

December 14, 2020

COVID-19 Update: Considerations for Employers Concerning COVID-19 Vaccination Programs

Now that the Food and Drug Administration has authorized the Pfizer/BioNTech vaccine for emergency use,¹ and given the probability that one or more other COVID-19 vaccines will be authorized in the coming weeks, employers are anticipating the widespread availability of these vaccines and considering whether to impose mandatory vaccination policies. We discuss the federal law and agency guidance relevant to employers weighing these decisions and offer practical considerations and alternatives.

Key Takeaways

- Currently, there is no federal or state authority directly addressing the question of whether employers may require a COVID-19 vaccine as a condition of obtaining or continuing employment.
- It is likely permissible for employers to implement a mandatory COVID-19 vaccination program pursuant to the “direct threat” exception under the Americans with Disabilities Act (the “ADA”) as long as they provide reasonable accommodations for disability and religious beliefs or practices in accordance with the ADA and Title VII of the Civil Rights Act (“Title VII”), respectively.
- The pandemic preparedness guidance issued by the Equal Employment Opportunities Commission (the “EEOC”) (the “EEOC Pandemic Guidance”) and a letter issued by the Occupational Safety and Health Administration (“OSHA”) during the 2009 influenza pandemic provided that employers may require that employees take an influenza vaccination, subject to allowances for appropriate accommodations and whistleblower activities.
- Employers may want to review relevant labor contracts, if any, to determine whether they are permitted to implement a mandatory COVID-19 vaccine program and whether consideration of implementation of such a program would trigger a duty to bargain. Employers may not interfere with employees’ right to engage in a concerted activity, which could include voicing concerns about the safety and efficacy of such vaccination program.

¹ Laurie McGinley, Carolyn Y. Johnson and Josh Dawsey, “FDA Authorizes the First Coronavirus Vaccine, a Rare Moment of Hope in the Deadly Pandemic,” The Washington Post (Dec. 12, 2020), <https://www.washingtonpost.com/health/2020/12/11/trump-stephen-hahn-fda-covid-vaccine/>.

- In deciding whether to require a COVID-19 vaccine as a condition of employment, employers may need to carefully balance the value of instituting a mandatory policy against the concerns and objections of employees who either cannot or do not wish to be vaccinated. One option would be for employers to encourage voluntary vaccination in the first instance, while leaving open the possibility of moving to a mandatory vaccination program, along with a flexible remote work policy, should circumstances change.
- Employers should stay abreast of guidance from federal, state, and local authorities so as to protect the safety and health of employees. Several states have issued COVID-19 vaccination plans outlining their approaches to the distribution and administration of vaccinations,² and may also issue guidance specific to employment settings. In addition, certain state laws, such as worker's compensation law, may be relevant as to employers' liability risks should they decide to implement a mandatory vaccination program.

I. Americans With Disabilities Act

Under the ADA, employers are generally prohibited from requiring a “medical examination” unless such examination is “job-related and consistent with business necessity.”³ Employers may require a medical examination if the employee's condition could pose a “direct threat” to the safety and health of the workforce.⁴ Under the current EEOC regulations a “direct threat” means “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.”⁵ Additionally, the ADA requires that employers make reasonable accommodations for individuals with disabilities absent a showing that such accommodations would impose an undue hardship on the operation of their business.⁶ For purposes of the ADA, an accommodation presents an “undue hardship” if it results in “significant difficulty or expense for the employer.”⁷

² See, e.g., NYS Department of Health, New York State's COVID-19 Vaccination Program (Oct. 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYS_COVID_Vaccination_Program_Book_10.16.20_FINAL.pdf; California Department of Public Health, COVID-19 Vaccination Plan (Oct. 16, 2020), https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/COVID-19-Vaccination-Plan-California-Interim-Draft_V1.0.pdf.

³ 42 U.S.C. § 12112(d)(4)(A).

⁴ 42 U.S.C. § 12111(3).

