The COVID-19 Vaccine – Next Steps for Canadian Employers with U.S. Operations

December 30, 2020 – Cross-Border Counselor
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The United States is currently experiencing the largest surge in COVID-19 cases since the global health emergency began. In the past several weeks, the United States Food and Drug Administration ("FDA") granted emergency-use authorization to the Pfizer and Moderna COVID-19 vaccines, prompting employers to ask whether they may require employees to be vaccinated.

It is imperative that Canadian employers understand their rights and responsibilities with regard to the vaccination of U.S.-based employees.

A. *Can* Employers Require Employees to Receive the Vaccination?

Generally speaking, employers may disallow employees from entering the workplace if they have not been vaccinated, though employers must accommodate employees with disabilities or religious objections. On December 16, 2020, the Equal Employment Opportunity Commission ("EEOC") published guidance addressing the topic of COVID-19 vaccinations in the workplace. This guidance confirms that employers may lawfully require employee vaccinations as a condition of entry to the workplace, absent a disability or religious objection that would prevent the employee from being vaccinated. The EEOC also warns employers who seek to require vaccinations to be conscious of confidentiality requirements under the ADA, which would apply to any pre-screening questions asked prior to the vaccine being administered.

Employees may be protected from adverse employment actions by the Americans with Disabilities Act ("ADA") if they have a disability that would make vaccination dangerous or by Title VII of the Civil Rights Act of 1964 ("Title VII") if they have a religious objection to vaccination. Employers are prohibited from mandating employee vaccination as a condition of employment when an employee indicates that they are unable to receive the vaccine due to a disability (including an allergy to the vaccine or its ingredients) or because of a sincerely held religious practice or belief.

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If an employee reports that they are unable to receive the vaccination due to a disability, the EEOC has stated that employers should consider the request for accommodation (in the form of not requiring that employee to be vaccinated) and determine whether 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" using the EEOC's direct threat analysis. If the unvaccinated employee poses an unacceptable direct threat to the health and safety of others, they must assess whether a reasonable accommodation may be made for the employee, such as allowing the employee to work remotely or otherwise in isolation from others. Likewise, employers must assess whether reasonable accommodations can be made for employees who report that they are unable to be vaccinated due to a sincerely held religious belief.

Employers that decide to make vaccination a condition of employment should be prepared for requests for accommodation based on disability and religious beliefs, and update their accommodation procedures accordingly.

B. *Should* Employers Require Employees to Receive the Vaccination?

There are several factors for employers to consider in determining whether they should make vaccination a condition of employment, including vaccine availability, the cost of vaccination, whether their employees are unionized, and how the employer would respond to employees refusing to be vaccinated.

1. Vaccine Availability

Although the FDA has granted emergency-use authorization for two vaccines, supply is severely limited, with the first doses being distributed to health care providers and high risk individuals. As a practical matter, it is highly unlikely that companies will have access to sufficient doses of the vaccine to inoculate their entire workforce for quite some time. In the meantime, employers should consider alternatives to vaccination, such as continued remote work, social distancing, and mask requirements to address safety concerns in the workplace. If these measures are adequate, employers should consider delaying any plans to mandate employee vaccination until doses of the vaccine are more widely available.

2. Cost of Vaccination

Employers considering a mandatory vaccination program should also consider the practical burdens for the employer and employees. Specifically, employers should determine whether they will cover some or all of cost of vaccination. Likewise, employers should consider whether employees will be provided time to be vaccinated during their workday or whether vaccines will be provided on-site. Providing answers to these questions at the outset will ease some employee concerns and facilitate the smooth roll-out of a vaccination program.

3. Employer Response to Employee Refusal of the Vaccine

The COVID-19 pandemic is an increasingly polarizing and political issue in the United States, including stay-at-home orders, mask mandates, and most recently, vaccination. Some employees may see vaccination as in infringement on their individual liberties or a safety concerns given the vaccine's accelerated development and approval. Despite statements by public health officials, many Americans feel that the risk of adverse side effects outweighs the vaccine's benefits, or that the vaccine may not be effective at all.

Employers hoping to implement a mandatory vaccine program should consider how they will respond to an employee's refusal to be vaccinated. Employers may have to decide whether they are prepared to terminate employees who refuse the vaccine. Employers should reflect on the impact that terminating employees may have on their workplaces, including increased turnover, decreased employee morale, difficulty hiring amidst an ongoing pandemic, and other staffing issues. Employers requiring COVID-19 vaccination should clearly communicate their policies in advance of implementation, emphasizing their necessity and describing how they will be enforced.

4. Unionized Workforces

Employers with unionized workforces face additional considerations. If a collective bargaining agreement is silent on the topic of vaccinations and the agreement's Management's Rights clause does not afford the company discretion to mandate employee vaccination, employers are likely required to bargain with the union over a mandatory vaccination program. Additionally, employers must decide whether an employee's refusal to be vaccinated (subject to the exceptions discussed above) would constitute "just cause" for termination in anticipation for union grievances.

C. Takeaways

Absent a disability or religious objection issue with particular employees, U.S. employers will generally be able to make vaccination a condition of employment. However, employers should carefully consider whether doing so makes practical sense. Employers who make the vaccine a condition of employment before it is widely available or fail to take into account employee concerns regarding costs and safety may face a significant backlash from their workforce, even if that workforce does not have a basis for bringing legal claims. Likewise, employers hoping to implement a mandatory vaccination program should be conscious of the effect of any collective bargaining agreements in their workplaces. Most importantly, employers must determine how to enforce a mandatory vaccination program prior to implementation.

The best route for many employers will be to strongly encourage employees to get the vaccine once it becomes available and to lower barriers to vaccination by paying associated costs, rather than to make vaccination a strict requirement for continued employment.