



## What Does Availability of a COVID-19 Vaccine Mean for Employers?

First, it is important to note that as of right now, the vaccine has not yet been licensed under the FDA's usual processes. The FDA's Emergency Use Authorization (EUA), under which the vaccine was authorized, is a "mechanism to facilitate the availability and use of medical countermeasures, including vaccines, during public health emergencies, such as the current COVID-19 pandemic." **The vaccine is currently available only pursuant to an EUA.**

This is an important distinction because it creates a somewhat gray area as to whether employers may require (mandate) employees to be inoculated with a vaccine approved only pursuant to an EUA. The language for EUAs may preclude employers from enforcing a requirement to take this vaccination. Once the FDA fully approves the vaccine, it is most likely that employers will have the right to require employees to receive it, subject to certain limitations.

Now is the time for employers to begin weighing the information at hand, along with the pros and cons of strongly encouraging their workforces to take the vaccine when it becomes available to them, and decide whether or not they are going to mandate it be taken. It's important to also keep in mind that the current situation and related information are fluid and subject to change.

### Encourage requirement or enforce a mandate?

The above question is one only you, as the employer, can answer and it should be based upon several factors since the decision to vaccinate is not a one-size fits all.

You should consider a number of factors including your business industry, state/local laws, employee job classifications, and company philosophy to name a few, in addition to the current facts. If you **require** employees to be vaccinated, you will be subject to the almost-certain requirement to accommodate employee requests for exemptions based upon medical circumstances or sincerely held religious beliefs. Further, if you implement a vaccine mandate, you should also be prepared to articulate your job-related reason for requiring a vaccine. For example, there may be no basis for requiring an employee who is working remotely to be inoculated and, should an employee refuse to be inoculated you must be prepared to not only engage in meaningful dialog with them (and formally document your discussions) but also understand that ultimately it may result in that employee being terminated or leaving your employ of their own choosing. If there is a high percentage of employees refusing inoculation, you may risk jeopardizing your business due to above average employee turnover.

An employer should strive to anticipate how a vaccine mandate would be received in the workforce as much as possible and consider how to respond if a large segment of the workforce pushes back.

Certain organizations may also consider mandating a vaccine requirement for specific job classifications within the company (depending upon individual job duties). Depending on industry, not all employees necessarily need to be subject to a mandate). These organizations must also consider the logistics of delivering the vaccine or otherwise ensuring it is easily administered, as well as general employee and public relations strategies around such an undertaking. Options may include offering incentives to employees to encourage them to be vaccinated and exploring how to make it easier for employees to obtain the vaccination.

Keep in mind, if an employer mandates the vaccination, it must pay for whatever costs may be involved. If incentives are offered, they must be tied to a corporate wellness plan and set up in a very specific manner in order to avoid violating provisions outlined by the Equal Employment Opportunity Commission (EEOC), the Americans with Disabilities Act (ADA) or Title VII – to name a few.

A conservative but important view by some legal experts is that employers should consider *encouraging rather than mandating vaccinations* due to potential compliance risk, especially related to the EEOC and ADA. The EEOC's position is that employers should consider employee exemptions from mandatory vaccination due to disability or religious beliefs, engage in interactive processes, consider reasonable accommodations, and document all communications.

#### **What are some of the considerations under EEOC, ADA & Title VII?**

- EEOC guidance regarding COVID-19 vaccines, issued on December 16, 2020, states that the only situation in which a vaccine may be mandated is when a worker poses a *“direct threat”* to themselves or others by their physical presence in the workplace without being immunized. If an employee is capable of fully performing their current job duties remotely without the potential spread of the virus to co-workers or work-related third parties, it does not appear that you can require vaccination.

- The EEOC also states that employers requiring the COVID-19 vaccine must consider reasonable accommodations for employees with disabilities. If an individual cannot be vaccinated because of a disability, you need to determine whether you can provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce the safety risk. You cannot automatically exclude them from the workplace or take any other negative action against them.
- Additionally, you must provide a reasonable accommodation if an employee's sincerely held religious belief, practice, or observance prevents them from receiving the vaccination, unless it would pose an undue hardship under Title VII.
- Under a workplace mandatory vaccine requirement, an employer may ask employees to show proof of vaccination. Employers may not question why an individual did not receive a vaccination nor should an employer ask for, or receive, any additional medical information along with said proof as this violates the ADA which prohibits discrimination.
- The administration of a COVID-19 vaccine is not a "medical examination" for purposes of the ADA and is therefore permissible.
- Employers may pose pre-screening vaccination questions as long as they comply with ADA requirements. In general, any pre-screening questions must be *job-related and consistent with business necessity*; however, you may ask these questions without needing to satisfy the above necessity with the following:
  - Offer the vaccination to employees on a voluntary basis and therefore, the employee's decision to answer pre-screening questions is also considered voluntary.
  - If an employee receives an employer-required vaccination from a third party such as a pharmacy or outside healthcare provider.
- Some employees may believe they have the right to refuse the vaccine even if mandated by their employer; however, any directive spoken of by the EEOC or the FDA itself, is targeted to whether an individual can be forced to take the vaccine by a government entity (i.e. the state), not whether an employer can condition an individual's continued employment on taking the vaccine. An at-will employee may always pursue alternative employment if they do not wish to get vaccinated as a condition of their current job. **Please note: if you are working with union employees, governed by a collective bargaining agreement, it is suggested that you consult with an attorney prior to implementing any mandatory vaccination plans.**

For further information please see the link here to the EEOC website with itemized points and FAQs related specifically to COVID-19, the ADA, and similar laws: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

### **What steps should you take now?**

You should begin to prepare a policy framework and employee communication plan. It's a good idea to stay up to date with current developments as they unfold and remain flexible in your approach to whichever vaccination policies you consider. Join our mailing list for invitations to webinars and other valuable content featuring exclusive advice from our team of HR and legal experts. **And for more information about all things COVID-19 and its impact on the workplace, visit our [COVID-19 Resource Center](#).**