

Mandatory Vaccinations and the Duty to Bargain

Presented by James Demetriades

Ferguson, Doyle, and Chester P.C.

jamesdemetriades@fdclawoffice.com

Can an Employer Mandate Vaccinations?

Yes, an employer mandate vaccination as a term and condition of employment however the employer must allow for

- religious accommodations
- disability-based accommodations.

Disability Accommodation

- Americans with Disabilities Act requires a reasonable accommodation needs to be proffered unless employer can demonstrate undue hardship.
- Employer may have qualification standard “that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.” Lack of vaccine can be a undue hardship on certain types of employers.
- Safety Based Qualification: 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.”
- Balancing Test applied for undue hardship or significant risk of harm standards.

Religious Exemption

- Title VII of the Civil Rights Act prohibits discrimination against employee's sincerely held religious beliefs; employer must provide reasonable accommodation unless it poses an undue hardship.
- Deeply held religious belief given broad discretion
- If no reasonable accommodation possible, employer may exclude employee from the workplace, but should still accommodate remote work, if possible, without undue burden.

Mandatory Subject of Bargaining?

- Section 8(d) of the NLRA requires that the Union and Employer “confer in good faith with respect to wages, hours, and *other terms and conditions of employment*”
- *NLRB: Virginia Mason Hospital*, 356 NLRB 564 (2011)
 - NLRB Held employer had duty to bargain on mandatory flu shots and mask wearing policy.

Management Rights Clause

- Look to Management Right's Clause language
- If Clause has language that allows management to “ensure the health and safety of the workplace” or “general welfare” then the employer could assert that a unilateral change is permissible.

The Contract Coverage Standard

- *In MV Transportation, Inc.*, 368 NLRB No. 66 (September 10, 2019). NLRB adopted Contract Coverage Standard.
- The Board will give effect to the plain meaning of the relevant contractual language,
- the Board will find that the agreement covers the challenged unilateral act if the act falls within the compass or scope of contract language that grants the employer the right to act unilaterally.

Impact or Effects Bargaining

- Even if Management Rights Clause, Union may bargain the impact or effects of unilateral change.
- These include:
 - the sequence or schedule of vaccination,
 - pay for time spent participating in vaccination,
 - sick leave for side effects of vaccinations,
 - the process for member's applying for exemptions.