



Mandatory vaccination programs: May employers stick it to their employees?

By Seth Neulight, Benjamin Kim, David Rosenthal, Rachel Conn, Alicia Anderson, and Sarah Swank

As the COVID-19 virus continues to take its toll, the promise of a vaccine to help prevent the spread of the virus has been highly anticipated. In record time, two different COVID-19 vaccines have been developed, tested, and approved for emergency use in the United States, based on priority need. As part of [Operation Warp Speed](#), the vaccine is currently being distributed to health care providers and vulnerable patients, such as seniors in skilled nursing facilities. While most Americans will not likely be able to get the vaccine until 2021, employers can proactively develop policies and procedures that address COVID-19 vaccination of their employees. Employers should weigh the anticipated benefits of vaccination, their OSHA requirements, and other public health benefits with the practical challenges, uncertainties, and public discourse surrounding the vaccine.

Background on COVID-19 vaccines

Earlier this year, Pfizer and Moderna each developed separate COVID-19 vaccines within remarkably short time periods. Both vaccines underwent large-scale human clinical trials, involving thousands of people. The advertised results of the trials showed that both vaccines are over 90% effective in preventing the recipient from contracting COVID-19, and they reportedly have shown no serious side effects. Both vaccines also were shown to be effective in preventing COVID-19 positive individuals from experiencing serious symptoms.

An advisory committee to the [U.S. Centers for Disease Control and Prevention](#) (CDC) voted to recommend approval of the [Pfizer](#) and [Moderna](#) vaccines for emergency use authorization (EUA). Earlier this month, the U.S. Food and Drug Administration (FDA) issued EUAs to permit emergency use of both vaccines for active immunization against COVID-19. Due to limited initial supplies of the vaccine and expected limitations in future production, the CDC recommended that the vaccines be distributed based on [prioritization](#), starting with health care workers and long-term care facility residents. Vaccinations of people in these groups have begun.

Despite widespread optimism about the Pfizer and Moderna vaccines, there is much we do not know about them. For example, it is unclear whether or to what extent the vaccines prevent an asymptomatic carrier of COVID-19 from transmitting the virus to others. It is also unknown how long any immunity benefit from the vaccines will last.

Importantly, because the protections afforded by the COVID-19 vaccines are not fully understood, the CDC recommends that even after vaccination, people should continue to use all other tools available to help stop the pandemic—while at work and elsewhere—such as wearing masks, physical distancing, and hand washing.

Can employers mandate COVID-19 vaccinations?

Generally, employers have a duty under federal law, and many state laws, to provide a safe workplace for their employees. Consistent with this obligation, employers have adopted measures recommended by the CDC, the Occupational Safety and Health Administration (OSHA), and state public health agencies to help reduce the spread of COVID-19. Typical requirements for employees have included wearing face coverings, maintaining physical distance from others at worksites, undergoing temperature checks, submitting to daily health self-screenings, and/or limiting group meetings and work travel.

With the advent of vaccines and the desire to protect their workers and operations, employers are now grappling with the question: Can employees be required to receive the COVID-19 vaccine as a condition of employment? As discussed below, the answer is probably yes, at least under current federal employment laws, though employer vaccination mandates are still vulnerable to legal challenges and raise significant practical concerns. The current EUA approval status of the vaccines raises additional issues regarding the legality of any employer vaccination mandate.

To date, neither Congress nor any state legislature has enacted a law that either (i) expressly allows or requires employers (regardless of industry) to mandate COVID-19 vaccinations of their employees or (ii) prohibits such a mandate. The COVID-19 pandemic is unprecedented and evolving. While past pandemics and vaccination programs offer limited guidance, there is no binding legal authority that prescribes employer efforts to vaccinate their employees against COVID-19.

EEOC COVID-19 Vaccination Guidance

Nonetheless, employers now have, at least, some specific guidance on COVID-19 vaccinations from the federal government. On December 16, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) published the long-awaited [Technical Assistance Questions and Answers](#) on mandatory COVID-19 vaccinations in the workplace. According to this guidance, employer vaccination mandates, with certain exceptions, are lawful under both the federal Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act (Title VII).

