

*FAQs regarding the workplace
implications of a COVID-19 vaccine (incl.
mandatory vaccination policies)*

February 9, 2021

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On December 11, the FDA issued the first approval for a COVID-19 vaccine. Then on December 16, the US Equal Employment Opportunity Commission (EEOC) issued long-awaited guidance on the interplay between federal anti-discrimination law and vaccine-related issues, including the permissibility of mandatory employee vaccination policies. The below FAQs address some of the more salient questions surrounding such policies and their implementation, as well as other workplace issues triggered by the vaccine.

Q: Can employers adopt a mandatory employee vaccination policy?

A: Generally speaking, yes. In its December 16 guidance, the EEOC took the position, as was anticipated, that mandatory employee vaccination policies are generally permissible under federal anti-discrimination law. There are two primary exceptions to this general rule, however – for employees with disabilities and due to sincerely-held religious beliefs – both of which will be discussed below.

Nevertheless, while state and local anti-discrimination laws are often treated as analogous to their federal counterparts, no state or local fair employment practices agency has yet opined on the permissibility of mandatory employee vaccination policies. It is therefore possible that a particular state/city/county could take a different view than the EEOC, although this is unlikely.

Other federal agencies, such as the CDC and OSHA, may also issue their own guidance in the coming weeks.

Q: If an employer adopts a mandatory employee vaccination policy, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a disability?

A: Federal law allows an employer to have a qualification standard that includes “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.” However, if a safety-based qualification standard, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, 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 or others that cannot be eliminated or reduced by reasonable accommodation.” 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 an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, 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.

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. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities. For example, if an employer excludes an employee based on an inability to accommodate a request to be exempt from a vaccination requirement, the employee may be entitled to accommodations such as performing the current position remotely. This is the same step that employers take when physically excluding employees from a worksite due to a current COVID-19 diagnosis or symptoms; some workers may be entitled to telework or, if not, may be eligible to take leave under the Families First Coronavirus Response Act, under the FMLA, or under the employer’s policies.

Managers and supervisors responsible for communicating with employees about compliance with the employer’s vaccination requirement should know how to recognize an accommodation request from an employee with a disability and know to whom the request should be referred for consideration. Employers and employees should engage in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship. This process should include determining whether it is necessary to obtain supporting documentation about the employee’s disability and considering the possible options for accommodation given the nature of the workforce and the employee’s position. The prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration.

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Q: If an employer adopts a mandatory employee vaccination policy, how should it respond to an employee who indicates that he or she is unable to receive a COVID-19 vaccination because of a sincerely-held religious practice or belief?

A: Mandatory employee vaccination policies are subject to religious accommodations under Title VII. Title VII prohibits an employer from discriminating against an employee on the basis of religion. Therefore, once an employer is on notice that an employee's sincerely-held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act. Courts have defined "undue hardship" under Title VII as having more than a *de minimis* cost or burden on the employer.

EEOC guidance explains that because the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for 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 would be justified in requesting additional supporting information.

In short, therefore, if a US business implements a mandatory vaccination policy, it may receive religious accommodation requests – these requests cannot be summarily dismissed. The business will need to engage in an interactive process to determine if a reasonable accommodation exists that will not cause an undue burden on the company.

Q: What are some examples of possible reasonable accommodations that may be appropriate here?

A: After an employee makes an accommodation request – either related to a disability or a religious belief – an employer must engage in the interactive process with the employee. Based upon the information gathered from the employee and the circumstances of the employer, a reasonable accommodation may need to be made. In the context of exemptions from a mandatory vaccination policy, reasonable accommodations could include: (1) minimizing contact with co-workers; (2) eliminating contact with the public; (3) remote working arrangements; (4) alternative safety equipment or PPE; or (5) reassignment.

Not all accommodation requests must be granted. As noted above, an accommodation that would impose an undue hardship on the employer may be rejected. Undue hardship can be both economic costs, such as lost business or having to hire additional employees, and non-economic costs, such as compromising a company policy. Further, "[u]ndue hardship can also exist if the proposed accommodation would either cause or increase safety risks or the risk of legal liability for the employer."

Q: What happens if an employer cannot exempt or provide a reasonable accommodation to an employee who cannot comply with a mandatory vaccine policy because of a disability or sincerely-held religious belief?

