As it relates to religious accommodation for vaccinations in New Jersey, the State’s Appellate Division dismissed at least one case in which an employee challenged an employer’s mandatory vaccination policy that allowed religious exemptions as discriminatory against non-religious individuals under the New Jersey Law Against Discrimination. Brown v. Our Lady of Lourdes Med. Ctr., Inc., No. A-4594-14T2, 2016 WL 5759654 (App. Div. 2016) (finding that non-religious employee challenging policy as discriminatory was not subject to LAD’s protections).

Similarly, the Third Circuit has held that to state a claim under Title VII in employment-related vaccination cases, the employee’s belief in opposition to vaccination must be based on a religious belief, and a non-religious opposition does not suffice. Fallon v. Mercy Catholic Med. Ctr. of Se. Pa., 877 F.3d 487, 490-491 (3d Cir. 2017) (it is not sufficient merely to hold a “sincere opposition to vaccination” as the individual must show that the “opposition to vaccination is a religious belief”). In assessing whether beliefs are religious, we consider whether they “address fundamental and ultimate questions having to do with deep and imponderable matters, are comprehensive in nature, and are accompanied by certain formal and external signs.” Id. at 491.

While public employers may have additional Constitutional concerns to consider when deciding whether to institute mandatory vaccinations, allowing religious accommodations in accordance

with the above guidance should satisfy one of the predominant Constitutional concerns raised by mandatory vaccinations, that of the First Amendment freedom of religion. Further, courts have upheld laws and policies mandating vaccinations for students for attendance at public schools against Constitutional challenge. See, e.g. Board of Ed. of Mountain Lakes v. Maas, 56 N.J. Super. 245 (App. Div. 1959) (holding that requirement that child be immunized before attending public school did not violate due process).

Workers' Compensation Issues Related to Mandatory Vaccinations

As to the issue of whether an employee that develops an adverse reaction from the vaccine after receiving it due to an employer mandate is then eligible for workers' compensation, New Jersey courts have typically found that employees that are injured while taking action that would normally not be considered arising out of or in the course of their employment due to an employer mandate are covered for purposes of workers' compensation.

For public safety workers, New Jersey passed a specific workers' compensation statute that applies to injuries arising from the administration of a vaccine. This statute at N.J.S.A. 34:15-31.6 provides:

Any injury, illness or death of any public safety worker, resulting from the administration to the worker of a vaccine including, but not limited to, smallpox vaccine, to prepare for, or respond to, any actual, threatened, or potential bioterrorism or epidemic, as part of an inoculation program in connection with the worker's employment or in connection with any governmental program or recommendation for the inoculation of workers in the worker's occupation, geographical area, or other category that includes the worker, or resulting from the transmission of disease from another employee or member of the public inoculated under the program, is presumed to arise out of and in the course of the employment and all care or treatment of the worker, including testing, diagnosis, surveillance and monitoring of the worker's condition, and all time during which the worker is unable to work while receiving the care or treatment, is compensable under the provisions of R.S.34:15-1 et seq....This prima facie presumption may be rebutted by a preponderance of the evidence showing that the administration of the vaccine is not linked to the injury, illness or death.

For purposes of this statute, a "public safety worker" includes a "member, employee, or officer of a paid, partially-paid, or volunteer fire or police department, force, company or district, including the State Police, a Community Emergency Response Team approved by the New Jersey Office of Emergency Management, or a correctional facility, or a basic or advanced medical technician of a first aid or rescue squad, or any other nurse, basic or advanced medical technician responding to a catastrophic incident and directly involved and in contact with the public during such an incident, either as a volunteer, member of a Community Emergency Response Team or employed or directed by a health care facility." N.J.S.A. 34:15-31.4.

We anticipate that there may be further guidance issued and/or legislation passed on the state and/or federal level on these topics as COVID-19 vaccinations get closer to widespread distribution to the general public.

For specific legal guidance on mandatory vaccination policies and how to address individual employee's issues concerning vaccinations, municipalities are encouraged to seek legal guidance from their legal counsel.