

Lawyer Insights

COVID-19 Vaccination Planning: Legal Considerations for Employers

It's in employers' hands to make the call on whether or not their employees should be able to come to work unvaccinated.

By Emily Burkhardt Vicente and Madalyn K. Doucet
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Employers impacted by the COVID-19 pandemic have anxiously awaited a safe and effective vaccine to offer some protection as employees return to work. However, with [three](#) vaccines authorized for emergency use in the U.S., employers now must wrestle with a number of important legal considerations raised by workplace vaccination programs and policies.

Is it legally permissible to require that all employees get vaccinated?

The answer is likely “yes,” but legal risks and practical hurdles may outweigh the value of a mandatory workplace vaccination program.

The U.S. Equal Employment Opportunity Commission (EEOC) has issued [guidance](#) indicating that employers likely can require vaccination against COVID-19. Under the Americans with Disabilities Act (ADA), an employer is permitted to implement a vaccination requirement as a qualification standard, or a “requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.” However, employers have reasonable accommodation obligations to employees who refuse vaccination due to disability or a sincerely held religious belief or practice. Failure to accommodate objecting employees could run afoul of the ADA or Title VII of the Civil Rights Act (Title VII), as well as various state and local laws prohibiting discrimination.

Also, because all of the available vaccines are currently authorized for emergency use, recipients must be informed “that they have the option to accept or refuse the vaccine.” This information is typically conveyed at the time of vaccine administration. This provision of the Food, Drug and Cosmetics Act does not explicitly prohibit employers from imposing work-related conditions on employees who exercise their right of refusal; however, it may provide a basis for an employee to challenge a mandatory vaccination program.

Employers also should consider how to address employees who may have contraindications to the COVID-19 vaccine (i.e., allergic reactions to any vaccine component). There may be additional practical considerations as well, such as the availability of vaccines or challenges related to scheduling or attending a vaccine appointment.

Finally, some states have proposed legislation that would prohibit or restrict employers from taking adverse action against employees based on vaccination status or from requiring employees to disclose

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vaccination status. Although no such legislation has been signed into law, employers should consult with legal counsel about pending or newly enacted legislation that may affect their vaccination program.

How can my business lawfully encourage employees to get vaccinated?

Most U.S. employers are choosing to encourage, rather than mandate, vaccination for employees. The CDC has created a Vaccination Communication [Toolkit](#) that employers can use to reinforce confidence. Employers also may reference any applicable guidance from state and local authorities regarding the availability of, and eligibility for, vaccination.

Employers who are able to host workplace vaccinations on-site provide an obvious benefit of ease of access which may encourage employees to sign up. For these employers, the CDC has provided [guidance](#), which includes resources for hosting a vaccination [clinic](#) and for planning clinics to be held at satellite, temporary or off-site [locations](#). Employers administering the vaccine should take care to comply with the ADA's provisions regarding disability-related inquiries, especially when administering pre-screening vaccination questionnaires.

Even employers who cannot offer on-site vaccination programs can take steps to incentivize employees to be vaccinated, including:

- Publishing announcements or policies that allow employees to be vaccinated during work hours or take paid leave to get vaccinated. Some employers are offering two to four hours of additional paid leave for employees to use to be vaccinated and/or recover from vaccine side effects. States like New York and California have passed paid vaccine leave laws.
- Supporting transportation to off-site vaccination clinics, for example, by reimbursing fares for ride share services used to attend a vaccination appointment. Transportation support should require appropriate social distancing.
- Providing cash incentives for workers who get vaccinated. Some employers are offering an extra \$100-500 to each employee who receives the vaccine. Vaccination incentives may implicate anti-discrimination laws such as the ADA, the Genetic Information Nondiscrimination Act or Title VII. The EEOC also has called the lawfulness of incentives into question by recently withdrawing its previously issued guidance on vaccine incentives.

Because the law is rapidly changing, employers are advised to consult with legal counsel before implementing vaccine incentives.

What can businesses do when an employee refuses to be vaccinated?

Employers would be wise to develop a clear policy governing any vaccination requirement which includes a reasonable accommodation process and consequences for an employee's refusal to comply.

Upon learning of an employee's request for an accommodation from a vaccine requirement, the employer should assess whether the accommodation request is due to disability or a sincerely held religious belief. If so, the employer should initiate the interactive process, including discussing the employee's specific circumstances to determine what accommodations may be needed and available. Reasonable accommodations may include telework, alternative work environments or an unpaid leave of absence.

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An employer can decline to provide an accommodation that would impose undue hardship, or in the case, of a disabled employee, one that would pose a direct threat due to “significant risk of substantial harm.” This “direct threat” analysis is individualized and may become difficult to satisfy as vaccination rates in the worker population increase. In other words, as more employees are vaccinated, the threat posed by an employee who refuses to be vaccinated may decrease.

If an employee cannot be reasonably accommodated, or is not entitled to reasonable accommodation under the ADA, Title VII or state or local law, the employer’s policy should clearly outline the consequences for failing to comply with a vaccination requirement. An employer should apply their policy neutrally. Failure to apply a vaccination requirement evenly could result in additional claims against the employer.

Are there other important legal considerations related to workplace vaccination programs?

There are a host of legal issues that may be implicated in any given employer’s vaccination program. Employers should consider any program’s compliance with nondiscrimination and anti-retaliation laws, wage/hour laws, collective bargaining concerns, paid leave laws, workers’ compensation questions, industry-specific regulations, any state or local limitations and their workplace health and safety program.

Vaccination programs may help the country return to work, but they also raise a number of pitfalls for employers that should be considered along the way.

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