

COVID-19 Vaccines and the Workplace: What Employers Need to Know About Mandatory Vaccination Policies



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With all adults in the U.S. now eligible to receive a COVID-19 vaccine, employers are grappling with the question of whether to make vaccination mandatory for employees. Currently, the legal consensus, given state and federal guidance, is that employers *may* require employees to be vaccinated, with some key exemptions and other considerations discussed below. Nevertheless, employers in multiple states have already faced legal challenges to mandatory vaccination policies. Given the legal nuances and evolving landscape surrounding mandatory vaccination policies and possible differences between states, employers considering mandatory vaccination policies should first consult with employment counsel in their respective states.

Can Employers Require Employees to Be Vaccinated?

In December 2020, the Equal Employment Opportunity Commission (EEOC) updated its Technical Assistance Questions and Answers (Guidance) to specifically address employer COVID-19 vaccine programs. The Guidance affirms that mandatory COVID-19 vaccination programs are

not prohibited under federal employment laws so long as employees may seek disability-related or religious exemptions under the Americans with Disabilities Act (ADA) and Title VII. The California Department of Fair Employment and Housing also has recently approved mandatory vaccination policies under California state employment law as long as employees can request accommodations for disability-related and religious reasons.

Nevertheless, employers should expect the legal landscape of mandatory vaccination to evolve in the wake of the COVID-19 pandemic. Some states, including Florida, Arkansas, and Montana, are advancing legislation or enacting laws that ban certain requirements—such as conditions of employment—based on vaccine status. Employers must check state law to determine if the state they are operating in has a law prohibiting vaccine mandates as a condition of employment.

Medical- or Disability-Related Exemption

Under the ADA, an employee may be entitled to an exemption from a mandatory vaccination requirement based on a qualifying disability that prevents him/her from getting the vaccine. For example, qualifying medical exemptions may include allergies to vaccine components or a history of Guillain-Barre syndrome. An employer can require some documentation, such as seeking a health care provider indication of a medical condition (not identified)

that would be negatively impacted by the vaccination.

The ADA requires employers to grant a reasonable accommodation request, unless the accommodation would result in undue hardship on the employer or poses a direct threat to the health and safety of others.

If an employee claims to have a disability-related objection to the vaccine, the Guidance provides that, before taking any adverse action, employers must show that an unvaccinated 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.”¹ In that regard, the Guidance provides that employers consider the following:

Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm. A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite.

If the direct threat cannot be reduced to an acceptable level, the employer can

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exclude the employee from the workplace, but not before the employer looks to alternatives (such as remote work, increased personal protective equipment, additional social distancing measures, or even modified work schedules to reduce potential contact) that could constitute a reasonable accommodation.

Sincerely Held Religious Practice or Belief Exemption

Employers must also attempt to accommodate employees who have a “sincerely held” religious practice or belief that forbids them from getting vaccinated. Employers may exclude an employee from the workplace based upon a religious objection but only after they have undergone an interactive process with the employee to determine whether they can be reasonably accommodated.

Whether a religious practice or belief is “sincerely held” is not a clear-cut inquiry. Generally, employers should presume that an employee’s request for a religious accommodation is based on a sincerely held religious belief. If, however, an employee requests a religious accommodation and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer is justified in requesting additional supporting information. The EEOC has not clarified what would constitute an “objective basis” for questioning an employee’s religious belief. Employers should accordingly proceed with caution.

Ultimately, whether an employer must accommodate an employee in light of a request for accommodation is a fact-specific inquiry that should be discussed with legal counsel.

Possible Exceptions for Pregnant Employees

Employers should also consider whether they will make an exception for pregnant employees. The Centers for Disease Control and Prevention (CDC) has stated that pregnant women are at increased risk for severe illness from COVID-19 and it does not have sufficient data to ascertain whether COVID-19 vaccines are safe for pregnant individuals. Thus, if an employer refuses to excuse a pregnant

employee from a vaccination requirement, the employer might be liable under the Pregnancy Discrimination Act if non-pregnant employees are excused from a vaccination requirement.

Impact of the Emergency Use Authorization (EUA) Nature of the Vaccine

The EEOC Guidance specifically notes that the Food and Drug Administration (FDA) cleared the COVID-19 vaccine for use under its emergency use² authority. The Guidance does not take a stance on whether employers may specifically mandate vaccination approved under the EUA other than to quote directly from the FDA website, which states:

The FDA has an obligation to ensure that recipients of the vaccine under an EUA are informed, to the extent practicable under the applicable circumstances, that FDA has authorized the emergency use of the vaccine, of the known and potential benefits and risks, the extent to which such benefits and risks are unknown, that they **have the option to accept or refuse the vaccine**, and of any available alternatives to the product.³

The meaning of this language is already being litigated in multiple cases challenging mandatory vaccination policies based on the theory that the employer is precluded from requiring employees to get a vaccine issued under an EUA. These cases are still in the early stages of litigation. Employers also must continue to monitor state-specific developments. Several states have bills pending to prohibit employers from requiring that employees receive COVID-19 vaccines unless and until the vaccines receive full FDA approval.

Can Employers Require Proof of Vaccination?

Employers may ask for proof of vaccination. The EEOC Guidance confirms that asking or requiring an employee to show proof of receipt of a COVID-19 vaccination is *not* a disability-related inquiry. In requesting proof, however, the employer should instruct the employee to eliminate or redact any medical information (except the actual

vaccination record). The employer should maintain the proof of vaccine as a confidential medical record.

Even if vaccinations are not mandatory, employers should attempt to track the vaccination status of its workforce to know which employees are fully vaccinated. Employers may ask employees to provide this information, but they should stop short of asking for any other information that could relate to a disability.

