

Do Your Employees Need a Shot in the Arm?

**The Legal and Practical Implications of
Mandatory COVID-19 Vaccinations**

PART 2

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Introduction

- There are several FDA-approved COVID-19 vaccines and others in the works, and President Biden has directed every state to open eligibility to all adults by May 1.
- The EEOC has confirmed that employers may lawfully require their employees to receive COVID-19 vaccinations provided they consider exemptions for medical and religious accommodations.
- In addition to these legal issues, employers will need to consider the practical issues with implementing such a policy.
- Employers may also want to consider ways to incentivize employees to get vaccinated and will need to evaluate the potential pitfalls with offering incentives.

The EEOC and COVID-19

- Since the beginning of the pandemic, the EEOC has recognized that COVID-19 meets the ADA’s “direct threat standard.”
- The direct threat standard permits employers to implement more extensive medical inquiries (*e.g.*, temperature screening and COVID-19 testing) than would typically be permissible under the ADA.
- The EEOC recognizes that an employer may mandate that its employees receive a COVID-19 vaccination provided that the employer accommodate an employee’s medical condition that rises to the level of a disability and any religious beliefs an employee may sincerely hold.

ADA Accommodations

- If an employee is unable to receive a vaccination due to a disability, the EEOC provides that employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: (1) duration of the risk; (2) nature and severity of potential harm; (3) likelihood that potential harm will occur; and (4) imminence of potential harm. (EEOC Guidance, K.5)
- A direct threat “would include a determination that an unvaccinated individual will expose others to the virus at the worksite.” (EEOC Guidance, K.5)

ADA Accommodations

- If an employer determines that an employee who cannot receive a vaccination due to a disability poses a direct threat, the “employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.” (EEOC Guidance, K.5)

ADA Accommodations

- If “there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean the employer may automatically terminate the worker.” (EEOC Guidance, K.5)
- Rather, employers will need to determine if any other accommodations apply (*e.g.*, remote work or teleworking, PPE, transfer, leave of absence, etc.).
- Employers may rely on CDC recommendations when deciding whether an accommodation would pose an undue hardship.

Religious Beliefs and COVID-19 Vaccinations

- If an employee claims that a sincerely held religious belief, practice, or observance prevents the employee from receiving a COVID-19 vaccination, the employer must provide a reasonable accommodation unless doing so would pose an undue hardship.
- “Undue hardship” has been defined as having more than a *de minimis* cost or burden on the employer. (EEOC Guidance, K.6)

Religious Beliefs and COVID-19 Vaccinations

- The EEOC’s guidance explains that because the definition of religion is broad, “the employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief.” (EEOC Guidance, K.6)
- If, however, an employer has an “objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.” (EEOC Guidance, K.6)

Religious Beliefs and COVID-19 Vaccinations

- If there is no reasonable accommodation for an employee's religious belief, then an employer could lawfully exclude the employee from the workplace.
- Again, this “does not mean the employer may automatically terminate the worker.” (EEOC Guidance, K.7)
- Rather, an employer would need to determine whether alternatives exist to on-site work (*e.g.*, remote work or teleworking, PPE, transfer, leave of absence, etc.).

Should I Implement a Policy?

- There is no one-size-fits-all answer to this question. Rather, employers must perform an individualized assessment and decide based on the nature of its business and workforce.
- Considerations:
 - Is there a benefit of requiring vaccinations?
 - Have we had a COVID-19 outbreak in the workplace?
 - Can we abide by the CDC's recommended safety measures?
 - Does our workforce work on-site or remotely?
 - Does our workforce work in an office setting with private offices or in a more communal or factory setting?
 - Do we want to administer such a policy?
 - Do we want to risk losing our best employees if they refuse?
 - What do the local jurisdictions require?

Considerations For Any Vaccination Policy

- There are certain considerations for employers that choose to implement a vaccination policy, whether mandatory or voluntary:
- Who will pay for the vaccine?
 - Employer is not required to do so under federal law, but some state laws may differ.
- Will we provide paid (or unpaid) time off for employees to receive the vaccine?
 - Some states require paid time off for vaccinations – for example, New York requires employers to provide up to 4 hours of paid leave for employees to get the vaccine.
- Will we provide paid (or unpaid) time off if employees have side effects from the vaccine?
- How will we store vaccination records?

Mandatory Vaccines

- As of today, there are no state laws expressly prohibiting employers from mandating COVID-19 vaccinations.
- Several states, including Illinois, Kentucky, and Minnesota, have proposed bills that would prohibit employers from mandating COVID-19 vaccinations prior to full approval by the FDA, but none have been passed.
- Some state legislatures have considered bills barring workplace COVID-19 vaccine mandates altogether. One such proposal recently passed the Montana House, and similar bills are pending in Missouri, Oklahoma, Ohio, and Tennessee.
- It is essential that you stay up-to-date on what is happening in the jurisdictions in which you conduct business.

