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Employers' Top Five COVID-19 Vaccination Questions Answered

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The introduction of COVID-19 vaccines has created many questions in the workplace for employers. In this alert, we address five of the most popular vaccine-related questions, including vaccine mandates, mask mandates, and ADA accommodations.

1. Once the COVID-19 vaccine is fully authorized by the Food and Drug Administration (FDA), may non-health care employers mandate that employees receive the COVID-19 vaccination and terminate employees who refuse to get vaccinated?

The Equal Employment Opportunity Commission's (EEOC's) technical guidance on the COVID-19 pandemic clarified that any vaccination authorized by the FDA is not a "medical examination" for purposes of the Americans With Disabilities Act (ADA). The guidance indicates that employers may condition employment on vaccination status, provided the employer grants reasonable accommodations to employees who are unable to receive the vaccine because of a disability or religious reasons. Thus, under current EEOC guidance, an employer could potentially terminate an employee who refuses the COVID-19 vaccination despite the vaccine's emergency use authorization (EUA) status. Notably, a small percentage of employers in the U.S. have announced they will require employees to be vaccinated to return to work or as a condition of employment.

Many other employers have taken a "wait and see" approach, however, while the vaccinations are under EUA status. This hesitancy is likely based on federal regulations that require the FDA to ensure that recipients of an EUA vaccine "have the option to accept or refuse the vaccine," which some interpret to mean that vaccinations cannot be forced on unwilling employees. Mandating that employees receive an EUA vaccine could potentially expose an employer to a wrongful termination suit for violation of public policy. In fact, one such suit was recently filed in federal court by a state corrections officer in New Mexico who is threatened with termination for refusing the COVID-19 vaccine.

Once the vaccinations are fully authorized, this public policy concern may cease to exist. Nevertheless, employers should proceed with caution before instituting a mandatory vaccination policy. Employers must be aware the EEOC's guidance is not the law and may still be challenged in court. In addition, mandatory vaccination policies may be at odds with state and local laws. For example, Arkansas recently passed a law that prohibits state and local governments from requiring proof of vaccination as a condition of employment. Several more states have introduced legislation that would prohibit government and private employers from discriminating or retaliating against any employee who refuses the COVID-19 vaccine.

Although the Occupational Safety and Health Administration (OSHA) recommends that employers make COVID-19 vaccinations free to employees, it recently published guidance that designates adverse reactions to the COVID-19 vaccine as a recordable injury if the employee receives the vaccination pursuant to a mandatory vaccination policy. Adverse reactions to voluntary vaccinations are not recordable even if the employee receives the vaccine in the workplace.

Adding to the legal concerns associated with such a policy, employers will need to carefully weigh morale issues and the risk of losing workers who may refuse to comply.

2. Can I require my employees to tell me if they are vaccinated and, if so, to provide proof?

The EEOC's COVID-19 guidance provides that asking for proof of an employee's vaccinated status is not a disability-related inquiry and is permitted under the ADA. However, the EEOC cautions that asking an employee about the reasons for declining vaccination could require the employee to reveal information about a disability. Thus, the employer would need to demonstrate that such questions were "job-related and consistent with business necessity." The EEOC recommends that employers warn employees not to provide any medical information as part of the proof of vaccination.

Before requiring employees to reveal their vaccination status, employers should also be mindful of state and local regulations. Several states have proposed legislation banning so-called "vaccine passports" that would bar employers from asking employees about employees' vaccination status. It is uncertain whether these laws will garner enough support to pass. However, as this is a quickly evolving area of the law, employers would be wise to seek out legal counsel before enacting such policies.

3. May employers treat unvaccinated employees differently than vaccinated employees, such as imposing different mask rules?

In March of this year, the Centers for Disease Control (CDC) issued new recommendations for fully vaccinated people which allows for fully vaccinated individuals to gather indoors with others who are fully vaccinated without wearing a mask. The CDC recommends, however, that fully vaccinated people still wear a mask when in the company of unvaccinated individuals and continue to avoid large gatherings. As such, the CDC's guidance suggests that employers keep mask mandates in place regardless of vaccination status unless the entire workforce is fully vaccinated.

