
COVID-19 Vaccinations: What Employers Need to Know Before Implementing a Mandatory Vaccination Policy

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With at least two COVID-19 vaccinations now approved by the Food and Drug Administration (FDA) for emergency use authorization, employers—who are obligated to provide a safe workplace free from recognized hazards—are naturally beginning to question whether, and under what circumstances, they should require employees to get a COVID-19 vaccination.

Although mandatory vaccinations are controversial and have received much national attention in recent weeks, employer-mandated vaccinations are not new. Employers have implemented mandatory vaccination policies for years, most often in healthcare settings where employees often interact with high-risk and vulnerable populations. **The general rule is that mandatory vaccination policies are permissible in the midst of a pandemic so long as employers consider certain exemptions**, such as religious and medical accommodations, as required under Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA), respectively.

The Equal Employment Opportunity Commission (EEOC) addressed mandatory vaccination policies over a decade ago during the H1N1 virus outbreak, resulting in the general rule above. At that time, the EEOC acknowledged where a pandemic meets the ADA's "direct threat standard," more expansive medical inquiries and workplace controls than the ADA typically allows will be permitted. Ultimately, however, the EEOC suggested that ADA-covered employers "consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it." This guidance was re-issued in March of 2020 to incorporate updates related to the COVID-19 pandemic, but noted that a COVID-19 vaccine was not then available.

With two COVID-19 vaccines now available to a limited segment of the population, the EEOC published new guidance, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws," specifically addressing questions related to COVID-19 vaccinations and the applicability of various federal laws that employers should consider before implementing a vaccination policy. Under this new guidance, the general rule remains intact, at least for now. Employers may mandate that employees get a COVID-19 vaccine, once available, so long as they provide an exemption or reasonable accommodation to

employees who have a disability or sincerely held religious practice or belief preventing them from becoming vaccinated.

Employers should also consider a myriad of legal considerations under the ADA, Title VII, the Occupational Safety and Health Act (OSHA), the National Labor Relations Act (NLRA), as well as safety, political, and cultural implications, before implementing such a mandatory program. Here is an overview of some of the issues employers should analyze before implementing a mandatory vaccination policy:

ADA

Under the ADA, employers are prohibited from making disability-related inquiries or conducting medical examinations unless they are job-related and consistent with business necessity. Medical examinations are procedures or tests, usually given by a health care professional or in a medical setting, seeking information about a person's physical or mental health or impairments. In its most recent guidance, the EEOC confirmed that the COVID-19 vaccination itself is not a medical examination. However, pre-screening vaccination questions or inquiries may constitute disability-related inquiries, and therefore, must be job-related and consistent with business necessity. However, merely requesting an employee to show proof of receipt of a COVID-19 vaccination is not considered a disability-related inquiry.

Although employers may mandate that employees receive a COVID-19 vaccination when the vaccination becomes generally available, employers cannot immediately exclude an employee from the workplace who cannot be vaccinated due to a disability. If the employer determines that an individual who cannot be vaccinated due to disability creates a direct threat at the workplace, then the employer must engage in the interactive process to determine whether a reasonable accommodation can be provided that would eliminate or reduce the risk such that the unvaccinated employee would not pose a direct threat to the workplace. A "direct threat" finding means that an individual poses 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." While the EEOC has previously acknowledged that an individual with COVID-19 meets the ADA's "direct threat" standard, the EEOC also directs employers to undergo an individualized assessment of its workplace to determine whether a direct threat exists, based on the following facts: (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm. If an unvaccinated person will expose others in the workplace to the virus, then the direct threat standard is satisfied.

Even with a direct threat present, however, an employer cannot exclude an unvaccinated employee with a disability from the workplace without first attempting to eliminate or reduce the direct threat to an acceptable level. This will involve engaging in the interactive process to determine if a reasonable accommodation exists that does not pose an undue hardship on the employer. Such reasonable accommodation may include permitting an employee to work remotely, or continuing to wear a mask and following social distancing and other guidelines from the CDC.

Employers must also be mindful of confidentiality obligations relating to employee medical information. While the COVID-19 vaccine is not considered a medical examination, any medical information obtained in

the course of the employer's vaccination program, including pre-screening inquiries and other disability-related inquiries, must be kept confidential and stored separately from regular personnel files.

Title VII

An employer must also provide reasonable accommodation to employees whose sincerely held religious beliefs, practices, or observances prevent them from receiving the vaccination, unless the accommodation would pose an undue hardship. Under Title VII, an "undue hardship" requires more than a *de minimis* expense or burden on the employer. Additionally, employers should proceed with caution when put on notice of an employee's religious belief, practice, or observance as the definition of religion is very broad and protects a plethora of beliefs, practices, and observances, even if unknown to the employer. Employers will only be justified in requesting additional information to support the request if the employer has an objective basis for questioning the religious nature or the sincerity of the belief, practice, or observance. As such, when presented with a request for a religious accommodation, employers should ordinarily assume that the request is based on a sincerely held religious belief. Only if there is no reasonable accommodation possible may an employer exclude the employee from the workplace.

