

▶ PART 1: MANDATORY VACCINATION POLICY

INTRODUCTION

Mandatory vaccination policies have long been common in the health care field with respect to illnesses like measles and the flu, but have not been implemented on a wide spread basis. To date, courts have generally found such policies to be permissible, provided the employer allows reasonable accommodations for medical reasons or sincerely held religious beliefs. Not surprisingly, the EEOC has taken a similar approach in its guidelines regarding mandatory vaccination for COVID-19.

An important distinction exists, however, between prior vaccines and the currently available COVID-19 vaccines, which, to date, have only been approved through a limited Emergency Use Authorization (EUA). Because the FDA requires patients to be given a choice whether to take a vaccine approved via an EUA, there is some risk that employees terminated for refusing vaccination might bring claims outside of equal employment opportunity laws, e.g., for wrongful termination in violation of public policy, or similar claims under state law. Many employers also fear verbal or written complaints from employees, which could also trigger protections from retaliation for those who engage in concerted action objecting to vaccination.

EEOC'S POSITION ON REASONABLE ACCOMMODATION FOR RELIGION AND DISABILITY

The EEOC issued guidelines on December 16, 2020 regarding COVID-19 vaccination of employees. The agency explained that employers seeking to mandate vaccination must allow reasonable accommodations for employees seeking an exception due to a medical reason under the Americans with Disabilities Act (ADA) or a sincerely held religious belief under Title VII of the Civil Rights Act (Title VII). The EEOC's guidance states that managers and supervisors are responsible for communicating with employees about compliance with the employer's vaccination policy and should know how to recognize a disability or religious accommodation request.

In anticipation of such exemption requests, employers may wish to prepare accommodation requests forms, and to establish a process whereby such requests will be reviewed (whether by an internal committee, or perhaps a third party neutral), including any procedure for an employee to appeal an adverse decision. Employers should consider what potential accommodations may be available to employees who require an exemption from vaccination. The EEOC did not go so far as to expressly approve the termination of employees who refuse vaccination, and only stated that such employees may be "excluded from the workplace."

ASKING FOR PROOF OF VACCINATION — POTENTIAL PRIVACY CONCERNS

In the EEOC's guidance, the agency clarified an important question — whether employers may ask if employees have been vaccinated. The EEOC concluded that merely inquiring as to whether an employee has been administered a COVID-19 vaccine is **not** a disability related inquiry for purposes of the ADA. Nevertheless, depending on how vaccine eligibility is determined in a particular state, the date an employee becomes vaccinated could potentially, at least by implication, reveal an employee's confidential health information. For instance, if a state were to prioritize individuals with certain medical conditions, information that an employee had been vaccinated earlier than his or her peers, could be viewed as revealing the employee suffered from one of the medical conditions at issue. To that end, employers should be careful not to take adverse action against such employees based on any such known or suspected medical condition, and should also exercise caution in requesting or sharing details of any individual's vaccination status. For these reasons, employers should consider treating vaccination status as part of an employee's confidential medical file in compliance with HIPAA/ADA and any other applicable state privacy laws.

OTHER LEGAL RISKS UNDER FEDERAL AND STATE LAW

The EEOC is just one of several federal agencies that has (or will) set forth guidance or regulations relating to the COVID-19 vaccines, and we anticipate various state and local authorities may also implement laws, ordinances or guidelines regarding employee vaccination. For instance, while some jurisdictions may consider mandating vaccination (or at least doing so for workers in certain industries), some state lawmakers have already introduced potential legislation to prohibit discrimination against individuals who choose not to be vaccinated (i.e., Washington and South Carolina, among others). Employers considering implementing a mandatory vaccination policy should check their applicable law, and proceed with caution as this is a rapidly evolving area of the law.

▶ PART 2: VOLUNTARY VACCINATION POLICY

EDUCATION OF EMPLOYEES ON PRIORITY SCHEDULE IN APPLICABLE STATES

Do your employees know when they are eligible to get the COVID vaccine? Employers crafting vaccine policies should consider communicating this information to employees so they are informed of the applicable vaccine priority schedule. According to the Center for Disease Control, vaccine priority consists of the following phases for availability:

- **Phase 1(a):** health care personnel and long-term care facility residents.
- **Phase 1(b):** persons aged ≥75 years and non-health care frontline essential workers.
- **Phase 1(c):** persons aged 65–74 years, persons aged 16–64 years with high-risk medical conditions, and essential workers not included in Phase 1b.
- **Phase 2:** all other persons aged ≥16 years not already recommended for vaccination in Phases 1a, 1b, or 1c.

Notwithstanding the above, states are free to deviate from the CDC recommendations, and many have done so. For example, Florida and Texas have chosen to prioritize senior citizens over younger non-healthcare essential workers.

INCENTIVIZING EMPLOYEES TO GET VACCINATED

Employers who are reluctant to make COVID vaccination mandatory for their employees may want to consider offering incentives for their employees to take the vaccine. Possible options include:

- Paid or unpaid time off to obtain a COVID vaccination;
- Cash bonus upon proof of vaccination;
- Enhanced wellness plan benefits for vaccination;
- Employer sponsored group functions for departments or teams achieving a requisite percentage of employee vaccinations; or
- Entering all employees who are vaccinated into a raffle for prizes.

It is important to keep in mind that any bonuses or additional compensation may be taxed as wages and could affect the regular rate for the calculation of overtime for non-exempt employees. Further, Employers requiring proof of a COVID-19 vaccination to obtain incentive benefits should warn employees not to provide any additional medical information (such as identifying an underlying condition which would allow early vaccination) to avoid implicating the ADA.

IMPACT OF VACCINATION POLICY ON CONTINUED WORK FROM HOME AND MASKING

For employers who choose to not mandate COVID vaccination, the availability of a vaccine may be considered a newly available “reasonable accommodation” for employees who have previously objected to returning to the workplace. In other words, it may be unreasonable for an employee to refuse to both return to work and receive a vaccination, or to insist on working from home after vaccination. Of course, each employee’s circumstance is different and employers should consult with legal counsel before making such determinations.

Lastly, employers should continue to monitor facial covering mandates under OSHA guidelines and applicable state and local mandates as they apply to the workplace. Such requirements are likely to continue in the near future, notwithstanding employee vaccinations, as some vaccines require two shots, and none of the approved vaccines are one hundred percent effective.

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