

When Employers Can Require COVID-19 Vaccinations

By Allen Smith, J.D.

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As COVID-19 vaccines become available, many employers will have a strong case for requiring employee vaccinations, so long as their vaccination policies have certain exceptions, are job-related and are consistent with business necessity, legal experts say.

"Employers may require vaccines before employees return to the worksite if the failure to be vaccinated constitutes a direct threat to other employees in the workplace because the virus is rampant and easily transmitted in the workplace," said Robin Samuel, an attorney with Baker McKenzie in Los Angeles.

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Exceptions must be made for employees who cannot be vaccinated because of disabilities or due to sincerely held religious beliefs, he added. Employers do not have to accommodate secular or medical beliefs about vaccines.

"Some companies will have strong justifications to require their employees to be vaccinated," according to Gary Pearce, chief risk architect for Aclaimant, a safety and risk management firm in Chicago, and Jody McLeod, an attorney with McLeod Legal Solutions PLLC in Charlevoix, Mich., in an e-mail. "The more likely it is that nonvaccinated employees put customers, fellow employees or the general public at risk, the more compelling the case will be for a vaccination mandate."

Business Necessity May Vary in Different Industries

Context matters when deciding whether to mandate vaccines. Health care, travel, retail or other businesses whose employees are at risk or who present a risk to others will have more business reasons to be "pro-vaccine," said Jon Zimring, an attorney with Greenberg Traurig in Chicago. Office-based businesses or businesses that can rely on remote workers may find it easier to take a "personal-choice" stance, he added.

COVID-19 vaccinations are a polarizing topic for many employees, said Alissa Kranz, an attorney with Lieser Skaff Alexander in Tampa, Fla. What's welcome to employees in one location might be unpopular at another site, she noted. "Certain employees may choose to no longer work for an employer, depending on whether or not a vaccination policy" is adopted, Kranz said. "This can result in business slowdowns and negative publicity."

Liability for Not Requiring Vaccination?

Kranz said that if a mandatory vaccination policy is not imposed, employees may allege that the employer has failed to provide a safe and healthy work environment, which is required by the Occupational Safety and Health Act.

"It would be breaking new ground to hold employers liable for not requiring vaccination," said Lindsay Burke, an attorney with Covington in Washington, D.C. "On the other hand, if public health authority guidance adopts the view that employers should not permit unvaccinated employees into the workplace, one might imagine this issue being a factor in tort litigation over whether appropriate safety protocols were followed by an employer."

Current Guidance

Available guidance indicates apparent support by several government agencies for mandatory vaccination policies, said Diane Welch, an attorney with McDonald Carano in Las Vegas.

For example, based on the findings of the U.S. Centers for Disease Control and Prevention, the Equal Employment Opportunity Commission (EEOC) has determined that COVID-19 meets the "direct threat" definition. "During the pandemic, employers have relied on this guidance to justify asking employees more in-depth health-related questions and performing medical screening of employees before allowing them to report for work," Welch said. But "the EEOC has not yet issued guidance for how it will view mandatory vaccine policies."

In addition, unionized employers probably will need to address collective bargaining obligations before the organizations communicate vaccination policies, Kranz noted.

Individual states may determine how the vaccines will be made available, said Deborah Schroeder-Saulnier, Ph.D., founder and CEO of Excel Leadership Solutions in St. Louis. According to *Scientific American*, the vaccine is expected to first go to high-risk workers in health care facilities plus first responders, then people with underlying conditions that put them at high risk, then teachers, next young adults and later everyone else.

"For some employers, implementing a mandatory vaccination policy makes sense, particularly for employees in positions that provide direct health care, caretaking of children and the elderly, or serving other populations at elevated risk from COVID-19," Welch said. "However, there are several important exceptions to a mandatory vaccine policy, making a policy that encourages—but does not require—vaccination easier to administer for many employers."

Reasonable Accommodations

In the context of flu vaccines, the EEOC has explained that employers that are subject to the Americans with Disabilities Act (ADA) generally must provide reasonable accommodations to employees with disabilities that prevent them from receiving a vaccine.

Similarly, employers that are subject to Title VII of the Civil Rights Act of 1964 must reasonably accommodate individuals who notify them of sincerely held religious beliefs that prevent them from receiving the vaccine.

Under the ADA, an employer requests information from the employee requesting accommodation, including the nature of the limitation or disability and the difficulty or issue that the vaccination would cause, Kranz said. An employer may also require an employee to provide documentation from the worker's medical provider to confirm the employee's specific limitation or

disability and the need for accommodation, Kranz added.

[SHRM members-only article: What You Need to Know About ... the Americans with Disabilities Act

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Under Title VII, accommodations for religious reasons "are a bit more complicated," she said. Employers generally should assume that requests for religious accommodations are based on sincerely held beliefs.

"However, if an employee requests an accommodation and an employer has an objective basis for questioning the sincerity of that belief or practice, the employer can request supporting information from the employee," Kranz said.

This information could be a first-hand explanation from the employee or may be verified by third parties. Third-party verification does not have to come from a religious official or member of the worker's religion. "Because sincerity is the metric, third-party verification can be provided by others who are aware of the employee's religious practice or belief," she noted.

But "be mindful not to pry for too much information," Kranz cautioned. An employer that asks for unnecessary evidence risks liability for denying a reasonable accommodation request.

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