

## Getting to the Point — Issues Related to Mandatory Vaccine Policies

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In December 2020, we sent out [an alert encouraging employers to start thinking about how to handle vaccine-related issues](#); but at that time, vaccines were hard to come by and there was no guidance from the Equal Employment Opportunity Commission (EEOC) regarding whether employers could require their employees to get vaccinated. By now, however, all adults in the US are eligible to receive a COVID-19 vaccine and, as of the date of this alert, more than 33% of adults are fully vaccinated and more than 50% of adults have received one dose of the vaccines requiring two doses. The news is filled with stories about states requiring employees in health care industries to be vaccinated, some universities requiring students and staff to be vaccinated, and the potential need for people to have “vaccine passports” to be able to travel. The EEOC has finally published some guidance on this issue, so it’s logical that private employers are re-examining whether they can or should require that their employees be vaccinated.

First, let’s look at the question of whether private employers **can** require their employees to be vaccinated. The short answer is, under federal law (and EEOC guidance agrees), “yes, but.” Yes, you can. But if you do, you’ll need to try to make reasonable accommodations for employees with disabilities that prevent them from being vaccinated and for employees with a sincerely held religious belief, practice, or observance that prevents them from receiving the vaccination. You’ll also have to consider whether to make an exception for pregnant employees. The Centers for Disease Control and Prevention (CDC) has stated that pregnant women are at increased risk for severe illness from COVID-19 and it does not have sufficient data to ascertain whether COVID-19 vaccines are safe for pregnant individuals. Thus, if an employer refuses to excuse a pregnant employee from a vaccination requirement, the employer might be liable under the Pregnancy Discrimination Act if nonpregnant employees are excused from a vaccination requirement. In addition to federal law implications, you’ll also have to check your individual state’s laws to see whether your state has a law prohibiting vaccine mandates as a condition of employment. Currently, more than a dozen states have bills pending to prohibit employers from requiring that employees receive COVID-19 vaccines unless and until the vaccines receive full Food and Drug Administration (FDA) approval.

Then there’s the other question. Just because you can require employees to get vaccinated, **should** you? Here’s where many issues and various laws come into play. Even if your state does not prohibit mandatory vaccinations, that doesn’t mean that an employee won’t file a lawsuit against you for requiring one. An employee in a New Mexico county detention center

already filed a lawsuit to challenge a county directive requiring first responders to get the vaccine in order to continue their employment. The employee claims that the directive is unlawful because it conflicts with the federal law regarding drugs approved by the FDA only under Emergency Use Authorization — a law which provides that individuals must be given the option to refuse “administration of the product.” There is also a potential for being liable if an employee develops an illness due to the receipt of the vaccine you required the employee to get. And if you require employees to get vaccinated, you might have to pay for: (1) transportation costs and/or mileage associated with your employees getting vaccinated, depending on your state’s laws; (2) the time it takes for an employee to get the vaccine — under the Fair Labor Standards Act and possibly under your state’s laws; and (3) missed work due to any side effects from receipt of the vaccine. Such an illness could be considered a compensable injury under workers’ compensation laws.

An alternative to requiring employees get vaccinated would be to strongly encourage and/or incentivize them to do so. The safest course of action is to strongly encourage employees to get vaccinated or to give them an incentive in the form of some extra personal time off to cover the time associated with getting and/or recovering from any side effects from the vaccine. Some companies are giving other incentives, such as gift cards or cash. Remember though, the Americans with Disabilities Act (ADA) requires employers to provide reasonable accommodations that allow employees with disabilities to participate equally in wellness initiatives, including eligibility for incentives. Therefore, if you give some tangible incentive to employees who choose to get vaccinated, you will still need to engage in the ADA interactive process and provide reasonable accommodations to the extent doing so would enable employees with disabilities to participate in the incentive and not cause an undue burden on you.

Whether you make a COVID-19 vaccination mandatory for employment/continued employment or you strongly encourage or give incentives to employees to get vaccinated, it’s a good idea to create a tracking system to know which of your employees are fully vaccinated and which are not. It is lawful to ask employees for this information; you just can’t ask an employee **why** he or she did not get vaccinated without potentially running afoul of disability discrimination laws. It is also a good idea to maintain CDC guidelines such as social distancing and masks. Although the current scientific evidence suggests that COVID-19 vaccines are effective at keeping recipients from getting very ill from the “original” COVID-19, it is still uncertain: (1) what level of protection, if any, the vaccine offers with respect to the variants of COVID-19; (2) how long vaccine protection lasts; and (3) to what extent a vaccinated individual may transmit the virus to others. Additionally, employees and third parties who are not vaccinated may be at your workplace. Thus, even if 100% of your workforce chooses or is required to get vaccinated, it’s still a good idea to keep other safety measures in place.

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