⁵ 29 C.F.R. § 1630.2(r).

⁶ 42 U.S.C. § 12112(b)(5)(A).

⁷ See EEOC, “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act” Section II. A. (Oct. 9, 2009), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> (updated Mar. 21, 2020).

Because vaccinations fall within the definition of “medical examinations,”⁸ any mandatory COVID-19 vaccination policy should be job-related, consistent with business necessity and/or justified by a direct threat that cannot be eliminated by reasonable accommodations. Notably, the EEOC has taken the position that it is permissible for an employer to administer *a mandatory COVID-19 test* under the “direct threat” exception.⁹ Thus, it is anticipated that the EEOC will issue updated guidance clarifying whether the direct threat exception applies to COVID-19 vaccines in the workplace.

In the context of the 2009 novel influenza A (H1N1) pandemic, the EEOC has opined that employers are permitted to require an influenza vaccine as a condition of employment as long as employees with disabilities that prevent them from taking the vaccine are exempt from the requirement.¹⁰ Accordingly, if an employer requires a COVID-19 vaccine as a condition of employment, it would need to provide reasonable accommodations to enable employees with such disabilities to opt-out of vaccination while continuing to perform their essential job functions and without compromising health and safety in the workplace, absent undue hardship to its business.

II. Title VII of the Civil Rights Act

Title VII prohibits employment discrimination on the basis of “race, color, religion, sex and national origin.”¹¹ With respect to religion, Title VII requires employers to reasonably accommodate an employee’s religious beliefs or practices, unless doing so would cause more than a minimal burden on the operations of the employer’s business.¹² The EEOC has advised in the past that employers wishing to implement a mandatory influenza vaccination policy must provide a reasonable accommodation upon notice that an employee’s sincerely held religious belief, practice, or observance prevents them from taking the vaccine,

⁸ See EEOC, “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act” Section II. A. (Oct. 9, 2009), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> (updated Mar. 21, 2020).

⁹ EEOC, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” A.6., <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last updated Sep. 8, 2020).

¹⁰ See EEOC, “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act” Section II. A. (Oct. 9, 2009), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> (updated Mar. 21, 2020).

¹¹ 42 U.S.C. § 2000e-2.

¹² See EEOC, Religious Discrimination, <https://www.eeoc.gov/religious-discrimination>.

absent an undue hardship to the business.¹³ Notably, the definition of “undue hardship” under Title VII—more than de minimis cost—is a lower standard than the definition under the ADA, which is defined instead as “significant difficulty or expense.”¹⁴

Accordingly, a mandatory COVID-19 vaccination policy should provide an exemption for employees who request a religious accommodation absent an undue hardship to the employer’s business. Upon a request for accommodation, an employer may make a reasonable inquiry into the sincerity of the employee’s religious belief or practice, including requesting supporting information from those “who are aware of the employee’s religious belief or practice.”¹⁵

III. Pregnancy Discrimination Act

The Pregnancy Discrimination Act (the “PDA”) prohibits employers from discriminating against an employee on the basis of pregnancy, childbirth or a medical condition related to pregnancy or childbirth.¹⁶ Accordingly, as with the employees covered under the ADA, employers may need to provide reasonable accommodations to employees with a condition related to pregnancy or childbirth that prevents them from taking a COVID-19 vaccine, absent undue hardship to their business.

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Examples of reasonable accommodations that employers could consider if employees seek an exemption from a mandatory vaccine policy under the ADA, Title VII or the PDA, include: permitting remote working, schedule changes and/or work station configurations that would lessen exposure for the unvaccinated employee to other employees and/or to the public.

IV. Occupational Safety and Health Act

Section 11(c) of the Occupational Safety and Health Act (the “OSH Act”), prohibits employers from retaliating against employees for exercising any rights afforded by the OSH Act, including the right to file

¹³ See EEOC, “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act” Section II. A. (Oct. 9, 2009), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> (updated Mar. 21, 2020).

