

Employer COVID-19 Vaccination Mandates: Yes or No?

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With the announcement that an effective vaccine to stop COVID-19 had been approved, some employers turned to their legal counsel and asked, “Can I force my employees to be vaccinated?” The short answer is “yes, with a few exceptions” but the inquiry should not stop there. The follow-up question may be even more important ... “Should I force my employees to be vaccinated?”

The first question was answered by the Equal Employment Opportunity Commission (EEOC) years ago, in its response to employer queries about mandatory annual flu vaccinations.

Employers were told they could condition new or continued employment on being vaccinated but may need to accommodate individuals who refused for disability or religious reasons. On the disability side, if an employee had a medical condition which prevented him or her from being vaccinated (e.g., Guillain-Barre Syndrome, known serious allergy to component of the vaccine), enforcement of the mandate by discharging a person who refused would support a claim under the Americans With Disabilities Act (ADA). Cue the handful of individuals who had severe allergic reactions to the Pfizer COVID-19 vaccine as proof that this exception is needed.

On the religious side, Title VII prohibits employment discrimination based on an individual’s “sincerely held belief.” This definition is much broader than most employers expect and has encompassed beliefs such as veganism. Religious objections include but are not limited to a belief that a vaccine intervenes with God’s will or when development of the vaccine involved testing on aborted fetuses. In both cases, disability and religion, the law inserts an additional hurdle for employers between the employee’s “no” and the employer’s “you’re fired.” This hurdle is an attempt at reasonable accommodation.

Put simply, is there another way to lessen or eliminate workplace infection without forcing everyone to take a needle?

At this point the need for the second question, the “should I” question, becomes apparent. There is a risk of incurring legal liability if the employee says “no”, has a good reason and there were other things the employer could’ve done in lieu of requiring vaccination of that individual. Options to consider include:

- Can the individual do the job from home?
- Is there additional personal protective equipment the employee can wear while in the workplace?
- How much close contact does that person normally have with others while doing his or her duties and is there a way to temporarily modify some or all of the duties to reduce the amount of contact?
- Can a leave of absence be offered?

If the reason for the employee’s “no” is a disability, the employer’s defense to an ADA claim will be that it did this analysis, had an interactive discussion with the employee, there was no way to mitigate the risk and the unvaccinated employee posed a “direct threat” to his or her co-workers. The EEOC’s definition of direct threat is that the person poses a significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.

The risk evaluation has four parts:

1. duration of the risk

2. nature and severity of the potential harm
3. the likelihood that the harm will occur
4. the imminence of the potential harm

In short, if the employee says “no” and the employer decides to terminate employment over the refusal, it should be prepared to prove the person posed a “direct threat” as defined by the EEOC via this attempt at reasonable accommodation. This is a relatively high bar, especially when compared to reasonable accommodation of religious beliefs where the standard is *de minimis*, meaning the employer is not required to incur significant cost or trouble in the name of accommodation.

The picture became even clearer on Dec. 16, 2020 when the EEOC updated its COVID-19 advice page to add Section K, which directly addresses vaccinations. Here are the key points:

- A vaccination is not a prohibited medical exam under the ADA, but the pre-vaccination screening questions can be prohibited medical inquiries, if done by the employer. The problem is that these questions elicit information about current medical conditions/disability to screen out individuals who are likely to have a bad response to the vaccine. These questions, asked of your current employees, are not allowed unless they are both job-related and consistent with business necessity. Avoid that issue by [1] making the vaccination voluntary; [2] having employees get the vaccine from their physician or pharmacy; or [3] both. Do not use the clinic you have a contract with to handle drug and alcohol testing or workers’ compensation injuries.
- Employers may ask employees to provide written proof that they have been vaccinated. However, if the employee says he or she has not been vaccinated, do not ask why.
- EEOC reiterated the four “direct threat” factors to be used when an employee refuses to be vaccinated due to a disability. If you cannot accommodate and the person poses a direct threat, you can exclude him or her from the workplace but before terminating employment, ensure there are no additional rights to be considered such as job-protected time off under the federal FFCRA and FMLA plus other state and local laws and ordinances which provide paid and unpaid time off for sickness and for COVID-related reasons.
- EEOC mentioned the Job Accommodation Network’s specific materials on COVID-19 which are posted at org/topics/COVID-19.cfm. Use this resource to help with your reasonable accommodation analysis when the issue is a disability.
- The Genetic Information Nondiscrimination Act (GINA) can be violated if an employer asks an employee about family medical history, which could come up on vaccination pre-screening questions. Avoid that problem by having the vaccine administered by the employee’s doctor or pharmacy. Do not use a health care provider the employer regularly contracts with.
- Requiring an employee to be vaccinated is not an unlawful use of genetic information, as prohibited by GINA, because per the Centers for Disease Control (CDC) the messenger RNA COVID-19 vaccines “do not interact our DNA in any way” and “mRNA never enters the nucleus of the cell, which is where our DNA (genetic material) is kept.”

Beyond the legal implications of the “should I” question there are employee relations concerns, too. If you think the dust-up over wearing masks at work was uncomfortable, it takes little imagination to see that being forced to be vaccinated could easily be worse. Beyond those with a disability or religious objection, there will be a slice of workers who see an employer mandate as an invasion of their privacy and an assault on their bodies. Parents of school-aged children may be emboldened by that fact that even though all 50 states mandate vaccinations for students, 45 of them (and Washington D.C.) grant exemptions for religious reasons and 15 of them allow philosophical exemptions based on personal, moral or other beliefs. Do you risk losing valuable talent who think their personal principles outweigh the indignity of mass inoculation in the name of herd immunity? Are you prepared to weather that storm?

If this concern is real, it may be more sensible to take a “wait and see” approach. As the vaccination becomes generally available, will your employees voluntarily get it on their own making an employer mandate unnecessary?

Taking account of your business and knowing your culture, perhaps a better approach to the goal of a high vaccination rate among your staff is to educate them and keep the conversations going in response to concerns and objections. Remove any cost concerns by making clear that your health plan will pay the cost of the vaccine. Or, if you have uninsured employees, offer to pick up the cost of the vaccine. If teleworking was feasible and the employee is itching to return to the workplace, it's fine to make clear that being vaccinated is the path to rejoining colleagues.

In the end, your decision should consider that simple truth of "Just because you can does not mean you should."

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