

Mandating COVID-19 Vaccinations in the Workplace: Practical Considerations for Employers

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With the United States experiencing the largest surge in cases since the COVID-19 crisis began, the Food and Drug Administration (“FDA”) recently granted emergency-use authorization of Pfizer’s and Moderna’s COVID-19 vaccines, prompting many employers to ask whether they can require their employees to get vaccinated.

Can employers mandate that their employees get vaccinated against COVID-19?

In short, yes, but subject to important exceptions. For example, employers are required to provide accommodations under the Americans with Disabilities Act (“ADA”) and Title VII of the Civil Rights Act of 1964 (“Title VII”). Whether an employer *should* require that its employees become vaccinated against COVID-19, however, raises a host of legal, regulatory, and practical considerations.

EEOC Issues Legal and Regulatory Guidance Regarding COVID-19 Vaccinations

On December 16, 2020, the Equal Employment Opportunity Commission (“EEOC”) published [guidance addressing the topic of COVID-19 vaccinations in the workplace](#) (the “Guidance”), which confirms that employers may lawfully require employee vaccinations.

Under the Guidance, the vaccination is not itself a medical examination, but any pre-screening questions are likely to implicate the ADA’s requirements concerning confidentiality. Pre-screening questions are also subject to the ADA’s standards for disability-related inquiries. Thus, employers should closely scrutinize any pre-screening questions to ensure they are job-related and consistent with business necessity.

The EEOC Guidance also addresses how employers may respond to exceptions limiting their ability to mandate vaccination – namely, when an employee indicates he or she is unable to receive a COVID-19 vaccination because of a disability or a sincerely held religious practice or belief. When an employee objects due to disability, the Guidance states that “the employer 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

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or others that cannot be eliminated or reduced by reasonable accommodation.” In making this determination, employers should first “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.” Then, if the employer determines that an unacceptable direct threat is posed if the employee does not receive a vaccination, the employer must assess whether a reasonable accommodation may be made for the employee (using the same interactive process as for other disability-related requests for accommodation). Similarly, employers must assess whether reasonable accommodations can be made for employees who indicate they are unable to be vaccinated due to a sincerely held religious belief. Consequently, if an employer wishes to mandate vaccinations, it should prepare for disability and religious-related requests for accommodation, including updating company policies and procedures.

Finally, the Guidance notes that the Genetic Information Nondiscrimination Act (“GINA”) is not implicated by either requiring employees to obtain a COVID-19 vaccination or to provide proof of such vaccination.

Practical Considerations for Employers Considering Mandating COVID-19 Vaccination

1. Vaccine Availability

Although the FDA has now approved multiple vaccines for use in the U.S., supply is severely limited, with initial doses distributed initially to health care providers and those populations most at risk, such as the elderly and residents and staff of long-term-care facilities. Thus, as a practical matter, it is highly unlikely that a company will have access to enough doses of the vaccine to provide it to its entire workforce. Employers should carefully consider whether alternatives to mandatory vaccination, such as continued remote work, social distancing, and masking are sufficient to address safety-related concerns in their business resulting from the pandemic. If so, employers may be wise to delay mandating vaccines until availability is less of an issue.

2. Employee Terminations and the Consequences of Refusal

With the politicization of the pandemic in the United States (and the corresponding polarization of personal-liberty issues such as stay-at-home orders and mask-related orders), some employees may be averse to a forced vaccination. And given the vaccine’s accelerated development timeline, some employees may feel that the risk of adverse side-effects outweighs its benefits or that the vaccine may not be effective. Accordingly, employers may wish to proceed with caution in implementing a mandatory vaccination policy—specifically, if an employer is going to require the vaccine, it should consider whether it is truly willing to terminate employees who refuse to get vaccinated. Employers should reflect on the potential impact that a mandatory-vaccination policy may have on employee turnover, morale, hiring difficulties amidst an ongoing pandemic, and the other staffing-related outcomes. Employers requiring COVID-19 vaccinations should clearly communicate any such policy ahead of implementation, emphasizing its necessity

and describing how it will be enforced.

3. Unionized Workforces

Additional considerations exist for employers operating with unionized workforces. To begin, where a collective bargaining agreement is silent on the topic and does not afford the employer discretion, the employer may need to bargain for a mandatory-vaccination program with the union. In addition, employers with unionized workforces should consider whether an employee's refusal to get vaccinated (subject to the exceptions discussed above under the ADA and Title VII) would constitute "just cause" for any subsequent grievance or arbitration hearings stemming from a termination.

4. The Cost of Vaccination

Employers implementing a mandatory-vaccination policy should also consider practical burdens their employees may be facing. For example, who will bear the cost of vaccination? Will the cost be covered by the employer? Will it be entirely covered from a financial perspective, or partially covered, or not covered? Will employees be provided time to get vaccinated during their workday, or will vaccinations be provided on-site? These types of logistical questions may weigh heavily on employees' minds; addressing them could help ease employees' worries.

Recap and Takeaways

Employers should carefully consider whether to require that its employees receive COVID-19 vaccination before access is more widespread, and should be sympathetic to employee concerns about access and cost. If an employee does not want to get vaccinated at this time and if he or she can work remotely (or if other reasonable accommodations can be made), an employer should seriously consider forgoing a mandatory-vaccination policy for now.

Overall, employers may initially want to **strongly encourage** employees to get vaccinated – with the caveat that it may be mandatory in the future – and only *require* vaccination in the future if absolutely necessary.

Dorsey is here to help. Since the beginning of the COVID-19 pandemic, Dorsey & Whitney lawyers have been guiding and advising companies of all sizes on COVID-19 related developments across the country. Please let us know if we can assist you in assessing and preparing relevant policies, developing a COVID-19 preparedness plan, training employees, answering paid-leave-related questions, or documenting compliance.