¹⁴ See EEOC, “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act” Section III. B.13 (Oct. 9, 2009), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> (updated Mar. 21, 2020).

¹⁵ See EEOC, Informal Discussion Letter: Title VII: Vaccination Policies and Reasonable Accommodation (Dec. 5, 2012), <https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-254>.

¹⁶ 42 U.S.C. § 2000e.

a whistleblower complaint relating to a health and safety concern.¹⁷ Additionally, employers have a general duty to provide a workplace that is “free from recognized hazards that are causing or are likely to cause death or serious physical harm.”¹⁸ OSHA relies on this provision, known as the General Duty Clause, for enforcement authority. OSHA previously provided that employers may require an employee to take an influenza vaccine as long as they do not interfere with the employee’s right to refuse 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 [a] serious reaction to the vaccine).”¹⁹

As such, employers wishing to implement a mandatory vaccination policy could consider clarifying that the policy does not interfere with an employee’s right to raise a health or safety concern. If an employee refuses to take a COVID-19 vaccine due to a reasonable belief that they have a medical condition creating a real danger of serious illness or death, they may be protected as whistleblowers under Section 11(c) of the OSH Act if they file a complaint with OSHA.

OSHA officials have previously stated that the agency expects to rely on the General Duty Clause to issue citations to employers for not protecting workers from on-the-job COVID-19 infections.²⁰ As such, it is possible that OSHA could invoke the General Duty Clause to issue citations against employers who fail to provide COVID-19 vaccination, on the ground that such failure violates their duty to provide a safe workplace. There is currently no OSH Act standard that would require employers to offer a COVID-19 vaccine to employees, and it is not yet certain that OSHA would take the position that employers are obligated to provide COVID-19 vaccines. To date, OSHA has not used the General Duty Clause to issue a citation to any employer for not providing vaccinations for an illness caused by exposures to infected individuals in the general population.²¹

V. National Labor Relations Act

The National Labor Relations Act (the “NLRA”) protects the rights of employees to bargain collectively through representatives of their own choosing and to engage in other “concerted activities” for the purpose of collective bargaining.²² The NLRA also prohibits an employer from interfering with an employee’s right

¹⁷ 29 U.S.C. § 660(c).

¹⁸ 29 U.S.C. § 654(a).

¹⁹ OSHA, “OSHA’s Position on Mandatory Flu Shots for Employees” (Nov. 9, 2009), <https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09>.

²⁰ Brece Rolfsen, “Covid-19 Employer Vaccination Programs Could Be Sought by OSHA,” Bloomberg Law (Sept. 18, 2020), <https://news.bloomberglaw.com/daily-labor-report/covid-19-employer-vaccination-programs-could-be-sought-by-osha>.

²¹ *Id.*

²² 29 U.S.C. § 157.; see NLRB, Interfering with employee rights (Section 7 & 8(a)(1)), <https://www.nlr.gov/about-nlr/b/rights-we-protect/the-law/interfering-with-employee-rights-section-7-8a1>.

to engage in a collective activity, including discharging or disciplining an employee for engaging in protected concerted activities.²³

Accordingly, employers should be mindful that implementing a mandatory COVID-19 vaccination program may trigger an obligation to bargain collectively, absent a preexisting contract providing otherwise. Prior to mandating a COVID-19 vaccination program, employers may want to review any existing labor contracts to make sure that they are permitted to mandate a vaccine as a condition of employment and to determine whether they are obligated to bargain before implementing such a program. Additionally, participating in a concerted refusal to participate in a mandatory COVID-19 vaccination program may be considered a protected activity under the NLRA, and employers are prohibited from retaliating against employees who, in good faith and reasonable belief, raise their concerns relating to a mandatory COVID-19 vaccination program.

