

Employers' Next COVID-19 Conundrum: To Mandate Vaccination, or Not to Mandate Vaccination?

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With COVID-19 vaccinations underway across the United States, many employers are considering whether to implement a mandatory employee vaccination policy. The following Q&A presents various legal and practical considerations that employers should think through when deciding how to approach this issue.

Can employers require employees to get a COVID-19 vaccine? If so, can employers terminate an employee who refuses to comply?

Yes, employers generally can require employees to be vaccinated for COVID-19, and they may be within their rights to terminate employees who refuse. The vaccination requirement, however, cannot be absolute. Employers must accommodate an employee's disability and religious beliefs.

Under the Americans with Disabilities Act (ADA), an employee may be entitled to an exemption if the employee has a disability that prevents him or her from safely taking the vaccine. Similarly, under Title VII of the Civil Rights Act of 1964 (Title VII), an employee may be entitled to an exemption if the employee has a sincerely held religious belief or practice that prevents him or her from taking the vaccine.

If an employee claims to need accommodation, the employer should work with legal counsel to determine its rights and responsibilities. This guidance will focus on whether reasonable accommodation for the disability or belief can be made and whether providing an exemption would impose undue hardship (defined in the ADA as significant difficulty or expense, and under Title VII as

"more than *de minimis* cost," to the operation of the employer's business).

The bottom line is that current authority suggests an employer can require its employees to receive the COVID-19 vaccine. If an employee refuses to get the vaccine, the employer should explore the reason why and whether the employee is entitled to accommodation under the ADA or Title VII. If the recalcitrant employee is not entitled to accommodation (or cannot be accommodated) but still refuses, the employer may be within their rights to terminate the employment relationship.

Can employers require some types of employees to get the COVID-19 vaccine, while not requiring others to get the COVID-19 vaccine?

Yes, employers may differentiate by position, department, duties, or any other criteria that are not otherwise protected under law when requiring employees to get the vaccine. For example, employers may wish to require the vaccine only for those employees who interact with the public, work in close quarters or engage in frequent air travel. Moreover, due to the vaccine's phased distribution, certain types of workers may be eligible to receive the vaccine before others. With each state adopting different vaccine distribution plans, employers should consider whether to implement different vaccination policies with reference to an employee's role, location and where the employee falls under the state's vaccine distribution plan.

In all cases, employers should take care to use only nondiscriminatory criteria to determine which employees will be required to get the COVID-19 vaccine. Employers ***should not*** use age, disability or any other protected category in their vaccination requirement selection criteria, despite the fact that the Centers for Disease Control and Prevention (CDC) has stated that individuals over 65 and those with preexisting conditions are at higher risk if they contract COVID-19.

Are there any costs associated with a mandatory vaccination policy?

Most employees, including those covered under the employer's group health insurance plan, should be able to get the vaccine at no cost. Still, the employer may have to compensate its hourly employees for time taken to obtain the shots. Under the Fair Labor Standards Act (FLSA), an employer must pay employees for all "hours worked," which would likely include time expended getting a mandatory vaccine.

The employer also will incur the cost of developing the infrastructure to implement a vaccine mandate. Employers requiring a vaccine will need to document their policy (see below), and train their supervisors on how to administer and enforce the policy. For example, supervisors will need to understand what kind of information may or may not be discussed with employees, since the ADA generally prohibits employers from asking employees certain "disability-related inquiries."

Should employers document a mandatory vaccination policy?

Yes, if an employer decides to require employees to receive a COVID-19 vaccine, it should develop an appropriate mandatory COVID-19 vaccination policy. Once the employer has developed and documented the policy, it should be distributed to the workforce. The policy should address an employee's right to accommodation under the ADA and Title VII and the ramifications of refusing to get the vaccine without good reason. Employers may also want to address related issues, such as employee reimbursement for expenses incurred or time spent receiving the vaccine.

Even if employers can require employees to get a COVID-19 vaccine, SHOULD they?

Just because employers **can** require employees to be vaccinated for COVID-19 does not mean they **should**. Unless an employer has a compelling reason to vaccinate its workforce (e.g., its employees work in close contact with a health-compromised population), it may want to *encourage* vaccination rather than mandate it. Beyond the legal complexities of mandatory vaccination, employers should consider the practical concerns. These concerns include limited availability of the vaccine, resistance from employees with vaccine hesitancy and/or resentment of employer medical mandates, and workplace disruptions caused by discharging employees who refuse to comply. Depending on the company's culture and employees' general attitude toward the vaccine, these practical considerations may strongly militate against requiring the vaccine.

Employers should also consider the potential side effects of the COVID-19 vaccine. At this point, the COVID-19 vaccine has only Emergency Use Authorization, which means it is not yet fully approved by the Food and Drug Administration. In the event employees suffer adverse effects from a COVID-19 vaccine, now or in the future, they may seek recourse against a mandating employer.

Can employers offer employees incentives to receive the COVID-19 vaccine instead of requiring them to receive the vaccine?

Employers can offer modest incentives to encourage employees to receive a COVID-19 vaccine. Incentives can take the form of a gift card, a water bottle or some similar benefit. The availability of more meaningful incentives is unclear given the EEOC's recent pronouncements regarding what constitutes "voluntary participation" in a "wellness program," and will depend on how the employer's vaccine program is structured and administered. Still, even small rewards may help achieve an employer's "herd immunity" goal without the potential backlash of a mandate. Of course, offering incentives may create other legal and practical considerations. For instance, the employer should think through what effect an incentive will have on employees who are medically unable to get the vaccine. The employer also should consider the potential tax implications of certain incentives.

Are other employers electing to mandate the vaccine or not?

At this time, the informal survey results we are hearing suggest that few employers are opting to mandate the vaccine. Current estimates suggest that no more than 10 percent of companies intend to compel employees to receive the vaccine. Of course, this figure may change as the vaccine becomes more common, the variants become more potent, or the cultural concerns shift. For now, employers who encourage but do not require vaccination would seem to be in good company.

Of course, we all hope that as more Americans are vaccinated, things will return to normal sooner rather than later. But, while we remain in the "new normal," our team at Katten will continue to assist clients navigate each new COVID-19 conundrum as it arises.

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National Law Review, Volume XI, Number 53

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