OSHA

OSHA has not yet weighed in on mandated COVID-19 vaccinations; however, it previously addressed mandated vaccinations during the H1N1 virus outbreak in 2009. At that time, OSHA said that "an employee who refuses vaccination because of a reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death . . . may be protected under Section 11(c) . . . pertaining to whistleblower rights." Employers must also assess their policy against OSHA's general duty clause, which requires employers to provide a safe workplace free from recognized hazards that could cause death or serious physical harm. In 2009, OSHA did not then require employees to take vaccines.

NLRA

Section 7 of the NLRA protects employees' rights to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Thus, employers should exercise caution and consult labor and employment counsel before taking any adverse action against employees who collectively discuss or protest a mandatory vaccination policy, as such adverse action could result in an unfair labor practice charge against the employer.

Labor Relations in Unionized Workforces

Employers with unionized workforces must also consider whether the controlling collective bargaining agreement provides for broad management rights or whether such a policy requires bargaining with the union. If a mandatory vaccination policy falls within the compass or scope of existing language in the collective bargaining agreement, then the employer may be able to unilaterally implement the work policy without first bargaining with the union. If the policy does not fall within the compass or scope of existing language, then bargaining will be required before implementation. Under either circumstance, effects bargaining would be required.

Other Considerations

Employers should consider a number of other factors before implementing a mandatory vaccination program, such as the general availability of the vaccine and FDA-approval status, objections based on ethical considerations, or risks associated with taking a vaccine lacking demonstrated safety protocols or documented side effects and efficacy rates. Employers should also recognize they may face workers' compensation claims due to adverse reactions from a mandatory vaccine. Employers should also consider the potential for civil liability for not mandating a vaccination when one becomes available under the theory that the employer failed to take adequate precautions to protect its workforce. On the other hand, employers will have to balance that consideration with the threat of employee refusals to work or to be vaccinated on the basis of Section 11(c) of the OSH Act, as described above, especially considering that the current vaccines available have been approved under the FDA's emergency authorization process and did not undergo the traditional authorization process. Employers must also examine state and local laws in all areas where they do business to ascertain whether the particular state or locality prohibits a mandatory vaccination program.

In addition to the plethora of legal considerations, employers must also contend with the political and cultural implications of such a policy. A number of studies show that approximately one-third of the workforce would refuse a COVID-19 vaccine if one were available. With the large numbers of employees resistant to wearing facial coverings in the workplace, which is far less intrusive than a mandatory vaccine, employers can expect to see similar (or greater) defiance against a mandatory vaccine.

With these considerations at the forefront, employers would be well-served to take steps now to prepare for the inevitable widespread availability of a COVID-19 vaccine:

- Consider whether a mandatory policy is truly necessary and consistent with the employer's business needs, particularly in light of other workplace controls in place (social distancing, facial coverings, remote working arrangements, enhanced cleaning, and disinfecting methods, etc.).
- Determine if any of your customers intend to mandate vaccinations of your employees.
- If a mandatory vaccination policy is deemed necessary, consider confining the requirement to high-risk worksites or departments where alternative methods of minimizing the risk of exposure are not viable.
- Prepare now for accommodation requests by considering the types of accommodation requests and creating the requisite forms to administer the requests.
- Consider what you will do if an employee refuses to follow your vaccination policy based upon a generalized fear or personal preference—will you require masks and other environmental protections, or consider reassignment, teleworking, or layoff?
- Evaluate current health insurance policies and wellness programs for guidance and resources related to workplace vaccinations, including the potential for discounted premiums or other

incentives to the employer.

- Review all controlling collective bargaining agreements to determine the breadth of management rights and health and safety provisions that regulate an employer's right to make policies.
- Frequently monitor administrative agency guidance and all federal, state, and local laws related to vaccinations; consider assigning these responsibilities to a well-trained employee or safety committee.
- Consult counsel for guidance.

While the above guidance will assist employers in dealing with these complicated issues, please be reminded that this is an overview of developing legal issues and is not intended to be and should not be construed as legal advice. If you desire assistance in determining whether a mandatory vaccination policy is right for your workforce, or if you wish to have a policy prepared, please contact your Taft attorney or a member of Taft's COVID-19 Task Force .

Please visit our COVID-19 Toolkit for all of Taft's updates on the coronavirus.

Additional Resources

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