

COVID-19 Vaccinations and the Workplace: What You Need to Know Right Now

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With two COVID-19 vaccines already authorized for emergency use in the United States and more likely forthcoming soon, employers are asking whether they can — and should — require employees to get vaccinated. This alert identifies some of the major issues that employers are likely to face when rolling out policies related to vaccinations.

Can Employers Require Employees to Get Vaccinated?

Recently released guidance from the federal Equal Employment Opportunity Commission (EEOC) strongly suggests that employers can require employees to get vaccinated. Although the guidance does not explicitly state that employer-mandated vaccinations are lawful, it addresses a range of issues confronting employers who have adopted a vaccination requirement policy. This suggests that the EEOC presumes mandatory vaccination policies can be lawful if administered properly.

Disability and Religious Accommodations

Employers who choose to mandate vaccinations may need to provide exemptions or reasonable accommodations to employees who are unable to get vaccinated because of a disability, or who object to vaccinations based on sincerely held religious beliefs. According to the EEOC, employers "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 ... risk so the unvaccinated employee does not pose a direct threat" to the health or safety of others. Employers must undertake an interactive, case-by-case accommodation analysis for each employee who seeks an exemption from the vaccine on the basis of disability or religious beliefs. Options might include excusing the employee from the mandate altogether and permitting them to work in an isolated workspace or remotely, granting a leave of absence, or providing equipment or auxiliary aids addressing specific disability or religious obstacles to full employee compliance.

Is a Mandatory Vaccination Requirement a Disability-Related Inquiry?



The Americans with Disabilities Act (ADA) generally precludes employers from requiring employees to undergo medical examinations or respond to disability-related inquiries. However, the EEOC's recently released guidance states that administering a vaccine is not a medical examination under the ADA, and asking an employee for proof of vaccination is not a disability-related inquiry. Employers should bear in mind, however, that other aspects of a vaccine policy — such as inquiring why an employee did not get vaccinated — might generate ADA compliance issues.

Should Employers Administer the Vaccine Themselves?

Employers who elect to administer the vaccine themselves add substantially to compliance duties and risks. These include, among other potential compliance duties, ensuring that any vaccination-related inquiries or requirements are job-related and consistent with business necessity and that they do not run afoul of prohibitions against requesting, receiving or discriminating on the basis of an employee's genetic information. Except where there is little or no alternative, most employers will not find it advantageous to administer the vaccine themselves, even where they may be readily qualified and prepared to do so.

Issues Raised by Emergency Use Authorization

Emergency Use Authorization (EUA) has allowed the Food and Drug Administration (FDA) to make the first two vaccines available to the public quickly. However, this EUA approval, in conjunction with state law, may further complicate an employer's attempt to mandate vaccinations. The federal law governing EUAs may require individuals to be informed that they have the option to refuse the vaccine. Therefore, employees might be able to sue their employers under so-called "lawful off-duty activities" statutes — state laws that prohibit employers from taking adverse actions against employees for engaging in lawful, off-duty conduct. Employees could argue that their refusals to get the vaccine are a lawful exercise of their protected rights. It is not clear that such an argument would be successful, however. Employers could push back, indicating, for example, that the adverse action is based on the employer's duty to provide a safe workplace, not the exercise of a right outside the workplace. Similarly, employees in states that recognize a public policy exception to at-will employment may bring a retaliatory discharge claim, arguing that their employers' action of terminating them for refusing to get vaccinated violates public policy; and employers would potentially have similar viable defenses available.

Labor Relations Issues

Vaccination policies also create labor relations issues for both unionized and non-unionized workforces. In non-unionized settings, employers attempting to implement mandatory COVID-19 vaccines could face coordinated resistance from employees working together to protest mandatory vaccinations. These protests would be protected activity under Section 7 of the National Labor Relations Act (NLRA), which means



employees may be protected from discipline due to their protests. In unionized settings, any mandated vaccination program would also likely be a mandatory subject of bargaining with the union, unless a collective bargaining agreement provides management with broad rights to develop such policies on its own. Employers may try to rely on prior authority that has allowed employers to make unilateral decisions when dealing with emergencies. However, employers attempting to rely on such an exceptions do so at their peril, as the National Labor Relations Board (NLRB) has rarely allowed them.

Encouraging Vaccinations through Wellness Program Incentives

Employers electing not to require their employees to get vaccinated may want to consider encouraging vaccinations through incentives such as small bonuses or additional paid time off. An incentive-oriented approach may be an attractive option for some employers, particularly if it can be tied into the employer's existing wellness program. However, employers considering this option should be mindful of several legal issues. For example, federal law requires that employers who offer wellness program benefits must offer a reasonable alternative to employees who elect not to participate in the program due to a qualifying disability or sincerely held religious belief. It is not yet clear what would qualify as a reasonable alternative to a vaccine, but guidance on that question may be forthcoming soon. Another consideration for employers to keep in mind is that many employers offering certain types of wellness programs can only offer *de minimis* incentives to employees, while others, such as those where the wellness program is tied to the employer's group health plan, can offer more generous perks. Lastly, employers should also bear in mind that while wellness incentives are often considered taxable income, the COVID-19 vaccine may qualify for an IRS exclusion as medical care.

What Should You Do?

Given the complexity of the issues involved, employers should strongly consider consulting with their labor and employment attorneys before moving forward with any vaccination policies or plans. Whether an employer elects to adopt a mandatory vaccine program may be impacted by the particular risks posed in their industry and to their workers and practical considerations about how their employees are likely to respond to the program and how this might impact operations.

For more information, please contact Mark Mathison or your regular Lathrop GPM contact.