

Locke Lord QuickStudy: Vaccinations: Thoughts for Employers

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As vaccines become available to employees, what do employers need to know, what should they do, and what should they avoid??

Employers may establish legitimate health and safety requirements that are job-related and consistent with business necessity, including immunization requirements. While we await further guidance from the CDC, EEOC, and other federal, state, and local agencies, we can presume that employers generally will be entitled to require the COVID-19 vaccination, subject to certain legal restrictions. As an initial matter, however, employers may not want to require a COVID-19 vaccine until it is proven safe and effective. Accordingly, employers should consider waiting to mandate the vaccine until the FDA and/or CDC have authorized a COVID-19 vaccine, as opposed to the current Emergency-Use Authorization.

In addition, employers should provide medical and religious exemptions from any vaccination requirement. The Americans with Disabilities Act of 1990 (“ADA”) legislates that employers exempt from mandatory vaccination requirements an employee whose disability prevents him/her from safely receiving the vaccine. If an employee claims he or she cannot safely receive a vaccine due to a disability, the employer should engage in a good-faith interactive process to determine whether the purported disability comports with the ADA and entitles the employee to an exemption and/or another type of accommodation (e.g., working remotely or wearing a face mask in lieu of receiving a vaccine). Title VII of the Civil Rights Act of 1964 (“Title VII”) requires employers to provide an exemption and/or other accommodation if receiving a vaccine would violate an employee’s “sincerely held religious belief.” Under both the ADA and Title VII, an employer need not provide an accommodation if doing so would pose an undue hardship on the employer.

While these legal considerations will be in play when it comes to vaccines for employees, so will practical factors. First, many employees may resist being vaccinated. Based on current polling information, forty percent (40%) of vaccine eligible employees may resist.¹

In that instance, employers have choices. On the one hand, absent one of the legal accommodation issues discussed above or a contractual impediment, employers may choose to terminate the employment of employees who decline to be vaccinated. On the other hand, employers may elect to retain employees who refuse to be vaccinated. However, doing so on a selective or case-by-case basis may raise significant issues. For example,

are employees in comparable positions and protected categories being treated similarly? Employers may find a slippery slope ahead if some employees in a protected category are fired while others are retained. Of course, employers may require retained employees who reject vaccinations to utilize PPE and abide by other safety measures, such as frequent hand washing and social distancing that vaccinated employees may no longer require.

And it's not that simple. We know that none of the impending vaccines will be 100% effective.² As a result, 1/20 vaccinated employees may still be exposed to the virus.

Another reality is that no one knows for how long the vaccines will be effective.³ Employers will need to anticipate these issues and decide whether their workforces should continue to abide by the COVID-related safety measures already implemented or risk that some of their vaccinated employees will be infected.

What should employers do??

Employers should stay up to date on guidance from the CDC, EEOC, and other federal, state, and local agencies. Subject to any forthcoming guidance, employers should consider requiring vaccinations of all employees (with exceptions; see above) and begin preparations in the event it chooses such a mandate. In addition, employers should provide a reasonable time frame for employees to be vaccinated. At the end of the period by which vaccinations are required, employers should require either written evidence of vaccinations having been administered or a statement why employees were not vaccinated. In the meantime, employers will need to decide whether to terminate all non-vaccinated employees or require safety measures of those not vaccinated while continuing to implement their current safety requirements.

Employers should also consider allowing those who refuse to be vaccinated to (continue to) work remotely and to require re-vaccinations as indicated by CDC and local authorities. Employers also need to adopt and distribute policies reflecting their approach to vaccinations.

What should employers not do??

First, employers should avoid treating employees in protected categories differently. Second, they should pay close attention to the ADA and Title VII issues discussed above. Lastly, it may be a year or more before epidemiologists learn how long vaccines will remain effective.⁴ Because not everyone will be vaccinated and the length of the efficacy of vaccinations is unknown, COVID may be with us for quite some time. Consequently, employers will need to consider these issues for not just the immediate future, but for the next year and possibly longer.

Please visit our [Adapt. Adjust. Advance. Resource Center](#) often for up-to-date information on navigating these and other important legal considerations in the post-pandemic reality.

1 <https://news.gallup.com/poll/325208/americans-willing-covid-vaccine.aspx> <https://www.forbes.com/sites/tomspiggle/2020/11/20/can-employers-force-employees-to-get-a-coronavirus-vaccine> <https://www.pewresearch.org/science/2020/12/03/intent-to-get-a-covid-19-vaccine-rises-to-60-as-confidence-in-research-and-development-process-increases> 2 <https://news.gallup.com/poll/325208/americans-willing-covid-vaccine.aspx><https://www.forbes.com/sites/tomspiggle/2020/11/20/can-employers-force-employees-to-get-a-coronavirus-vaccine>

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