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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

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## NJ Employers Weigh Vaccine Rules Against Legal Liability

By Jeannie O'Sullivan

Law360 (January 22, 2021, 6:57 PM EST) -- New Jersey businesses considering requiring workers to get vaccinated against COVID-19 should be flexible and brace for potential liability pitfalls due to exemptions under the state's strong workplace protection law, employment law attorneys tell Law360.

Management-side New Jersey attorneys say they've been fielding an onslaught of client inquiries amid the rollout of the Pfizer and Moderna vaccines, which comes as cases in the state surge to levels unseen since last spring. New Jersey at the time became second only to New York in the nation in terms of positive test results and deaths.

Garden State employers are now forced to strike a delicate balance between keeping their workplaces safe amid a coronavirus death toll that's surpassed 18,000 and honoring the needs and desires of workers, said attorney Michele Siekerka, president and CEO of the New Jersey Business & Industry Association.

Workers who resist vaccination may have a disability or ascribe to a faith that shuns vaccines, both of which form the basis for legal exemptions, and thus mandatory vaccination policies cannot be enforced against them.

"You're still going to have to follow all the discrimination laws at play in the state of New Jersey," Siekerka told Law360, noting that the New Jersey Law Against Discrimination is among the most sweeping workplace protection laws in the nation.

The NJ LAD protects more than a dozen classes — including religion, disability and even a perceived disability — against discrimination, harassment and retaliation.

Under the law, employees who feel their request for an exemption is being rebuffed can sue for compensatory, emotional distress and punitive damages, along with lost wages and attorney fees.

Faith-based resistance to vaccines is at play in the state, where the number of religious exemptions for children rose steadily from 8,977 in the 2013-14 school year to 13,840 in the 2019-20 school year, according to the state's annual immunization status reports.

Employees may also mount objections that aren't protected by legal exemptions. Some may be fearful due to a perceived link between vaccines and autism, although research to that effect by former British doctor Andrew Wakefield has largely been debunked, with one of his studies retracted.

New Jersey, which has the highest autism rate in the nation, has a stronghold of vaccine choice activists who descended on the state capitol in Trenton in December 2019 to protest a since-defeated legislative proposal that would have ended nonmedical exemptions to vaccines.

Yet another reason people may distrust the coronavirus vaccine is the speed at which it garnered regulatory approval, Siekerka added.

Fox Rothschild LLP partner Jonathan D. Ash, a labor and employment law attorney in the firm's

Princeton office, said employers may enforce a mandatory vaccine policy against workers who cite safety fears, because that objection isn't covered under any of the LAD's legal exemptions. As a result, resistant employees may be subject to discipline or ordered to work remotely, he said.

A remote work order prompted by vaccine resistance or exemptions could be particularly burdensome on retail and service industries, where employees must be onsite to do their jobs, Siekerka noted.

Another "minefield" employers should be wary of is the questions asked of employees during the vaccine prescreening and follow-up stages, according to Ash. He said while the U.S. Equal Employment Opportunity Commission has determined coronavirus vaccinations can be mandated without violating the Americans With Disabilities Act, disability-related inquiries must by law be "job-related and consistent with business necessity."

Prescreening questions that reveal a disability unrelated to the vaccine will not alone form the basis for a discrimination claim by an employee, Ash said. However, if that employee were to later suffer an adverse employment action or harassment, the employee could launch an NJLAD or ADA lawsuit claiming it happened because their disability was identified, Ash said.

Ash further warned that employers tempted to challenge the legitimacy of an employee's claim of an exemption face a "slippery slope," as such a challenge could be seen as discriminating.

"Even though employers can mandate the vaccine, given these complexities, it may be better to just strongly encourage or incentivize the vaccine to avoid the potential discrimination issues," Ash said via email.

One way for employers to avoid liability pitfalls of a mandatory vaccine policy is to enlist a third party, such as a pharmacy, to handle the prescreening questions and the administration of the vaccine, according to guidance from Greenbaum Rowe Smith & Davis LLP.

Greenbaum Rowe partner Maja M. Obradovic, co-chair of the New Jersey-based firm's employment practice, recommends planning early for a vaccine policy. She noted that while the administration of the vaccine is currently limited to health care workers and other priority candidates, at some point it will be accessible to a wider pool of people.

"Employers should formulate a strategy for when vaccines become generally available," Obradovic told Law360.

Included in any policy should be a description of the legal exemptions, a process for employees to notify the employer they are entitled to an exemption, and a statement that the employer will accommodate employees who are entitled to an exemption unless such an accommodation presents undue hardship for the employer, according to Obradovic.

The policy should also state that any communications and documentation concerning exemption requests or accommodations would be kept confidential, Obradovic said.

Some employers who have decided to dispense with a mandatory policy in favor of a voluntary program have implemented educational programs to get employees more comfortable with the idea, according to Frier Levitt partner Jesse C. Dresser, a Pine Brook, New Jersey-based member of the national health care boutique's life sciences department and head of the firm's pharmacy practice group.

In fact, he's seeing more educational programs than mandatory vaccine policies among his firm's clients, which range from pharmacies to laboratories to doctor's offices.

Health care businesses providing vaccine education programs often use experts from their own organizations to helm the initiatives, Dresser said, noting employers are more likely to trust a familiar health care information source they know and work with.

"Those are examples of ways in which you can sow a level of confidence within the staff to encourage them to go get it without a mandate," Dresser said.

--Editing by Philip Shea and Nicole Bleier.

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