

When the COVID-19 Vaccine Arrives, Will Your Business Be Ready?

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Who Needs to Know

All employers.

Why It Matters

Businesses should begin to address these issues now so that when COVID-19 vaccines are ready for distribution, they will be too.

On a nearly daily basis, Americans hear promising news about vaccine developments that will help protect us from COVID-19. As the reality of a safe, effective, and accessible vaccine draws closer, industries and businesses across the country have started developing their own COVID-19 vaccine strategies. These entities have quickly discovered that any vaccine policy implemented will raise complicated questions not previously faced. While historic annual influenza vaccine strategies are informative, COVID-19 vaccine issues bring new challenges because of the sheer magnitude of the pandemic and the unique issues surrounding the pace of development and distribution. As such, businesses should proactively address these issues now so when the COVID-19 vaccines are ready for distribution, they will be too.

As a threshold matter, under current law, an employer may require an employee to take the COVID-19 vaccine as a condition of employment provided that the employer makes an exception for those with a *bona fide* medical condition under the Americans with Disabilities Act (ADA) or sincerely held religious belief, practice, or observance under Title VII of the Civil Rights Act of 1964 (Title VII).

The Equal Employment Opportunity Commission (EEOC) issued [guidance in 2009](#) to help employers navigate the ADA and Title VII at a time when the H1N1 virus had reached pandemic status. Earlier this year, the EEOC updated this guidance to address the COVID-19 pandemic and offer employers assistance in planning for, operating during, and preparing for the transition to reopen operations once permitted by federal, state, and local governments. While the EEOC clearly prefers employers to encourage employees to get vaccinated rather than issuing a mandate, the agency acknowledges that employers can mandate it if circumstances warrant, while also offering an exception for medical conditions and religious beliefs. Specifically, the EEOC states:

An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the [] vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee's sincerely held religious belief, practice, or observance prevents him

from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII (“more than de minimis cost” to the operation of the employer’s business, which is a lower standard than under the ADA).

Like the EEOC, the Occupational Safety and Health Administration (OSHA) issued an [interpretation letter](#) in 2009 in response to an inquiry about mandatory flu vaccinations in health care facilities following the H1N1 virus outbreak. Specifically, the interpretation letter stated:

OSHA does expect facilities providing healthcare services to perform a risk assessment of their workplace and encourages healthcare employers to offer both the seasonal and H1N1 vaccines. It is important to note that employees need to be properly informed of the benefits of the vaccinations. However, although OSHA does not specifically require employees to take the vaccines, an employer may do so. In that case, 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 (such as serious reaction to the vaccine) may be protected under Section 11(c) of the Occupational Safety and Health Act of 1970 pertaining to whistleblower rights.

Further guidance specific to the vaccine may be forthcoming from OSHA or the EEOC as the vaccine becomes more readily available.

When an employee claims a *bona fide* medical condition and/or that a sincerely held religious belief should exempt him/her from any vaccine requirement, an employer must engage in an interactive process with that individual to determine possible reasonable accommodations. An employer may still deny the requested accommodation if it demonstrates that the accommodation presents an “undue hardship.” In the Title VII context, an employer need not grant religious accommodation requests that result in more than a *de minimis* cost to the operation of the employer’s business. The undue hardship standard is higher under the ADA since consideration is given to whether the accommodation requested would entail significant difficulty or expense for the employer — including considering the resources of the employer and facility involved, the type of business, and the impact of the proposed accommodation upon the employer’s operations.

One of the unique issues that may arise with the COVID-19 vaccine, as compared to other vaccines, is safety. All COVID-19 vaccines available for distribution in the U.S. will need to secure an Emergency Use Authorization (EUA) from the Food and Drug Administration (FDA). Nonetheless, some people may have concerns about the pace of the vaccine’s development. Our lack of previous experience with a vaccine developed on this timeline, coupled with employers mandating that employees receive the new vaccine, may lead to questions about the enforceability of employers’ policies. Employers must be ready, however, to respond to employee refusals beyond the historical categories, such as *bona fide* medical conditions or sincerely held religious beliefs.

Employers that choose to mandate the COVID-19 vaccine must also grapple with the fact that, at least initially, sufficient doses of the vaccine may not be available to immunize the entire workforce. If there is a scarcity, employers must contemplate how this will impact their policies.

We have only started to scratch the surface of the myriad questions employers will face about a new COVID-19 vaccine. The Troutman Pepper Vaccine Task Force will maintain a [COVID-19 Vaccine Frequently Asked Questions](#) site to help our clients as they think through these issues. If you have questions specific to your

business or COVID-19 vaccination policies, please feel free to [contact us](#) or visit the [Troutman Pepper COVID-19 Resource Center](#).

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