

# PUBLICATION

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## COVID-19 Vaccinations: Should You Require Employees to Take Them?

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Over 14 million total cases and more than 280,000 deaths from COVID-19 infections have been reported to the Center for Disease Control and Prevention (CDC) since January 21, 2020. For more than a month, the United States has reported more than 100,000 daily infections of COVID-19. The growing number of COVID-19 infections and the growing number of daily hospitalizations, which are reported here by the COVID Tracking Project, are concerning. Governors are considering or have already re-implemented safety and stay-home measures, and employers are striving to stay open *and* keep their workforce safe. With recent reports by Pfizer and Moderna that their COVID-19 vaccinations are effective and safe, many employers are considering whether to mandate vaccinations as a COVID-19 safety measure once the vaccines are ready for distribution. While generally employers may mandate vaccinations, there are a number of issues employers should consider, including federal, state and local law, federal guidance, other safety measures as well as employee morale.

### Federal and State Law

The Americans with Disabilities Act (ADA) generally prohibits employers from mandating vaccinations unless they are job related and consistent with business necessity and are otherwise no more intrusive than necessary. This is difficult to prove for most employers unless they are in health care. And, it is unclear whether the severity of the pandemic will support vaccination mandates beyond the health care industry. Employers should also consult state and local law. More states are considering these issues and may provide vaccination mandates and/or required exemptions in the near future. Further, Pfizer and Moderna have obtained Emergency Use Authorization (EUA) for their respective vaccines. Whether an employer can legally mandate a vaccine being distributed under an EUA is not entirely clear. In [guidance](#) published by the U.S. Food and Drug Administration (FDA) on the EUA process, the FDA wrote "FDA must ensure that recipients of the vaccine under an EUA are informed, to the extent practicable given the applicable circumstances, that FDA has authorized the emergency use of the vaccine, of the known and potential benefits and risks, the extent to which such benefits and risks are unknown, *that they have the option to accept or refuse the vaccine*, and of any available alternatives to the product." The FDA has been asked to provide guidance on whether an employer may mandate a vaccine under an EUA, and such guidance is expected to the extent the EUA requests are granted.

### EEOC Guidance

The EEOC has not provided guidance on whether employers may mandate COVID-19 vaccinations, but the EEOC has provided guidance about the influenza vaccination that is instructive for employers. The EEOC stated in its Pandemic Preparedness in the Workplace and the Americans with Disabilities Act guidance that an employer covered by the ADA and Title VII of the Civil Rights Act (Title VII) *may not* compel its employees to take the influenza vaccine. The EEOC explains that an employee may be entitled to an exemption from a mandatory vaccination requirement based on a disability that prevents the employee from taking the vaccination and entitles the employee to a reasonable accommodation under the ADA. In addition, an employee may be entitled to a religious exemption from the vaccination requirement pursuant to Title VII if the employee has a sincerely held religious belief, practice or observance that prevents the employee from taking the influenza vaccine. Covered employers must accommodate an employee seeking an exemption based on

disability under the ADA or religion under Title VII unless the requested accommodation would pose an undue hardship.

In short, the EEOC's position is that employees who are entitled to an exemption or accommodation may not be required to take the flu vaccination. Consequently, the EEOC advises employers to *encourage* all employees to take the influenza vaccine rather than requiring them to take it. Many opine the EEOC will follow this same reasoning for COVID-19 vaccinations to conclude that employers should also encourage and not mandate COVID-19 vaccinations.

### **OSHA Guidance**

The Occupational Safety and Health Administration (OSHA) has not provided guidance on COVID-19 vaccinations, but in a 2014 guide, [Protecting Workers during a Pandemic](#), OSHA said "Depending on the pandemic, a vaccine may or may not be available to protect people from illness. If available, employers *may offer* appropriate vaccines to workers to reduce the number of those at risk for infection in their workplace." Additionally, in pandemic preparedness guidance, OSHA indicated employers should "encourage employees to take care of their health by . . . getting a seasonal flu vaccination". These publications suggest OSHA will also recommend encouraging employees to get a COVID-19 vaccination.

Notably, OSHA may arguably rely on the general duty clause of the Occupational Safety and Health Act of 1970 that requires an employer to provide a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm" to cite employers who do not offer employees COVID-19 vaccines. However, OSHA likely will not use the law for this reason especially if the employer has other measures in place (e.g. masks, cleaning, sanitation, social distancing) and otherwise follows CDC and OSHA guidance to protect employees from COVID-19 exposure in the workplace. OSHA recently released a common COVID-19 citations guide demonstrating that for the general duty clause it has commonly cited employers for not furnishing a place of employment free from recognized hazards by "for example, installing plastic barriers or ensuring social distancing." Consequently, OSHA guidance may ultimately indicate that COVID-19 vaccinations may be offered onsite and encouraged while other measures are required.

### **Other Considerations**

In addition to considering federal and state law, EEOC guidance and OSHA guidance, employers should also consider collective bargaining agreements, potential concerted activity, whether only certain positions require a vaccination mandate, employee morale, tort claims and other safety measures when deciding whether to require COVID-19 vaccinations. Surveys suggest that a large volume of the population may refuse to get the vaccination for reasons unrelated to disability or religion particularly given how politicized vaccinations have become and how quickly vaccinations have been developed. Mandating the vaccination may negatively impact employee morale and require employers to make difficult decisions on whether to terminate or discipline otherwise productive employees who refuse to take the vaccination for reasons other than disability or religion. Other measures, which include cleaning and disinfecting, ventilation, face coverings and social distancing, have proven successful in mitigating the spread of COVID-19. Many health care experts explain that, even when vaccinations are available to the public, these proven safety measures should continue for some time. Further, there are potential risks of tort claims regardless of whether the employer requires or only encourages the vaccination.

### **Takeaway**

Given the volume of potential issues and considerations on whether to require or simply encourage vaccinations, please consult employment counsel to weigh the pros and cons of either decision for your organization. The response for one company may not be the proper response for another. Ultimately, most employers should consider encouraging rather than mandating the COVID-19 vaccination. This is particularly true if the employer is unable to demonstrate the vaccine should be mandated because it is job-related and

consistent with business necessity or is justified by a direct threat. Employers who do mandate the vaccination should develop measures and a process to allow accommodations and exemptions particularly due to disability and religion. These requirements should be clearly communicated to employees, and specific individuals should be designated *and trained* to handle these accommodation and exemption requests.

If you have any questions, contact [Nakimuli Davis-Primer](#) or any member of Baker Donelson's [Labor & Employment Team](#).