Special Considerations for Employers with Unionized Workforces

Employers who operate a unionized workforce must consider additional steps to take before implementing vaccination programs. Under the National Labor Relations Act (NLRA), unionized employers must bargain collectively with the authorized collective bargaining representative over mandatory subjects of bargaining, including all matters affecting “wages, hours, and other terms and conditions of employment.” Employers should treat mandatory vaccination policies as mandatory subjects of bargaining.

For example, in *Virginia Mason Hospital v. Washington State Nurses Association*,⁵ the employer hospital implemented a mandatory influenza immunization for all nurses and other employees. The union filed a grievance, and an arbitrator ordered that the hospital stop the mandatory immunization as it violated the collective bargaining agreement. The Ninth Circuit upheld the arbitrator’s decision “in light of the considerable deference for arbitral decisions and citing the clearly established public policy requiring employers to bargain with their union-represented employees over conditions of employment.”⁶

Employers without unionized workforces still need to consider Section 7 of the NLRA, which provides employees the right to engage in concerted activity.⁷ If employees collectively protest a COVID-19 vaccine program, or an employer’s failure to implement such a program, and suffer some adverse employment action, the employees could allege retaliation and file unfair labor practice charges with the National Labor Relations Board.

Occupational Safety and Health Administration (OSHA) and Mandatory Vaccines

The OSHA, the federal agency charged with enforcing workplace health and safety standards, has also weighed in on whether vaccine-related reactions are recordable or reportable. The answer turns on whether an employer requires employees to be vaccinated. If an employer does require its employees to be vaccinated, adverse reactions to the vaccines are considered “work-related” such that they are subject to mandatory reporting and recording requirements. This means that employers who require COVID-19 vaccines must notify OSHA within 24 hours of an employee’s inpatient hospitalization (or within 8 hours of an employee’s death) resulting from an adverse reaction.

For employers subject to OSHA’s recordkeeping requirements, if the adverse reaction meets other general recording criteria (e.g., days away from work, restricted work or transfer to another job, or medical treatment beyond first aid), the reaction must be recorded on the employer’s OSHA 300 log, even if it does not lead to hospitalization.

Importantly, employers who merely *recommend*, but do not require, vaccination do not need to record adverse reactions or report hospitalizations due to those adverse reactions, even if the employer facilitates employees’ access to the vaccine.

Must Employers Pay Employees for Time Spent Getting the Vaccine or Recovering From It?

Employers requiring vaccinations also must consider wage and hour implications. In many cases, employers may need to pay employees for time spent getting vaccinated—especially if the employer requires vaccines. Time spent traveling to and from an appointment, and waiting for and receiving a COVID-19 vaccination, counts as “hours worked” for minimum wage and overtime purposes and must be paid.

Various state labor departments also have published guidance on this issue, including California, Illinois, Massachusetts, and Oregon. At least in some states, including California, if the employer requires an employee to get vaccinated, the time the employee spends obtaining the vaccine is considered compensable hours worked under state law, even if vaccination occurs outside of work hours and off company

property. Also, some states, again including California, require employers to reimburse employees for the cost of a vaccine if they require the employee to be vaccinated.

The CDC also has suggested that employers “offer flexible, nonpunitive sick leave options (e.g., paid sick leave) for employees with signs and symptoms after vaccination.” State and local sick leave laws, as well as employer policies, may also cover time off to receive and recover from the vaccination. For example, California Governor Gavin Newsom signed Senate Bill 95, which requires covered employers to provide employees with supplemental paid sick leave for various COVID-19-related absences, including time spent recovering from vaccination symptoms.

Conclusion

Employers may have the legal right to require employees to get vaccinated, but a majority of employers continue to encourage, not require, employees to become vaccinated. Employers must continue to weigh the advantages of mandating vaccinations, including decreased risk of spreading the virus in the workplace, reduced absenteeism, and decreased employee health care costs, with the risk of employee push-back and other legal considerations. 

Endnotes

¹ 29 C.F.R. 1630.2(r).

² An EUA is a “mechanism to facilitate the availability and use of medical countermeasures, including vaccines, during public health emergencies, such as the current COVID-19 pandemic. Under an EUA, FDA may allow the use of unapproved medical products, or unapproved uses of approved medical products in an emergency to diagnose, treat, or prevent serious or life-threatening diseases or conditions when certain statutory criteria have been met, including that there are no adequate, approved, and available alternatives.” See <https://www.fda.gov/vaccines-blood-biologics/vaccines/emergency-use-authorization-vaccines-explained#:~:text=Under%20an%20EUA%2C%20FDA%20may,are%20no%20adequate%2C%20approved%2C%20and>.

³ Emphasis added.

⁴ See *California Educators for Medical Freedom, Artemio Quintero, Miguel Sotelo, Janet Phyllis Bregman, Cedric Johnson, Misanon Lloyd, Heather Poundstone, and Theresa D. Sanford v. The Los Angeles School District and Austin Beuter* (Central District of California Case No. Case No.: 21-cv-02388, Complaint filed 3/17/2021) (challenging mandatory vaccination policies in light of EUA status); see also *Isaac Legaretta and DOES 1-20 v. Fernando Macias, Director Bryan Baker, Captain Ben Mendoza, Captain Joshua Fleming, and DOES 1-20* (District of New Mexico Case No. 2:21-cv-00179-MV-GBW, Complaint filed 2/28/2021) (same).

⁵ 511 F.3d 908, 911 (9th Cir. 2007).

⁶ *Id.* at 913, 917.

⁷ 29 U.S.C.A. § 158.