

COVID-19 Vaccinations: Thoughts for Employers

Labor & Employment Workforce Watch

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As the COVID-19 vaccination becomes more readily available, many employers are considering whether to require that employees be vaccinated. In December 2020, the Equal Employment Opportunity Commission (“EEOC”) issued [guidance](#) addressing certain questions related to the administration of the COVID-19 vaccination. Under this guidance, employers may implement a mandatory vaccination policy. However, before implementing such a policy, employers should give careful consideration to various legal issues.

Legal Considerations for A Mandatory Vaccination Policy

First, an employer should determine whether to (1) provide the vaccine to its employees itself or through a contracted third party or (2) require its employees to receive the vaccine from an independent third party such as a pharmacy or health care provider. Employers or their contracted third parties who provide the vaccine to their employees may only ask pre-screening questions that are “job-related and consistent with business necessity.” Employers should look to health care officials to determine the necessary pre-screening questions and delve no deeper than what the medical community advises is necessary. An employer whose pre-screening questions exceed the bounds of what is “job related and consistent with business necessity,” runs the risk of violating the Americans with Disabilities Act’s (“ADA”) prohibition against inquiries that elicit disability-related information.

In contrast, if an employee receives the employer-required vaccine from an independent third party, the ADA’s “job related and consistent with business necessity restriction” related to pre-screening questions will not apply.

Second, under the EEOC guidance, an employer who requires vaccinations must allow for disability and religious exemptions. The guidance, consistent with the ADA, requires that employers exempt from mandatory vaccination requirements an employee whose disability (i.e., a physical or mental impairment that substantially limits a major life activity) prevents the employee from safely receiving the vaccine. If an employee claims they cannot safely receive the vaccine due to a disability, the employer should engage in a good-faith interactive process to determine whether the purported disability entitles the employee to an exemption or other accommodation such as working remotely, wearing a face mask, or limiting the employee’s contact with the public and/or their co-workers.

Similarly, the guidance, in accordance with Title VII of the Civil Rights Act of 1964 (“Title VII”), requires employers to provide an exemption or other accommodation if receiving the vaccine would implicate an employee’s “sincerely held religious belief.” In each of these instances, an employer does not need to provide an accommodation if doing so would pose “an undue hardship” on the employer.

Third, the current COVID-19 vaccinations only have received Emergency Use Authorization (“EUA”) from the

Food and Drug Administration, meaning that individuals who have the opportunity to receive the vaccination may refuse it. This loophole arguably presents a conflict between an employer's mandatory policy and an individual's right to refuse a vaccine. If an employer requires its employees to be vaccinated, but one or more of its employees decline, then the employer will be confronted with a conundrum. How does it enforce a mandate when it may not be enforceable? The EEOC's guidance raises the issue of the vaccinations' EUA (see Section K.4), but does not directly address this issue.

Pros and Cons of a Mandatory Vaccination Policy

One obvious pro of a mandatory vaccination policy is that a vaccinated workforce may be a safer workforce. Such a policy may also help bring employees back to the workplace. Working in the office or other business locations may help increase productivity and profitability and provide more certainty to workforce availability. A mandatory vaccination policy may also allow employers to avoid certain COVID-related risks and liabilities.

On the other hand, many people are unwilling or hesitant to receive the vaccine. Thus, a mandatory vaccination policy could be met with resistance from employees, leading to morale and retention issues, or an argument that an employer who makes vaccinations mandatory should be somehow liable in the event that an employee has an adverse reaction to a vaccine.

Pros and Cons of a Discretionary Vaccination Policy

Many employers have adopted policies and programs to entice, rather than require, employees to be vaccinated. This "carrot" approach has included PTO for time taken to be vaccinated and for absences due to the side effects of a vaccine or for assisting family members to be vaccinated, gift cards, free Lyft rides to vaccination centers, and cash awards. A discretionary vaccine policy may result in a more content workforce and generally avoids ADA and Title VII issues. It also eliminates the specter of liability from an adverse reaction to a vaccine or its withdrawal from the marketplace, and it diminishes the administrative burdens necessitated by a mandatory policy, especially if the employer is administering its own vaccine program.

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