

COVID-19

Vaccines in the Workplace

Eight considerations for employers

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Three vaccines, one from Moderna Inc., one from Pfizer Inc., and one from Johnson & Johnson, have been approved for emergency use in the U.S. by the Food and Drug Administration [as of February 2021], and there are other vaccines in late-stage clinical trial phases. Employers across the country are contemplating whether to mandate their employees receive the COVID-19 vaccine as a condition of employment and evaluating the risks associated with mandating or not mandating the vaccine.

On Dec. 16, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) issued new guidance to assist employers considering mandating COVID-19 vaccines. The guidance addressed some of the risks employers must weigh in evaluating a mandate. In particular, it warned employers their COVID-19 vaccination policy could be impacted by other EEOC laws, such as the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964 (Title VII) and the Genetic Information Nondiscrimination Act (GINA).

Below are common questions facing employers contemplating a COVID-19 vaccine requirement:

1. What are an employer's options when it comes to administering the COVID-19 vaccine for employees?

Some employers are considering entering into agreements whereby they will be considered a closed point-of-dispensing site and administer vaccines to its employees onsite. Administering vaccines onsite raises many liability concerns, and employers considering this should seek legal advice. Alternatively, some employers are considering providing vaccines to employees through third-party vendors, and others are requiring or encouraging employees to obtain the vaccine on their own.

2. What if a state adopts a law prohibiting mandatory vaccinations?

There is proposed legislation pending in several states which would preclude state and local governments and private businesses from requiring COVID-19 vaccinations. Some of the proposed laws apply only to state and local governments; however, some of the proposed laws apply to private employers. If a state adopts a law prohibiting mandatory vaccinations, the federal government's ability to allow



such maybe limited. Thus, employers must confirm if the states where they have employees have adopted any laws that prohibit mandatory vaccinations.

3. If an employer requires or merely encourages employees to receive the COVID-19 vaccine, is the time compensable?

If an employer merely encourages its employees to be vaccinated, it should also indicate that such should be done outside of the employee's working hours. When the employer requires its workers to be vaccinated, the inquiry is more complicated and can depend on several factors. Thus, if you adopt a mandatory COVID-19 vaccination policy, you should consult legal counsel to confirm if employees will need to be compensated for time incurred to be vaccinated. Compensable time could include the time incurred making the appointment as well as the time spent to get the shot.

4. Can employers provide incentives to employees who receive the COVID-19 vaccine?

Aldi and Dollar General announced in January they would compensate employees for up to four hours of work if they voluntarily elected to receive the vaccine. However, the EEOC issued a proposed rule in early January, which was intended to clarify whether wellness incentives were appropriate and, if so, to what extent. The proposed rule limits incentives to *de minimis* awards, indicating "a water bottle or a gift card of modest value" would be

an example of a small award. On Feb. 1, 2021, 42 business groups sent a letter to the EEOC requesting the EEOC clarify the extent employers may offer employees incentives without violating the ADA and other laws and urged the EEOC to adopt a broad definition of what is permissible.

5. If an employer requires employees to receive a COVID-19 vaccine, how should an employer respond to an employee who indicates they cannot receive the vaccine due to a disability or a sincerely held religious belief?

Even though an employer may require employees to be vaccinated, employers still have a duty under the law to accommodate employees who request an accommodation based on the employee's disability or the employee's sincerely held religious belief or practice or observance, as long as the accommodation does not cause an undue hardship. "Undue hardship" means significant difficulty or expense and focuses on the resources and circumstances of the particular employer in relationship to the cost or difficulty of providing a specific accommodation." When determining whether a reasonable accommodation is an undue hardship, it is recommended that you seek legal advice to ensure you act in accordance with the law. Employers and employees should engage in an interactive process whereby they identify workplace accommodations that do not cause an undue hardship on the employer.

Disability

If an employer's mandatory vaccination policy precludes an employee with a disability from being employed, "the employer must show that an unvaccinated employee would pose a direct threat due to a 'significant risk of substantial harm' to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." Once an employee with a disability advises an employer they are unable to be vaccinated due to a disability, the employee with a disability and the employer should engage in an informal, interactive dialogue to clarify what the employee needs and identify an appropriate workplace accommodation that would not cause an undue hardship on the employer.

Religious belief

Per the EEOC guidance, if an employee advises its employer that the employee's sincerely held religious belief, practice or observance prevents the employee from receiving the vaccination, the employer, similar to when an employee is disabled, must provide a reasonable accommodation unless doing so would pose an undue hardship under Title VII. However, the "undue hardship" standard used for purposes of ADA differs from the standard applied by the courts for purposes of determining a religious accommodation under Title VII. For purposes of religious discrimination, courts have defined "undue hardship" as having more than a *de minimis* cost or burden to the employer.

As noted in the EEOC guidance, it is also important for managers and supervisors to remember "it is unlawful to disclose that an employee is receiving a reasonable accommodation or retaliate against an employee for requesting an accommodation."

6. What if an employer cannot exempt an employee or provide a reasonable accommodation to an employee who is unable to comply with employer's mandatory vaccine policy due to a disability or a sincerely held religious practice or belief?

The EEOC guidance provides, "[i]f an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace." However, the EEOC notes "[t]his does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state and local authorities."

7. Can employers require employees to provide proof of vaccination?

The EEOC guidance indicates an employer may request or require an employee to provide proof they received a COVID-19 vaccination from a provider. The EEOC also confirms such inquiry is not a disability-related inquiry under the ADA; however, the EEOC warns other related





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questions, similar to asking an employee why they did not receive a vaccination, may be considered a medical inquiry under the ADA and would therefore only be permitted when such inquiry is “job-related and consistent with business necessity.”

8. Has OSHA issued any regulations requiring COVID-19 vaccinations?

Although OSHA has issued guidelines for job sites relating to social distancing, mask use and other COVID-19 mitigation precautions, it has not issued guidelines addressing COVID-19 vaccinations or how vaccinations may reduce or affect the other guidelines or requirements for construction sites. However, OSHA has previously taken the position that employers may require employees to receive the flu vaccine. Employers should be alert for any new OSHA guidance on this topic and should consult with counsel if they have any questions.

Employers considering mandating or simply encouraging COVID-19 vaccinations of employees should consider relevant EEOC, CDC and state guidance. For specific questions about vaccine policies, employee matters during COVID-19, state and local COVID-19 requirements, or about managing Title VII or ADA obligations, please contact your labor and employment attorney. ▼

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