

# A Vaccine is Coming: Can Employers Require Employees to Take it?

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As clinical trials continue across the world for a COVID-19 vaccine, many employers are asking whether they will be able to require employees to take the vaccine when it becomes available in the United States. Like with so many questions surrounding COVID-19, the answer is not entirely clear. In general, employers *can* require vaccination as a term and condition of employment, but such practice is not without limitations or always recommended.

The U.S. Occupational Safety and Health Administration (“OSHA”) has taken the [position](#) that employers can require employees to take influenza vaccines, for example, but emphasizes that employees “need to be properly informed of the benefits of vaccinations.” OSHA also explains that “an employee who refuses 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) may be protected under Section 11(c) of the Occupational Safety and Health Act of 1970 pertaining to whistleblower rights.”

In March 2020, the Equal Employment Opportunity Commission (“EEOC”) issued COVID-19 [guidance](#) specifically addressing the issue of whether employers covered by the Americans With Disabilities Act (“ADA”) and Title VII of the Civil Rights Act of 1964 (“Title VII”) can compel *all* employees to take the influenza vaccine (noting that there is not yet a COVID-19 vaccine). In responding to this question, the EEOC explained that an employee could be entitled to an exemption from a mandatory vaccination under the ADA based on a disability that prevents the employee from taking the vaccine, which would be a reasonable accommodation that the employer would be required to grant *unless* it would result in undue hardship to the employer. Under the ADA, “undue hardship” is defined as “significant difficulty or expense” incurred by the employer in providing an accommodation. Additionally, Title VII provides that once an employer receives notice that an employee’s sincerely held religious belief, practice, or observance prevents the employee from taking the vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship to the employer as defined by Title VII, a lower standard than under the ADA. Under Title VII, employers do not need to grant religious accommodation requests that result in more than a *de minimis* cost to the operation of the employer’s business. However, analogous state laws may impose stricter standards.

In light of these exemptions and the risk of discrimination, the EEOC has advised that it is best practice to simply encourage employees to take the influenza vaccine rather than to mandate it. Although we can presume that the EEOC will issue similar guidance when a COVID-19 vaccine is approved, the threat imposed by COVID-19 to the health and safety of others may make employers more inclined to require vaccination. Moreover, this threat and the necessary safety measures required of employers with unvaccinated employees may render exemptions to the COVID-19 vaccine more burdensome. However, employers must also consider that employees may respond negatively to a vaccination requirement, and adverse reactions to the vaccine could lead to workers' compensation claims.

Accordingly, employers contemplating any policy mandating a COVID-19 vaccine should be prepared to carefully consider the threat posed to the health and safety of their employees, the risk of future claims, and employee morale. Moreover, employers must be prepared to carefully consider the reasons for any employee requests for exemptions.

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