The EEOC guidance states that an employer-administered vaccination of an employee for protection against COVID-19 is not a “medical examination” subject to the ADA’s strict standards for disability-related inquiries. However, the agency noted that pre-vaccination medical screening questions of employees may implicate those standards, and, therefore, such questions must be “job-related and consistent with business necessity.” The EEOC also opined that employers may ask or require employees to show proof of receipt of a COVID-19 vaccination without violating the ADA.

Notably, the EEOC offered guidance as to how an employer should respond if, when requiring COVID-19 vaccination, an employee indicates he or she is unable to receive the vaccine because of a disability. The agency stated that under the ADA, the employer must conduct an “individualized assessment” to determine whether an unvaccinated employee would pose a direct threat to the health or safety of others in the workplace. Such a determination may be based on a conclusion that the employee could expose others to the virus. Yet the EEOC cautioned that an “employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.” The agency stated that even if the employer determines the employee must be excluded from the physical workplace, it should consider potential accommodations that could be made without undue hardship, such as a remote work arrangement.

The EEOC also provided guidance on how an employer should respond if an employee states he or she cannot comply with a COVID-19 vaccine requirement because of a religious practice, belief, or observance. The agency opined that under Title VII, the employer must provide a reasonable accommodation for a sincerely held religious practice or belief unless it would pose an undue hardship. The EEOC indicated that because religion is defined broadly, and religious practices or beliefs vary widely and may be unfamiliar, an employer “should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief.” The EEOC suggested that if the employer has an objective basis to question the nature or sincerity of the religious belief or practice, it would be justified in requesting additional information. As a practical matter, however, employers may find it awkward to ask an employee probing questions about their personal religious beliefs. Given the inherent difficulty of this inquiry, employers are vulnerable to liability if they take adverse action against an employee who refuses the vaccine on asserted religious grounds.

Finally, the EEOC noted in its guidance the distinction between vaccines given full approval by the FDA and those—like the Pfizer and Moderna COVID-19 vaccines—that are approved under an EUA. The EEOC noted that for EUA-approved vaccines, the FDA has a regulatory obligation to ensure that potential recipients of such vaccines are informed of the known and potential benefits and risks of the vaccine *and* have the option to accept or refuse it for any reason. As long as the EUAs are in effect for the vaccines, this FDA duty to inform recipients of the right to refuse the vaccine conflicts with an employer-mandated vaccination program and creates further legal uncertainty.

While the EEOC has issued guidance regarding the vaccines under certain federal laws, states may interpret their own employment laws in a manner that is more protective of employees. These laws may further limit employers’ ability to require employees to receive COVID-19 vaccinations. Employers should monitor legal developments in this area in the states in which they have operations.

Employment law risks of mandatory COVID-19 vaccination policies

Employers that require their employees to receive COVID-19 vaccinations should be aware of the potential for employment claims, which should inform their practices if they decide to move forward with a mandatory vaccination policy. In the case of a disabled employee or applicant who declines the vaccine, employers face potential liability under the ADA and/or state discrimination laws. Employers should avoid overbroad disability-related inquiries, disciplinary actions, or termination of an employee without considering other work options. Such actions may result in

one or more disability-related federal or state law claims. Such claims include disparate treatment discrimination, failure to accommodate disability, failure to engage in the interactive process, and retaliation.

Separately, employers may be exposed to similar claims under Title VII and/or analogous state employment discrimination laws if they take action against employees who refuse the vaccine based on sincerely held religious beliefs. Employers who attempt to question the nature or sincerity of an employee's religious beliefs or practices, offered as grounds for refusal of the vaccine, also risk violating state privacy laws.

Mandatory vaccination policies may also give rise to potential workers' compensation claims. If an employee becomes ill or suffers a significant adverse reaction to the vaccine, requiring medical treatment and/or time off work, such an injury could be deemed compensable under state workers' compensation statutes.

Finally, employers also face potential exposure to retaliation claims under federal or state occupational safety laws, and/or whistleblower laws, if they take action against employees who object to the vaccine based upon a good-faith concern about its impact on their health. Uncertainties about the safety and efficacy of the current vaccines and the evolving nature of scientific data during the pandemic may fuel such claims.

Employers can mitigate these risks by establishing a policy and practices specific to COVID-19 vaccinations, and by educating their managers to direct employee questions or concerns about vaccination to human resources professionals.

