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Employment, Workers' Compensation and Waiver Questions - The COVID-19 Vaccine

Now that the COVID-19 vaccine is being distributed to hospitals, nursing homes and then other health care providers, questions are arising regarding an employer's right to require direct or indirect care employees to be vaccinated, whether workers' compensation waivers are allowed, and whether the side effects of the vaccine are covered under workers' compensation. The intent of this advisory is to provide you with our analysis and the latest guidance issued by the federal agency tasked with enforcing anti-discrimination laws, and preliminary answers to these questions because there could be federal or state legislation or other directives that will change the responses below.

Employers Can Require Employees to Be Vaccinated With Exceptions

In new guidance issued this week, the Equal Employment Opportunities Commission, which is the agency responsible for enforcing federal anti-discrimination laws, has indicated that an employer can require employees to get the COVID-19 vaccine as a condition of employment based on the public health emergency created by this pandemic, unless an employee declines because of a linked disability (e.g., severe allergic reaction risk) or a sincerely held religious belief (very few religions expressly prohibit vaccinations). The EEOC's guidance applies to employers generally and does not make any distinctions based on the nature of the employer's business. Based on this guidance, it is our opinion that a healthcare employer could require its direct patient care employees to be vaccinated as a condition of employment, as non-vaccinated employees would create a direct threat to patients. We believe the same answer would apply to direct care providers to residents, individuals or clients in the non-traditional patient care settings that arise for DDS or DMHAS agencies and DCP-governed companion agencies. This could arguably be applicable to other positions that interact with patients (e.g., custodial, dietary, discharge planners).

Employee Refuses Vaccine

If an employee refuses the vaccination based on a disability covered by the Americans With Disabilities Act (ADA) or a sincerely held religious belief (e.g., Christian Scientist, Dutch Reformed Church), the employer has every right to require additional information from the employee to support the exemption. In the case of a disability, the employer could require sufficient and acceptable medical proof from a treating provider to support any claim of a health care risk to the employee that goes beyond the temporary side effects. In the case of a sincerely held religious belief, the employer could require additional information from the employee if the employer has an objective basis to question either the religious nature or the sincerity of a particular belief, practice or observance. Certain religions discourage, but do not prohibit vaccinations.

It is most important to understand that employees have certain rights under the law, but, in our opinion, providers of care have even more significant obligations to their patients, residents, clients or individuals to not put them at risk of significant harm. In such cases, when there is clear acceptable medical proof (demonstrating a clear risk of an anaphylactic reaction if vaccinated) supporting the refusal to be vaccinated, then the employer is likely going to have to see if they could reasonably accommodate the employee. Unlike other accommodations that arise when an employee is injured, this accommodation cannot place others in the workplace at risk of catching the virus because the accommodated employee

will not agree to be vaccinated. In that case, the accommodation could be a full or part-time remote option (which is not practical for most direct care positions), temporary unpaid leave, furlough or layoff. Remember, it may be a violation of the Occupational Safety and Health Act's general duty clause to knowingly place any employee at unreasonable risk of harm or injury. Therefore, this OSHA obligation may provide further support for a workplace requirement that all employees be vaccinated, and to not allow non-vaccinated employees back into the workplace.

Right to Require Proof of Vaccination & Other Medical Inquiries

The new EEOC guidance also indicates that an employer can ask an employee to show proof of a COVID-19 vaccination, and that such an inquiry is not a disability-related inquiry. This is consistent with the EEOC's prior guidance that the pandemic meets a higher "direct threat standard than the flu," which allows employers to conduct more extensive medical inquiries of employees. For example, employers are allowed to take temperatures and send employees home that have a temperature of 100.3 or higher and put in a requirement that employees have to report any virus-recognized symptoms before reporting or while at work and obtain the results of any COVID-19 test.

Waivers of Workers' Compensation Liability

We have been receiving questions from a few clients on whether they could require the employee to sign a waiver of liability. As far as workers' compensation, it is illegal to ask an employee to execute a waiver of workers' compensation liability as part of the vaccination process, and even if voluntarily signed in return for receiving the vaccine, it is unenforceable. As far as waiving general liability, a vaccinated employee with even significant medical side effects is barred by the Connecticut Workers' Compensation Act ("CWCA") from suing his/her employer. It is not the intent of this memo to address waivers that cover any non-employers.

Are the Side Effects of the Vaccine Covered by Workers' Compensation?

In our opinion, if employees are required or even "encouraged" to be vaccinated and they suffer side effects that result in the vaccinated employee missing work and/or seeking medical care, that will likely be deemed compensable under the CWCA because the vaccine is seen as a "mutual benefit" to the employer and employee. In 2002, I wrote to the then-Chairman of the Commission regarding the same question as it related to the voluntary CDC smallpox vaccine program and that was the former Chairman's position, even though the smallpox vaccination program was voluntary by law. It is important to note that a significant majority of side effects to date have been temporary; not lasting more than a few days. The first three days of an absence due to a workers' compensation injury/illness are not paid under workers' compensation. Therefore, the employee absent for three days or less would need to use sick or PTO time, unless the employer voluntarily agrees to pay for that absence.

If anyone has any questions or would like more information, please do not hesitate to reach out to Senior Of Counsel Phyllis M. Pari at pari@laflegal.com or 203-787-7000 ext. 14, or contact me at letizia@laflegal.com or 203-787-7000 ext. 35. Hoping all of you have a safe and healthy holiday during this difficult time.