Similarly, OSHA recommends that vaccinated workers continue to follow protective measures, such as wearing a face covering and remaining physically distant, "because at this time, there is not evidence that COVID-19 vaccines prevent transmission of the virus from person-to-person."

One important takeaway from the CDC's guidance is that employees who are fully vaccinated do not need to quarantine if they have an exposure unless the employee experiences symptoms. This is good news for employers who want to keep employees at work.

In implementing any policy that treats employees differently, employers must adhere to federal and state anti-discrimination laws. Employers may not treat an employee who is unvaccinated less favorably in terms of conditions of employment if the employee rejects the vaccine for sincerely held religious beliefs or an ADA-qualifying disability. It is unlikely that requiring an unvaccinated employee to wear a mask would be considered a less favorable term and condition of employment and could even be a reasonable accommodation for employees who cannot be vaccinated. However, state and local laws may provide further protections to employees who decline to be vaccinated and should be reviewed before segregating the workplace based on vaccination status.

4. Can we require employees who refuse to be vaccinated to sign a waiver/release of claims against the company if they contract COVID-19 at work?

We do not recommend that employers require employees to sign such waivers because workers' compensation benefits generally cannot be waived and any possible limited benefits probably do not outweigh the potential downsides.

If an injury or illness arises out of and occurs in the course of employment, workers' compensation will apply in most situations to provide certain compensation to the employee and to limit the employer's liability. Note that most employees face substantial hurdles in establishing that they contracted COVID-19 at the workplace, as opposed to someplace else, although some states have recent rules establishing a presumption of work-relatedness for certain high-risk employment positions. However, assuming the employee can establish causation, most states do not permit employees to waive their rights to workers' compensation benefits. Any document signed by an employee that purports to waive or limit workers' compensation benefits will generally be unenforceable and should not be used as the reason to deny a workers' compensation claim.

Also, outside of the employment and workers' compensation setting, most states, on public policy grounds, do not enforce waivers of certain egregious conduct (e.g., intentional, criminal, gross negligence). Therefore, the possible areas or types of claims for which a waiver may be effective are severely limited at best.

Waivers between employers and employees cannot cover Occupational Safety and Health Administration (OSHA) complaints or investigations. No waiver or other attempt at limiting liability should replace the need to maintain a safe workplace. Practically speaking, attempted waivers may have a negative psychological effect on employees and thus hinder operations and could result in negative publicity concerns.

5. Employers are ready for employees to return to the workplace, including those who were on leave or working from home as an ADA accommodation during the pandemic because of an underlying health condition. (A) Should employers send a request for updated information from these employees' physicians? (B) Should employers ask if there is any reason such employees cannot be vaccinated?

(A) The EEOC states that doctor's notes (or possibly other alternative forms of documentation) certifying fitness for duty for returning to work "are permitted under the ADA either because they would not be disability-related or, if the pandemic were truly severe, they would be justified under the ADA standards for disability-related inquiries of employees." Employers most likely need information from these employees' physicians as part of the reasonable accommodation interactive process and/or the individualized assessment employers are required to make under the ADA of whether the employees pose a direct threat.

(B) Asking an employee if there is any reason that he or she cannot receive a COVID-19 vaccination most likely is a medical examination under the ADA and appears to be the equivalent of pre-screening vaccination inquiries. Therefore, such questions will implicate the ADA's provision on disability-related inquiries, which are inquiries likely to elicit information about a disability. If the employer administers the vaccine, it must show that such pre-screening questions 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.

The EEOC has noted two circumstances in which disability-related screening questions can be asked without needing to satisfy the "job-related and consistent with business necessity" requirement. First, if an employer offers a vaccination to employees on a voluntary basis, 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. Second, 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.

If you have any questions about vaccines or any other COVID-19 topics, please contact [Chad E. Wallace](#), [Rachel VanNortwick Barlotta](#), or any member of Baker Donelson's [Labor & Employment Team](#).