VI. Compensation for Vaccine-Related Injury

Worker's Compensation

Worker's compensation laws, which vary by state, generally extend insurance benefits for paid leave and medical expenses to employees for injuries "arising out of or in the course of employment."²⁴

In some states, where an employee takes a vaccination at the direction of the employer and for the employer's benefit, an injury resulting from an adverse reaction to the vaccination may be compensable under the relevant worker's compensation law.²⁵ As such, employers may need to consider whether requiring a COVID-19 vaccine—especially one that has not had the benefit of being tested over time—may give rise to worker's compensation claims relating to any injury or illness occurring after the administration of the vaccine.

VII. Practical Considerations and Alternatives

Although an employer will likely be able to require employees to get a COVID-19 vaccine as a condition of employment, it is noteworthy that the EEOC Pandemic Guidance concerning the influenza vaccine advises that employers covered under the ADA "should consider simply encouraging employees to get the influenza

²³ 29 U.S.C. § 158(a).

²⁴ See, e.g., New York State Worker's Compensation Board, "Introduction to the Worker's Compensation Law," <http://www.wcb.ny.gov/content/main/onthejob/WCLawIntro.jsp>.

²⁵ See, e.g., *Maher v. Workers' Comp. Appeals Bd.*, 33 Cal. 3d 729, 734 (Cal. 1983) ("The rule is well settled that where an employee submits to an inoculation or a vaccination at the direction of the employer and for the employer's benefit, any injury resulting from an adverse reaction is compensable under the Workers' Compensation Act.") (citing *Roberts v. U.S.O. Camp Shows*, 91 Cal. App. 2d 884, 886 (Cal. 1949)).

vaccine rather than requiring them to take it.”²⁶ Thus, employers may wish to weigh their interest in instituting a mandatory vaccination policy against various other considerations—including employee relations and potential legal challenges associated with such a policy. For example, given the shortened timeline for the development and approval of potential COVID-19 vaccines, employees may have concerns about the safety and efficacy of the vaccines, especially during the initial months of the vaccine’s administration to the public. Mandating a COVID-19 vaccine amid such concerns may negatively affect employee relations or morale.

Instead of mandating a COVID-19 vaccine, employers may consider, in the first instance, encouraging employees to get vaccinated, and perhaps later consider the option of mandating vaccinations, if circumstances change or additional guidance from relevant public health authorities is promulgated.

VIII. Other Considerations

No state or locality has yet issued guidance specifically addressing whether a mandatory workplace COVID-19 vaccination policy is permissible. However, multiple states have issued COVID-19 vaccination plans outlining their approaches to COVID-19 vaccination.²⁷ As such, employers should be aware that state or local public health authorities may issue guidance specific to COVID-19 vaccination programs at the workplace.

Additionally, employers in health care settings may wish to keep abreast of guidance that may be specifically relevant to their employees. The CDC recommends the COVID-19 vaccine for healthcare workers who have the potential for direct or indirect exposure to COVID-19.²⁸

The EEOC Pandemic Guidance can be found [here](#).

OSHA’s letter on mandatory influenza vaccines can be found [here](#).

²⁶ See EEOC, “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act” Section II. A. (Oct. 9, 2009), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> (updated Mar. 21, 2020).

²⁷ See, e.g., NYS Department of Health, New York State’s COVID-19 Vaccination Program (Oct. 2020), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/NYS_COVID_Vaccination_Program_Book_10.16.20_FINAL.pdf; California Department of Public Health, COVID-19 Vaccination Plan (Oct. 16, 2020), https://www.cdph.ca.gov/Programs/CID/DCDC/CDPH%20Document%20Library/COVID-19/COVID-19-Vaccination-Plan-California-Interim-Draft_V1.0.pdf.

²⁸ CDC, “COVID-19 Vaccination,” <https://www.cdc.gov/coronavirus/2019-ncov/hcp/vaccination.html> (updated Dec. 4, 2020).

For additional resources and real-time updates regarding new legal developments in connection with COVID-19, please visit Paul, Weiss's [Coronavirus Resource Center](#).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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