Union and workers' rights under the NLRA

For any unionized workplace, an employer must consider whether it needs to bargain with the applicable labor unions before any vaccination program begins. Generally, employers have a duty to bargain with a union over any changes to "wages, hours, and working conditions." Unions have taken varying positions with their members as to whether or not COVID-19 vaccinations are necessary and/or appropriate. Yet more often than not, unions have asserted that employer vaccination policies, like most workplace safety matters, are a mandatory subject of bargaining. Such negotiations, if they occur, are most likely to focus on the logistics of the vaccinations, who pays the costs, and the consequences to employees who refuse the vaccine or claim an inability to receive it.

Employers will need to review the terms of any applicable collective bargaining agreement when implementing a vaccination program. Some contracts may already cover employee health issues, including required vaccinations. Other contracts may contain more generic provisions, such as management rights clauses, that can be interpreted to give the employer the right to require vaccinations. If the contract is silent about vaccinations, employers should consult with legal counsel before implementing a vaccination program in reliance on any such broader provisions.

Whether the workplace is unionized or not, all employees have a right under Section 7 of the National Labor Relations Act (NLRA) to engage in "concerted activity." This concept involves group activity or communications among employees related to the terms and conditions of employment for their "mutual aid or protection." Employers should anticipate that some employees may object to a mandatory vaccination policy as an infringement on their personal liberty or on other personal, ethical or political grounds. Employees may express these views with

each other, either privately or through online social media websites, as a form of group protest. Such activities may be protected by the NLRA. Employers will need to consider how they will handle such activity. Any disciplinary action taken in response may leave the employer exposed to liability for violation of the NLRA.

Alternatives to mandatory COVID-19 vaccination policies

Employers may find they can achieve an equal or better rate of workforce participation in vaccinations by educating employees and encouraging them to receive vaccination on a voluntary basis. This can be done in several ways.

- Employers should consider paying all costs of the vaccination. Many health plans are covering the costs during the public health emergency. They should ask their insurers whether the costs may be covered under a group health insurance plan.
- Employees should be educated with accurate, up-to-date information about the known and potential benefits (and risks) of the vaccines and the vaccination procedure.
- If available, employers could consider hosting vaccination clinics on-site during work hours when convenient for most employees or contract a third party at an off-site location. These clinics must meet state and federal laws and regulations on vaccine administration, including a requirement that the shots are administered by a licensed health care provider.
- Consider offering employees additional benefits or “perks” for their participation in the program.

For those employees who do not get the vaccine, additional safety precautions may be required in the future. For now, the CDC still recommends that even those people who receive the vaccine should wear masks, observe physical distancing, wash hands frequently, and exercise other personal safety precautions.

Actions employers can take now

To prepare for the wider availability of COVID-19 vaccines, employers should consider taking the following actions now:

- Establish a working committee of management, human resources, legal, and safety personnel to discuss and develop a plan for employee vaccinations.
- Review existing employment policies and procedures for impact on employee vaccinations.
- Review the terms of existing union contracts and any bargaining obligations that may apply before a vaccination program is implemented.
- For mandatory vaccination programs, establish clear guidelines for handling employee objections and/or requests to be excluded based on a disability, medical condition, or religious beliefs or practices.
- Monitor guidance from the CDC, OSHA, and other federal and state government agencies and executive orders on vaccination issues as the rules are likely to evolve in the near and long term.
- Review supply chain and vaccine distribution efforts as they develop.

- Check on health plan benefits.
- Consider a communication strategy, including obtaining and distributing materials from federal and state government agencies to educate employees about the benefits and risks of COVID-19 vaccinations.

Like so much about our collective societal experience with COVID-19, there are many questions and few clear answers concerning mandatory vaccination programs. Whether or not employers should require vaccinations and how such programs should be established and implemented, create a myriad of legal and practical issues. Employers should consult legal counsel for additional guidance as the pandemic and related public health and regulatory guidance continues to evolve.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

- Seth Neulight, 415-984-8377, sneulight@nixonpeabody.com
 - Benjamin Kim, 213-629-6090, bkim@nixonpeabody.com
 - David Rosenthal, 617-345-6183, drosenthal@nixonpeabody.com
 - Rachel Conn, 415-984-8216, rconn@nixonpeabody.com
 - Alicia Anderson, 213-629-6073, acanderson@nixonpeabody.com
 - Sarah Swank, 202-585-8500, sswank@nixonpeabody.com
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