

Will Your Workplace Require a COVID Vaccination?

It is only a matter of time until a COVID-19 vaccination becomes available given the resources spent on the effort. A vaccine will help employers avoid pandemic related shut-downs and it will improve the productivity of every employer's human capital. Many employers will consider requiring employee vaccinations. In certain high-risk workplaces, such as hospitals and nursing homes, vaccination requirements are nothing new. The issue is more complicated for employers not involved in health care.

A [recent survey](#) indicates as many as 35% of Americans are reluctant to accept a COVID-19 vaccination. Some people are worried a "fast-tracked" vaccine hasn't been properly tested or proven safe. Others may be medically unable to be vaccinated or have sincere religious objections to vaccination.

Current Guidance

The Equal Employment Opportunity Commission ("EEOC") has not yet addressed the issue of mandatory vaccinations as they apply to COVID-19. However the EEOC did address the issue in response to the H1N1 pandemic in 2009. In the 2009 EEOC publication, [Pandemic Preparedness for the Workplace](#), the EEOC said that both the ADA and Title VII prohibited employers from compelling employees to be vaccinated for H1N1 regardless of their medical condition or religious beliefs – even during a pandemic.

The EEOC has since updated [Pandemic Preparedness for the Workplace](#) to acknowledge that COVID-19 meets the ADA's "direct threat standard" that permits more extensive medical inquiries and controls in the workplace than the ADA previously

allowed. These inquiries include checking employee temperatures, symptom checklists, and actual testing. All of these methods are now common since the pandemic's onset. The EEOC further noted that there was, as of the date of publication, no COVID-19 vaccine available. Until the EEOC further updates its guidance, employers should consider the 2009 publication controlling with respect to mandatory vaccination requirements for COVID-19.

For employers who do not receive accommodation requests under the ADA or Title VII, there are other concerns to be mindful of when requiring employee vaccinations. Such concerns include, employer liability for injuries to employees who have adverse reactions to the vaccine and complications with collective bargaining agreements that may not allow such policies without union consent.

On the other hand, when a vaccine becomes available, employers risk liability if they fail to implement legally sufficient precautions to protect other employees or visitors from becoming infected. Employers find themselves whipsawed between balancing their obligations to protect employee safety, while also protecting employee liberties.

Employer Takeaways

Employers are better off encouraging employees to get vaccinations rather than requiring them. Until the EEOC and other relevant authorities release more guidance on mandatory vaccinations, employers should take the following steps when creating COVID-19 vaccination policies:

- Require employees who do not get vaccinated to continue wearing a face mask, work remotely, or accept reassignment to less social roles.
- Require unvaccinated employees to submit regular antibody tests to employers.
- Pay for or subsidize vaccinations.
- Permit employees to opt out of vaccination for medical, religious, or even political or ideological reasons.
- Update job descriptions to provide for essential duties that might demand mandatory vaccination, such as frequent travel and customer interaction.
- Adhere to ADA mandates that medical records be kept separate from general personnel files when recording employee vaccinations status.
- Continue following general COVID-19 sanitization procedures until no longer recommended by the CDC.

Conclusion

Mandatory vaccinations are an issue subject to individual state police power. Per [*Jacobson v. Massachusetts*](#), “Mandatory vaccinations are supported by the authority of the state police power when the vaccinations are necessary to protect the health of the community.” While no state has passed mandatory vaccination legislation yet, such legislation, if passed, would take the vaccination issue out of the hands of employers and put it squarely in the hands of the state legislatures - where it rightfully belongs.

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