Mandatory Vaccines: Who Will Administer?

- If an employer administers the vaccine, any pre-screening questions that may elicit information regarding a disability must be “job-related and consistent with business necessity.” (EEOC Guidance, K.1.)
- To meet this standard, an employer would need to have a “reasonable belief” that an employee who does not answer the questions (and, therefore, does not receive a vaccination) “will pose a direct threat to the health or safety” of the employee or others. (EEOC Guidance, K.2.)
- Pre-screening questions related to family history may also implicate the Genetic Information Nondiscrimination Act (GINA).
- If the vaccine is being administered on a voluntary basis or by third party, then this test need not be met and there will be no GINA implications.

Mandatory Vaccines: Proof of Vaccination

- An employer is permitted to require an employee to show proof of receipt of a COVID-19 vaccination without violating the ADA. (EEOC Guidance, K.3)
- Subsequent employer questions, however, “such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be ‘job-related and consistent with business necessity.’” (EEOC Guidance, K.3.)

Mandatory Vaccines: Will It Be Required For All Employees?

- Employers can decide whether the mandatory vaccination policy will apply to all employees or just certain groups.
- Employer's should use ADA's direct threat of harm test as a guide: (1) duration of risk, (2) nature and severity of potential harm, (3) likelihood potential harm will occur, and (4) imminence of potential harm.
- Considerations:
 - Do certain employees work in areas where social distancing is not possible while others work in closed offices?
 - Do certain employees have customer-facing positions or positions where they have more face-to-face interaction?
 - Do other businesses/companies/industries with which the employer conducts business require vaccinations for entry?

Mandatory Vaccines: What If An Employee Refuses?

- Aside from the legality of mandatory vaccinations, employers should also examine the societal, political, and ethical considerations of requiring employees to get a COVID-19 vaccination.
- With the highly politicized and polarized dialogue surrounding any potential COVID-19 vaccine, employers are certain to receive numerous objections from employees. Accordingly, employers need to be prepared to address these objections.
- Employers also need to decide how they will deal with employees who refuse to get the vaccine because of a personal preference (i.e., termination, accommodation, etc.).

Concerted Activity

- Unionized *and* nonunionized employees are permitted to engage in protected concerted activity under Section 7 of the NLRA.
- This includes discussing dissatisfaction with a mandatory vaccination program or protesting or opposing such a program.
- Action taken against employees for engaging in such activity can result in unfair labor practice charges.

Incentivizing Employees To Get Vaccinated

- A February survey showed that 1% of employers are mandating the vaccine, and 6% plan to do so.
- If you decide that mandatory vaccinations are not right for your business, you may choose to offer incentives to promote vaccinations.
- The nature of what the incentive can be is unsettled at this point:
 - During the Trump administration, the EEOC proposed new regulations preventing employers from offering more than a de minimis incentive to encourage participation in voluntary wellness programs. The proposed rule was withdrawn after election.
 - The EEOC has not issued new guidance on incentives for voluntary wellness programs – however, if the employer is not involved in administering vaccines, then the EEOC’s potential wellness rule likely would not come into play.

Incentivizing Employees To Get Vaccinated

- Potential ADA failure-to-accommodate or other disparate impact claims?
 - Under ADA, employees with disabilities are permitted to participate equally in wellness initiatives, including eligibility for incentives.
 - Employees may argue that a voluntary COVID vaccination policy with incentives has a disparate impact against employees with disabilities and/or who hold certain religious beliefs.
- How to avoid those claims?
 - Consider incentives tied to making the vaccine more accessible, such as paid time off to make an appointment, go to an appointment, and recover from side effects.
 - Consider offering incentive to those who need disability- or religious-based accommodations. For example, offer the incentive if they agree to wear a face covering while at work.

Incentivizing Employees To Get Vaccinated

- Another potential issue stems from the FLSA and overtime pay. If you provide a monetary incentive (for example, a one-time bonus or gift card), the amount of the bonus will need to be calculated into the employee's regular rate of pay for overtime.
- As an alternative to incentives, some employers are choosing to rely on educating employees.
 - Provide them with information about the vaccines to help address some of their concerns.
 - Have a doctor or other medical professional come to talk to your employees about the vaccines and answer questions.
 - Publicize your CEO or executive team receiving the vaccine.

Implementing the Policy

- Create a written policy for employees to read and know exactly what is required/expected.
- Designate an individual or team to answer vaccination policy questions and to handle accommodation requests, and develop a process for accommodation requests.
- Educate your employees about the policy.
 - Consider having a meeting with employees to explain the policy and answer any questions.
 - May also hold a separate meeting for supervisors and management team on how to address concerns and questions about the policy.
- Apply the policy in a consistent manner.
 - Inconsistency is a recipe for a potential discrimination claim.

QUESTIONS?



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