A: If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely-held religious belief and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace. This does not mean the employer may automatically terminate the worker, however. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.

Q: Can employers ask or require an employee to show proof of receipt of a COVID-19 vaccination?

A: Yes, simply requesting proof of receipt of a COVID-19 vaccination is permissible. However, subsequent employer questions, 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." Accordingly, if an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own healthcare provider, the employer may want to warn the employee not to provide any medical information as part of the proof.

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Q: According to the CDC, health care providers should ask certain questions before administering a vaccine to ensure that there is no medical reason that would prevent the person from receiving the vaccination. If an employer requires an employee to receive the vaccination from the employer (or from a third party with whom the employer contracts to administer a vaccine) and asks these screening questions, are these questions subject to the ADA standards for disability-related inquiries?

A: Yes. Pre-vaccination medical screening questions are likely to elicit information about a disability. This means that such questions, if asked by the employer or a contractor on the employer's behalf, are "disability-related" under the ADA. Thus, if the employer requires an employee to receive the vaccination, administered by the employer, the employer must show that these disability-related screening inquiries are "job-related and consistent with business necessity." To meet this standard, an employer would need to have a reasonable belief, based on objective evidence, 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 her or himself or others.

Having said that, there is a circumstance in which disability-related screening questions can be asked without needing to satisfy the "job-related and consistent with business necessity" requirement. This is if an employer has offered a vaccination to employees on a voluntary basis (i.e., employees choose whether to be vaccinated). Under this circumstance, the ADA requires that the employee's decision to answer pre-screening, disability-related questions also must be voluntary. If an employee chooses not to answer these questions, the employer may decline to administer the vaccine but may not retaliate against, intimidate, or threaten the employee for refusing to answer any questions.

Lastly, note that if an employee receives an employer-required vaccination from a third party that does not have a contract with the employer, such as a pharmacy or other health care provider, the ADA "job-related and consistent with business necessity" restrictions on disability-related inquiries would not apply to the pre-vaccination medical screening questions and, thus, this issue would not be triggered.

Q: Do pre-vaccination screening questions implicate the Genetic Information Nondiscrimination Act (GINA)? [FAQ ADDED ON FEBRUARY 9]

A: Potentially. It is not yet clear what screening checklists for contraindications will be provided with COVID-19 vaccinations. There is a possibility that the screening questions may elicit information about genetic information, such as questions regarding the immune systems of family members.

If screening questions do include questions about genetic information, employers may want to instead simply request proof of vaccination rather than administering the vaccine themselves. If an employer requests proof of vaccination, it should warn employees not to provide genetic information as part of the proof. As long as this warning is provided, any genetic information the employer receives in response to its request for proof of vaccination is considered inadvertent, and therefore not unlawful under GINA.

Q: What language can employers use for the GINA warning to warn employees not to provide genetic information as part of proof of vaccination? [FAQ ADDED ON FEBRUARY 9]

A: Employers can use the following language: "The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."

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Q: Will the federal government mandate the vaccine?

A: Since this vaccine will be authorized under an emergency use authorization (EUA), it cannot be mandated by the federal government. Nevertheless, the EUA does not expressly prohibit a state or locality from requiring vaccination. To that end, on December 4, New York State introduced a bill that would require most residents to receive the COVID-19 vaccine. See <https://www.employmentlawwatch.com/2020/12/articles/employment-us/new-bill-would-require-virtually-all-new-yorkers-to-receive-covid-19-vaccination/> for additional information.

Q: Are there any particular implications for employers with unionized workforces?

A: Yes. The National Labor Relations Board has previously found that an employer must collectively bargain with its employees' union over a flu-prevention policy requiring immunization. Thus, for employers with unionized workforces, whether to implement a mandatory COVID-19 vaccination policy will likely require collective bargaining.

Q: Are there workers' compensation issues with requiring a vaccine as a condition of employment?

A: Potentially. If a vaccination is listed as a condition of employment and the employee has an adverse reaction due to the vaccine, there could be potential for a worker's compensation claim.

Q: Will my employees still need to use PPE after being vaccinated?

A: Yes. OSHA requirements for PPE use will continue to be in place after an employee is vaccinated. Current information suggests that the vaccine takes four weeks after the last dose to generate antibodies, but even in people who are vaccinated, some may still have the ability to get sick and current information is unclear whether vaccinated individuals will still be able to spread the virus or not. Employers should continue to monitor developments in this information as it becomes available in the near future.

