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Health Care Employers Face Increasing Challenges with COVID-19 Vaccines

Given that COVID-19 vaccines will soon be available in Wisconsin, employers in the health care industry are beginning to evaluate how to navigate questions surrounding the administration of the vaccines to employees and patients.

Requiring vaccinations as a condition of employment is already a common practice in the health care industry, particularly with flu vaccinations. However, employers may be required to provide employees with religious accommodations as required by Title VII of the Civil Rights Act (Title VII) or disability accommodations as required by the Americans with Disabilities Act (ADA). An employee may also have a valid medical reason to refuse a vaccination such as a food or medication allergy or a previous history of anaphylaxis to a prior vaccination.

Employers in the health care industry may be able to demonstrate that vaccination accommodations pose an undue hardship on their business because of employees' proximity to vulnerable patient populations and for patient safety. For instance, in *Robinson v. Children's Hosp. Boston,* the U.S. District Court for the District of Massachusetts found that it would have been an undue hardship for a hospital to accommodate a nurse who refused to get a flu vaccine due to religious objections because the nurse's job involved direct contact with hospital patients.

However, instituting a mandatory vaccination program may not resolve other issues faced by health care employers. Many health care employers are dealing with dire staffing shortages due to COVID-19 outbreaks among residents and staff. Does taking an employee out of the workplace for refusing a vaccination only compound the circumstances for the employer? Most certainly “yes” for most health care employers.

For now, health care employers should approach the COVID-19 vaccination the same way they do annual flu vaccinations for staff. Currently there are no laws in Wisconsin or at the federal level that either mandate or prohibit influenza vaccinations. Implementing a similar policy for the COVID-19 vaccine will help health care providers ensure patient safety.

If you chose to mandate a flu or COVID-19 vaccination, be sure to have a sound policy and reasons for doing so. Analyze what that decision means for your

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facility. For instance, will you take disciplinary action or implement consequences to employees for refusals without valid reasons? Will those actions or consequences negatively impact staffing, other facility operations or COVID-19 protocols currently in place? What liability may health care employers have for an employee who refuses to be vaccinated and could potentially cause an outbreak at a facility?

Health care employers should also be aware of emerging state or federal guidance or legislation regarding the administration of the COVID-19 vaccine in the workplace. For instance, in Wisconsin, Republican lawmakers have introduced legislation that, if passed, would prohibit employers from requiring a COVID-19 vaccine as a condition of employment. Currently, the proposed legislation does not include an exception for employers in the health care industry.

Health care employers have somewhat easier decisions for patients or facility residents who refuse to be vaccinated since such refusals should be seen as a resident's right to refuse treatment. Whether facilities determine non-vaccinated residents need to be cohorted, treated differently or even whether such residents can be treated differently is a decision each facility will need to make.

There are many factors to consider when implementing your own vaccination policy. The current legal and regulatory landscape regarding vaccination issues is fluid and may change. If you are an employer in the health care industry and you have questions regarding mandatory vaccinations policies, or the COVID-19 vaccine, contact Robert Lightfoot, Shannon Toole or any Reinhart attorney in our Health Care or Labor and Employment practices.

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