

Incoming Relief: The COVID-19 Vaccine Rollout

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With our country's healthcare systems on the verge of collapse, there is some encouraging news to report – recent trials of COVID-19 vaccines with promising results have been announced and it is likely that one or more vaccines may be available to some select individuals by the end of the year.

State and local public health departments are currently in the process of documenting plans for vaccine distribution when vaccines are approved (likely first on an emergency basis, and then on a regular basis). It is anticipated that healthcare workers and emergency responders will be among the first who are approved to receive vaccinations. As the vaccine(s) are approved and distributed more broadly, however, there will be many legal concerns that employers will have to understand and deal with relating to employees receiving a vaccine and whether an employer should make the vaccine mandatory.

The Centers for Disease Control (CDC) has issued a COVID-19 Vaccination Program Interim Playbook which summarizes state programs for distribution of the COVID-19 vaccine. The CDC anticipates that there may be a limited supply of COVID-19 vaccine initially, and vaccination efforts will likely focus on healthcare personnel; workers in essential and critical industries; people at high risk for severe COVID-19 illness due to underlying medical conditions; and people 65 years and older.

It is expected that vaccine supplies will increase substantially in early 2021. The CDC will then determine priority groups for receiving the COVID-19 vaccine through the Advisory Committee on Immunization Practices. It is anticipated that most state and local health department vaccination plans will include mass vaccination clinics for hospital staff and long-term care and other similar facilities.

It is also important to examine the nature of what a vaccine is. For example, the COVID-19 vaccination prevents an individual from having the most serious physical ailments of COVID-19, but does not necessarily provide "immunity," as some in the media have described it. Accordingly, it is not yet clear that employees who receive the vaccine will be immune in terms of not getting infected at all. It is instead possible that some vaccinated individuals may be infected and potentially spread the virus by way of transmission to other employees, especially those that have not been vaccinated. But, it appears that these vaccines will prevent future hospitalizations by minimizing the most serious effects of the virus and eliminating long-term illness. If successful, this will relieve hospital overcrowding and provide a respite to first responders fighting the virus. At the moment, the COVID-19 vaccines will require two dosages administered at different times and may require several weeks to ramp up to a sufficient anti-body response. The level of anti-body production will likely vary by individual. But if the initial data is accurate, the vaccines appear to be effective even in older individuals which is critical to protecting the elderly.

One issue that is intertwined with effectiveness or efficacy is that millions of Americans may refuse to be vaccinated. In fact, some polls suggest that a substantial minority (40-50%) of Americans will not. If so, employers will be actively "enforcing" COVID-19 policies, and dealing with new COVID-19 cases, at least through 2022. Another related aspect of this issue is that employees and employers may be less inclined to use masks and take the necessary steps to deal with a respiratory virus, *e.g.*, air flow issues, thinking that a vaccine is a "total solution" to the pandemic. It is not. In fact, it is highly likely that COVID-19 will become endemic to the U.S. and return each year. Unlike a measles vaccine, however, it will be necessary to continue to vaccinate individuals, and the COVID-19 vaccine will likely become part of the normal flu vaccine regiment.

Against this backdrop is the great desire by the healthcare community (and all employers, in general) to “get back to normal.” Vaccines are clearly at the forefront of making that goal a reality. Thus, it is highly likely that employers, individual states and/or building managers will push this solution forward and many may make receiving a vaccine a requirement to work or enter into a workplace.

Previously, hospitals, healthcare organizations and the healthcare community in general have implemented mandatory flu vaccination policies. These policies have gained increasing acceptance by hospitals, healthcare providers and other employers providing direct care to medically vulnerable populations. Mandatory flu vaccination policies have also led to wrongful discharge lawsuits by individuals who object to vaccination for a variety of reasons, including medical, disability or religious concerns, and are terminated as a result of their refusal to be vaccinated. It is unclear how our courts will determine such cases in connection with COVID-19. For example, the considerations involving the common flu are quite different than the COVID-19 pandemic. Given this dissimilarity, it is unclear how the courts will evaluate concepts of “undue hardship” found in applying disability laws in the workplace or how infringement of the practice of religion claims will be decided, particularly after the Supreme Court’s opinion in *Roman Catholic Diocese of Brooklyn, New York v. Andrew M. Cuomo, Governor of New York*, striking down New York’s quarantine efforts to limit the number of worshippers in places of worship.

As mentioned, a COVID-19 vaccination will hopefully allow businesses and general life to “return to normal.” However, with that brings liability issues related to employers implementing mandatory vaccination policies and employees undoubtedly refusing to get the vaccine for any multitude of reasons. White and Williams’s series of alerts on the COVID-19 vaccine will look at the key reasons that employees refuse to get the vaccine – religious beliefs and disability concerns. Lastly, we will examine the structure of vaccine policies for employers and other related issues.

If you have any questions please contact Jim Anelli (anellij@whiteandwilliams.com; 201.368.7224), Tanya Salgado (salgadot@whiteandwilliams.com; 215.864.6368) or any other member of the Labor and Employment Practice Group.

As we continue to monitor the novel coronavirus (COVID-19), White and Williams lawyers are working collaboratively to stay current on developments and counsel clients through the various legal and business issues that may arise across a variety of sectors. Read all of the updates [here](#).

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