



LEGAL BULLETIN – URGENT

TO: Fund Commissioners of the Atlantic County, Burlington County, & Gloucester Salem Cumberland Counties Municipal Joint Insurance Funds

FROM: David S. DeWeese, Fund Solicitor

DATED: January 19, 2021

RE: Mandatory Vaccination of Employees

Based upon several inquiries that we have recently received regarding the voluntary or mandatory requirement for employees to receive the COVID-19 vaccine, the Executive Director’s Office and I, in consultation with the MEL Safety Director, Executive Directors of other MEL affiliated Funds, and MEL Labor Law Attorneys, have determined that it is appropriate to provide guidance to our Member Municipalities on this matter as we anticipate Members may be required to make policy decisions as to whether or not employee vaccinations should be mandatory or voluntary.

Attached, is a Legal Memorandum which provides an analysis and important legal considerations for Member Municipalities to consider in making any policy determinations regarding the COVID-19 vaccine. This Memorandum was originally prepared by Matthew Giacobbe, Esq. & Nicholas DelGaudio, Esq. of the law firm of Clearly, Giacobbe, Alfieri, Jacobs, LLC.; however, was revised and augmented with additional information, by my office, for your use.

After you have thoroughly reviewed this Bulletin and the attached Legal Memorandum, each Member Municipality is encouraged to provide a copy of the Bulletin and Legal Memorandum to their Solicitor and/or Labor Counsel for their review and guidance prior to taking any action regarding this issue.

It is my understanding that the MEL Solicitor will be scheduling a webinar to provide further guidance and an opportunity for questions and discussion regarding the COVID-19 vaccine policy considerations and the legal ramifications for our Member Municipalities. Once this webinar has been scheduled, a notification will be sent to all members.

As a reminder, the attorneys for the MEL ELP Helpline are available to assist with any of your inquiries regarding these issues and any other Employment issues. The MEL Helpline Attorneys & their contact information is as follows:

David S. DeWeese, The DeWeese Law Firm, P.C., 609-522-5599
Jodi Howlett, Cleary Giacobbe Alfieri Jacobs LLC 732-583-7474
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Finally, as a reminder, there is funding available through each JIF’s EPL/Cyber Risk Management Budget that can be used to offset legal expenses incurred obtaining legal advice regarding this issue. Each members’ balance is included in the monthly agenda packet.

Thank you for your attention to this important matter, please do not hesitate to contact me if you have any questions.

CC: Risk Management Consultants & Municipal Clerks
File: ACM/BURLCO/TRICO/GEN/COVID 19 Tab: Vaccinations

Introduction

The purpose of this Legal Memorandum is to provide guidance to our Member Municipalities regarding the issue of whether a public employer should be mandating that their employees receive a COVID-19 vaccine when such vaccines become available.

It has been recommended that the most prudent course of action for Member Municipalities is to defer to the action by the State and/or Federal government on the topic of mandatory vaccinations in order to avoid potential legal claims from employees. Member Municipalities are strongly encouraged to share and review this Legal Memorandum with their Solicitors and/or Labor Counsel and obtain their guidance prior to taking any action regarding this issue. Prior to adopting any vaccination policy and prior to instituting any employment action against any employee with regard to the issues discussed in this Legal Memorandum, it is imperative that each Member Municipality consult with their Solicitor and/or Labor Counsel, and review all applicable Ordinances, Collective Bargaining Agreements, and Policies that may impact this policy determination.

To date, there have not been any State or Federal laws or Regulations passed and/or adopted which specifically address and govern the issue of employer-mandated COVID-19 vaccinations. There is an existing New Jersey State Law which empowers 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 of Health has not exercised her power under this statute.

If you are considering mandating that your employees receive the COVID-19 vaccine, the following are some significant legal issues which must be carefully considered and reviewed with your Solicitor and/or Labor Counsel.

Legal and Constitutional Issues Concerning Mandatory Vaccinations

Guidance was recently issued by the Equal Employment Opportunity Commission (“EEOC”) on its website¹ regarding COVID-19 vaccinations. In addition, prior guidance had also been issued by the EEOC on their website² regarding mandatory vaccinations, which indicates that employer-mandated vaccinations are generally permissible, subject to exceptions for disability and religious purposes. The EEOC explained that if an employer can establish 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.

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

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

Medical Exceptions to Mandatory Vaccinations

It is anticipated that many employees will indicate that they cannot receive the COVID-19 vaccine based upon a medical 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.

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 based upon 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: 1) the duration of the risk; 2) the nature and severity of the potential harm; 3) the likelihood that the potential harm will occur; and 4) the imminence of the potential harm. The EEOC guidance explains that:

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 a 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 such as performing their work remotely.

The EEOC explains that employers and employees should engage in an interactive process to identify any reasonable 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 indicates 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, it 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 receiving the 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

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 which shall require a similar analysis as set forth above for employees with disabilities. The EEOC has advised that employers must 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 be vaccinated based upon 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 a non-religious employee who was challenging the 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 a 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 unemployment 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). It does not cover "Essential Employees" under the Essential Employees Act (except for Public Safety Workers who are covered under both Acts). The statutory language provides for coverage irrespective of whether the program is voluntary or mandatory. The rebuttable presumption for this particular coverage is medically-based only. The only way that the employer could rebut the presumption would be with expert testimony that the vaccine is not linked to the injury, illness or death alleged. It is likely to be almost impossible to obtain such evidence, unless the allegations being made by the employee are so ludicrous that even common sense dictates that such allegation could not be related.

Other Potential Legal Consequences when Considering Mandating the Vaccine

If the Member Municipality is considering making the determination to mandate that employees receive the vaccine, there are many potential issues that should be reviewed and considered prior to making that determination. The first situation to be considered is if an employee does not claim a medical disability or religious exception for not receiving the vaccine, but the employee still refuses to receive the vaccine. Obviously, this circumstance will create many potential legal consequences associated with the employer's determination as to how they will handle the employee's determination not to receive the vaccine. As indicated previously, should the employer face this circumstance, they should immediately consult with their Solicitor and/or Labor Counsel, and they should review all of their Ordinances, Collective Bargaining Agreements and Policies that may impact the determination as to how to proceed. If and when this circumstance occurs, and the employer determines that the employee is to be excluded from the workplace based upon their refusal to receive the vaccine, the reasonable accommodation analysis detailed the Medical Exceptions section above must be followed. If no reasonable accommodation can be made, there is the potential that the employee's exclusion from the workplace will effectively be considered a suspension without pay. Obviously, if that occurs, that action will likely result in the employee taking legal action (Employment Practices Liability claims and Civil Rights claims) against the employer. There is the potential that these claims would be covered under the Employment Practices Liability policy and/or the General Liability policy; however, there is also the potential that some of these claims may be uncovered (i.e. back and future wage claims). If the Member Municipality mandates that employees receive the vaccine, there is also the potential that a reduction in the workforce or staffing issues will result from that determination based upon the number of employees who will assert that they should not receive the vaccine based upon a medical disability or religious exception and those who simply refuse to receive the vaccine. Again, these are all important considerations that each Member Municipality should review with their Solicitor and/or Labor Counsel prior to adopting any mandatory vaccine policy.

It is anticipated that there may be further guidance issued and/or legislation passed on the State and/or Federal level on these topics as the State proceeds with COVID-19 vaccination distributions.

For specific legal guidance on mandatory vaccination policies and how to address individual employee's issues concerning vaccinations, all Member Municipalities are encouraged to seek legal guidance from their Solicitor and/or Labor Counsel.