



COVID-19 Vaccines: To Mandate or Not to Mandate?

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Mandatory Vaccine Programs Overview

Various court decisions and guidance from the EEOC and OSHA have confirmed that, in general, employers can require employees to receive vaccinations if:

- They are job-related and consistent with business necessity; and
- They allow for:
 - medical exemptions as required by the Americans with Disabilities Act (“ADA”); and
 - religious objections under Title VII of the Civil Rights Act of 1964 (“Title VII”).

Mandatory Vaccine Programs Overview

Mandatory vaccine policies are not uncommon in certain industries:

- Healthcare industry;
- Schools;
- Senior living communities; and
- Day care centers.

There is less precedent outside of these industries.

ADA Accommodations

- Employees with a qualifying disability which prevents them from safely receiving the vaccine may be entitled to an exemption from a mandatory vaccine policy. Examples include:
 - A serious allergy to any ingredient in the vaccine;
 - A history of Guillain-Barré syndrome.
- Minor sensitivities and undocumented allergies are likely insufficient to constitute a disability under the ADA.
- The EEOC has advised that employers should accommodate a pregnant employee's request to not to be vaccinated.

Religious Objections

- If employees' sincerely held religious beliefs or practices preclude them from receiving vaccinations, they may have a valid religious objection under Title VII.
- Their beliefs do not need to be “mainstream” beliefs of any organized religion.
- The EEOC considers religious practices to include sincerely held moral or ethical beliefs as to what is right and wrong.
- But political, medical, or intellectual beliefs opposing vaccinations do not entitle an individual to a religious exception.

Accommodation Requests

- If an employee requests an accommodation, the employer should engage in the interactive process.
- An employer may deny a vaccine-exemption if it can prove that it would result in an “undue hardship.”
 - Religious belief under Title VII = more than *de minimis* cost or burden
 - Disability under the ADA = significant difficulty or expense
- An accommodation that would pose a direct safety threat to employees or third parties would amount to an undue hardship.
- Employers could require an employee to follow different protective measures as an accommodation.

Recent EEOC Guidance

- On December 16, 2020, the EEOC updated its guidance regarding mandatory influenza vaccine policies.
- The EEOC stated that administering a vaccine is not a medical examination under the ADA.
- However, if an employer administering the vaccine (or having a contractor do it on its behalf), and asks the questions suggested by the CDC as a precursor to administration of the vaccine, those questions are likely disability-related inquiries under the ADA.
 - This issue is avoided if employers simply require proof of vaccination from a third party.
- If an employee is unable to be vaccinated due to a disability, the EEOC advises that the employer must determine whether allowing the employee to return to work unvaccinated would pose a direct threat to the employee or his co-workers. Even if there is a direct threat, the employer may not automatically terminate the employee, but must determine whether there are any accommodations that would allow the employee to perform the essential functions of his job without imposing a threat to others.

Is COVID-19 Different?

YES!

- COVID-19 is more deadly than any other communicable disease that modern workforces have faced.
- The first COVID-19 vaccines available will have only received Emergency Use Authorization (EUA) from the FDA.

Emergency Use Authorization

- The EUA process is a rigorous one, but it is not supported by the same long-term safety data required for typical FDA approval.
- The EUA statute states: “individuals to whom the product is administered are [to be] informed of . . . the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.” 21 U.S.C. § 360bbb-3(e)(1)(A)(ii).
- The Secretary of Health and Human Services may establish “[a]ppropriate conditions on . . . the categories of individuals to whom, and the circumstances under which, the product may be administered with respect to such use.” 21 U.S.C. § 360bbb-3(e)(1)(B)(ii).

Can We Provide Incentives?

- Some employers are talking about incentives (cash payments, gift cards, extra PTO days, etc.) in order to encourage employees to be vaccinated.
- Lots of considerations, as incentives could constitute a wellness program regulated by the ACA, ADA, ERISA, and HIPAA. Talk to your employee benefits attorney to make sure your program is compliant.
- Most incentives will be subject to tax.

Liability Considerations

There is a potential for liability whether or not an employer requires employees to be vaccinated:

- If it requires employees to report to work in person without requiring them to be vaccinated and someone contracts COVID-19 at work.
- If the employer mandates or encourages vaccination and an employee experiences an adverse reaction to the vaccine.
- If an employer denies an employee's requested accommodation to the vaccine based on a medical or religious objection.

Plaintiffs'-side lawyers are already advertising.

Employers should look for updated guidance and weigh the risks based on their industry, employees, etc.

Practical Concerns

- Employers may find that employees may react poorly to a mandatory vaccine policy.
 - A recent Gallup Poll shows that only 63% of Americans would agree to be vaccinated.
 - There is concern that the FDA has “fast-tracked” the vaccine and that it is not supported by long-term safety data.
 - Many employers in the healthcare industry have indicated that they are going to strongly encourage rather than mandate vaccination.
 - The vaccine has been politicized.

Practical Concerns

- Vaccine policies should be consistently enforced so that employees are treated like similarly situated employees.
 - How will your company react if a number of key employees refuse vaccination without a valid exemption?
 - Is your company willing to terminate employees who refuse to comply?
- There are reports of some individuals experiencing flu-like symptoms (fever, muscle pain, chills, and headaches) after the second injection.
 - Should you stagger vaccination of key employees and employees within the same department?
 - Will employees refuse the second injection once they hear from others who experienced a more severe response?

Practical Concerns

- Whether or not you mandate or encourage vaccination, offer employees a trusted resource to provide knowledgeable, science-based information.
- Consider whether you will provide employees with paid time off to get vaccinated.
- Consider whether you will require employees to use accrued leave for absences related to an adverse reaction.
- If you are a unionized employer, review your CBA to determine whether this is a permissive or mandatory subject of bargaining.

Practical Concerns

- Be on the look-out for employees engaging in protected concerted activity.
- Ensure executive level employees are “on board.”
- Ensure privacy of employee health information.
- Continue other preventative measures post-vaccination.
- Alert worker’s disability carrier of employee illness following vaccination.
- Provide education to employees, and training to supervisors and management personnel.

Conclusion

- There is not one right answer – what is right for each employer depends on their industry, their workforce, and the impact of COVID-19 on their business.
- Start developing a plan but stay nimble.
- We expect updated guidance will become available from multiple sources over the next several months.

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Thank you!



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