Q: Can I relax social distancing requirements when my employees get vaccinated? [FAQ ADDED ON FEBRUARY 9]

A: No. The CDC and OSHA requirements for social distancing will continue to be in place even after an employee is vaccinated. Additionally, no existing vaccine has been proven to prevent transmission even where it otherwise prevents infection. The relaxation of workplace limitations will be dependent upon a number of factors, including widespread vaccination, better scientific data regarding transmissibility post-vaccination, and the impact of mutations. Further, selective relaxation of rules of vaccinated employees may raise discrimination concerns.

In short, unless and until applicable government bodies/agencies expressly lift social distancing requirements, such requirements should be kept in place even after employees are vaccinated.

Q: Do I have to provide paid leave for employees with adverse reactions from the vaccine?

A: While there is no current federal requirement for an employer to provide paid leave for an adverse reaction from the vaccine, an employer may be obligated to provide leave consistent with the Family and Medical Leave Act or ADA. Additionally, paid leave may be required under applicable state or local laws or the employer's own policies and, therefore, employers should consult with their employment attorney to the extent the need for leave arises.

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Q: Do I have to pay my employees for their time to get vaccinated?

A: Potentially. Where an employer maintains a vaccination program, the time an employee spends getting vaccinated may be compensable. This is particularly important as it relates to non-exempt employees. We expect the US Department of Labor to issue guidance on this issue in the coming weeks.

Q: Could an employer have liability for not adopting a mandatory vaccination policy?

A: Possibly. If a mandatory vaccination policy is not imposed, employees may allege that the employer has failed to provide a safe and healthy work environment, which is required by the Occupational Safety and Health Act. At present, OSHA has not yet issued guidance on this issue however.

Q: Are there any other potential complications associated with adopting a mandatory employee vaccination policy?
[FAQ UPDATED AS OF FEBRUARY 9]

A: Employers need to be prepared to address accommodation requests and the likely subsequent litigation following a denial of accommodation. A mandatory COVID-19 vaccination policy will almost assuredly be subject to the above-mentioned religious and medical exemptions. And depending on how states and cities regulate COVID-19 vaccinations, a mandatory policy may also be subject to philosophical exemptions. The denial of accommodation requests to be exempt from a mandated COVID-19 vaccination policy may be defensible in some cases. However, even if the denial of an accommodation request is defensible, litigation may well follow.

At the same time, state and local regulations, restrictions, and guidance will likely be equally as important as any guidance issued by the federal government, particularly for businesses that operate in proactive jurisdictions (e.g., California, New York State and City, New Jersey, Massachusetts and Illinois).

In addition, uncertainty still surrounds the price and the initial availability of a COVID-19 vaccination. It is currently unknown whether medical insurers will cover the cost of the vaccine. If they do not or if an employee does not have health insurance, employers may have to bear the cost to ensure a healthy workforce remains available to execute operations. Additionally, it is unknown how quickly the vaccine will be widely available in the US. Employers will have to decide what they will do with employees who have not been vaccinated due to unavailability, which could lead to collateral legal risks.

Employer should also bear in mind that the vaccine is technically still in EUA status, and therefore has not been officially approved by the FDA. As such, there is potential liability/risk if an employer requires employees to get vaccinated by a non-FDA-approved vaccine, in the event the FDA ultimately does not approve the vaccine, or if there are medical or safety risks associated with the vaccine that come to light in the future. Additionally, mandating employee vaccinations may pose a significant administrative burden for human resources departments, especially for large companies.

Q: Can my business administer the COVID-19 vaccine to our employees? Should we? [FAQ ADDED ON FEBRUARY 9]

A: Technically yes, an employer can directly administer the vaccine (like many do for the flu vaccine). Having said that, in most circumstances we would advise against it given the potentially significant attendant risks. For instance, pre-screening questions may solicit medical and disability-related information, thereby implicating various employment laws such as the ADA and GINA. There are also a variety of administrative burdens that would have to be met, such as having trained staff on-site who can administer the vaccine, as well as sufficient refrigeration on-site for storage. There is also potentially heightened liability if an employee experiences an adverse reaction to the vaccine. Additionally, there are risks of potential discrimination claims if there are not enough vaccines for all employees and employers are forced to determine how to prioritize administration.

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Q: *What approaches are other national companies taking with respect to vaccine?* [FAQ ADDED ON FEBRUARY 9]

A: Certain large companies have publicly stated they currently do not plan to require employee vaccination or will not issue vaccination mandates. One health system has not mandated vaccinations for its employees because the vaccines have not received full FDA approval yet.

Other companies are lobbying state and federal decision makers in an attempt to get their employees priority access to the vaccines. The same is being done by groups representing airline workers, the meatpacking industry, transit workers, banks, retail, and restaurants.

Still other companies are not considering requiring vaccinations as of now, but are waiting for more information on vaccine distribution and acceptance rates to make any final decisions.

Q: *Are companies facilitating employee sign-ups for vaccines?* [FAQ ADDED ON FEBRUARY 9]

A: Some employers are facilitating employee sign-ups for vaccines and some states are aiding in that process. For example, Connecticut has created a program for employers to enroll their employees in the state's vaccination rollout to ensure employees receive access to the vaccine. As it is still early on in most states' vaccination rollout process, it remains unclear if employer participation will facilitate priority access or if vaccines will simply be provided on a first-come, first-served basis.

Q: *Are companies providing incentives to employees to get vaccinated (rather than implementing mandatory vaccination programs)?* [FAQ ADDED ON FEBRUARY 9]

A: Yes, some companies are incentivizing, or plan to incentivize, employees to get vaccinated, as opposed to adopting a mandatory vaccination program. Some emergency response departments and health care providers have been incentivizing their employees with gift cards and small prizes. Other companies have announced their intention to offer their employees additional hours of pay or a cash bonus if they get vaccinated.

Q: *Is it permissible for companies to provide incentives to employees to get vaccinated?* [FAQ ADDED ON FEBRUARY 9]

A: Generally speaking, yes, companies can provide incentives to employees as a means of encouraging them to get vaccinated. However, employers should be aware of the potential risks that could accompany a vaccine incentive program. For example, employers should take care to ensure that a vaccine incentive program is entirely voluntary, and that supervisors do not pressure employees to participate. Pressuring or even strongly encouraging employees to get the vaccine could inadvertently create a *de facto* mandatory program, and be viewed as suggesting that failure to secure a vaccine will result in adverse impacts on the terms and conditions of employment. Similarly, if the incentive offered is too rich or valuable, this could also be seen as punishing non-vaccination rather than rewarding vaccination. Additionally, under the EEOC's proposed rules for wellness programs, employers may not offer more than a *de minimis* incentive to encourage an employee or employee family member to participate in a wellness program.

Vaccine incentive programs may also raise discrimination-related issues. Employees who are unable to receive a vaccine for legally-protected reasons—such as a disability or sincerely held religious belief—may claim they are being treated less favorably than employees who are able to get the vaccine and related incentive offered. Employers are also obligated under both the ADA and Title VII to provide employees with disabilities or sincerely held religious beliefs with a reasonable accommodation, as long as it does not place an undue burden on the employer.

There may also be wage and hour risks associated with certain vaccine incentives. Specifically, if an employer offers a cash "bonus" to incentive employees to get vaccinated, such payment could be deemed a nondiscretionary bonus under the FLSA, thereby requiring overtime adjustments for some employees. Additionally, the FLSA requires employers to compensate employees for expenses they incur on their employer's behalf, if such expenses should effectively reduce the employee's

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wages. As such, employers may need to compensate employees for time spent receiving the vaccination and reimburse them for any costs incurred, such as transportation expenses or vaccination costs.

Employers should consider offering *de minimis* incentives or something unrelated to the terms and conditions of employment, such as a gift card, which may help reduce the risk of discrimination and wage and hour claims.

Q: How are states handling the vaccine rollout? [FAQ ADDED ON FEBRUARY 9]

A: Each state is responsible for their own rollout of the COVID-19 vaccines. This means that national companies may have employees eligible for the vaccine in one state, but not in another. For example, West Virginia has a Joint Interagency Task Force that is overseeing the state's vaccine allocation and registration process. As states are individually determining who is eligible for the vaccine and when, employees status as an "essential worker" likely will not be determinative of when they will be eligible for the vaccine. States have focused their initial vaccine rollouts on healthcare workers, frontline emergency responders, and the elderly. Many states have not yet announced who will be eligible for the vaccine next once it becomes more widely available.

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