
The COVID-19 Vaccine Rollout: What Employers Need to Know

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► **With the arrival of widespread vaccine eligibility and availability, employers should consider whether a vaccination policy is right for their workplaces. Such policies implicate a broad range of employment laws and regulations. Below, we address key questions about mandatory and voluntary vaccination policies, including discrimination, wage and hour, collective bargaining, and privacy considerations, and offer recommendations for employee vaccination programs. Although we focus on federal law, employers should in all instances consider any applicable state and local laws and consult with experienced counsel.**

MANDATORY VACCINATIONS AND DISCRIMINATION CONCERNS

May employers require employees to get vaccinated for COVID-19?

Yes, subject to exceptions under antidiscrimination laws, though employers should monitor legislative and litigation developments that could impact employer vaccination programs. At present, no laws expressly prohibit employers from mandating COVID-19 vaccinations as a condition of employment, though bills having that effect have been proposed in a number of states and a few states have issued executive orders restricting private entities' ability to require proof of vaccination as a condition of providing services. Additionally, at least one lawsuit has been filed challenging an employer vaccination mandate on public policy grounds while COVID-19 vaccines are administered under an Emergency Use Authorization and not yet fully approved by the FDA. See *Isaac Legaretta et al. v. Fernando Macias et al.*, Case 2:21-cv-00179-MV-GBW (D.N.M. filed Feb. 28, 2021).

How does the Americans with Disabilities Act apply to mandatory vaccination policies?

Under the Americans with Disabilities Act (ADA), employers may only conduct medical examinations on employees, or ask employees questions that are likely to elicit disability-related information, where the exams or questioning are “job-related and consistent with business necessity.” However, in guidance published in December 2020, the Equal Employment Opportunity Commission (EEOC) clarified that vaccine administration alone, or asking about or requiring proof of vaccination, is not a medical examination within the meaning of the ADA. Therefore, under the ADA, employers would generally be permitted to mandate vaccination.

Still, complications may arise if an employer were to provide vaccinations on-site or otherwise contract with a third party to administer vaccines (as opposed to merely requiring employees to get vaccinated without employer involvement). In order to obtain a vaccine, employees need to answer screening questions for “contraindications” (i.e., medical conditions that increase the risk of a serious adverse reaction). According to the EEOC, while the fact that somebody has been vaccinated is not a medical inquiry, the pre-screening questions for obtaining the vaccine are. Therefore, if the employer is involved in administration of a mandatory vaccine, the employer must be able to show that mandatory vaccination is job-related and supported by business necessity. To satisfy this standard, the EEOC’s guidance states that the employer must have a “reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of [the employee] or

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others.” To assess the threat, employers should conduct an individualized assessment of four factors: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. Additionally, an employer must engage in an interactive process with employees who claim that a disability prevents them from receiving the vaccine to explore accommodation alternatives. For example, remote work may serve as a reasonable accommodation when a direct threat justifies excluding unvaccinated employees from the worksite.

How does the Pregnancy Discrimination Act apply to vaccination of employees?

According to the CDC, pregnant individuals are at increased risk for severe illness from COVID-19, and there is limited data at this time about the safety of COVID-19 vaccines for people who are pregnant. The federal Pregnancy Discrimination Act (PDA) generally forbids discrimination based on pregnancy with respect to any aspect of employment. The PDA requires an employer to provide the same benefits of employment to pregnant employees that it provides to all other employees with similar abilities or inabilities to work. This means that an employer who grants accommodations from a vaccination program to nonpregnant employees must either do so for pregnant employees or have a legitimate and nondiscriminatory explanation for treating pregnant employees differently.



What if an employee objects to vaccination on religious or philosophical grounds?

Title VII of the Civil Rights Act of 1964 prohibits discrimination based on religion. This protection includes requiring employers to accommodate an employee's sincerely held religious (including theistic and non-theistic) beliefs, practices or observances. Applying this standard, the EEOC's guidance explains that an employee may be entitled to a reasonable accommodation whereby the employee is excused from a mandatory vaccine requirement due to religious objections. However, the Title VII standard for providing religious accommodations is not as demanding as the ADA standard. Under Title VII, an employer need not provide a religious accommodation if doing so would require the employer to bear "more than a de minimis cost." Costs to be considered include not only financial costs but also other burdens on the employer's business. For example, courts have found more than a de minimis cost where an accommodation would impair workplace safety or cause coworkers to carry the accommodated employee's share of potentially hazardous or burdensome work. Employers should consider whether any such cost could be mitigated through alternative accommodations, such as remote work.

May employers offer employees incentives to get vaccinated?

Yes, with limitations. Before the change in presidential administration, the EEOC proposed regulations that interpreted a "voluntary" wellness program as a program where the employer offers no more than a de minimis incentive, such as a water bottle, to encourage employee participation, reasoning that incentives cannot be so

attractive that they have the effect of coercing an employee into providing protected information. However, under the current administration, the EEOC's proposed rule was withdrawn. The EEOC has announced that it expects to provide updated guidance, but did not say when.

If the employer is not involved in administering vaccines (directly or through a third party), then the EEOC's wellness rule—if and when it is issued—likely would not come into play. Offering incentives for such vaccinations likely would not involve a "medical exam" or disability-related inquiry, and thus would not implicate the ADA. However, the ADA requires employers to provide reasonable accommodations that allow employees with disabilities to participate equally in wellness initiatives. Therefore, the employer would still need to engage in the ADA interactive process and provide reasonable accommodations to the extent doing so would enable employees with disabilities to receive incentives without causing an undue burden.

Given the uncertainty in this area, employers are wise to be cautious with respect to vaccination incentives until the EEOC publishes guidance. One potential option to incentivize vaccination would be to offer paid time off to allow employees who choose to be vaccinated adequate time to make vaccination appointments, become vaccinated, and recover from potential side effects. Paid time off reasonably offered to keep employees whole is likely to be considered a de minimis incentive, and persons with disabilities who cannot get vaccinated for medical reasons would not need to devote time to making vaccination appointments, becoming vaccinated, or recovering from potential vaccine side effects.

WAGE AND HOUR CONSIDERATIONS

Are employees entitled to reimbursement for mileage or other transportation costs incurred in getting vaccinated?

Generally, no, under federal law. Under the Fair Labor Standards Act (FLSA), employers are not generally required to reimburse employees for business expenses. One exception is that an employer must reimburse nonexempt employees for the cost of “tools of the trade” provided by the employee if failure to do so would reduce pay below required minimum or overtime wages. However, trips for vaccination are generally isolated, infrequent events. Therefore, even if obtaining a mandatory vaccination were deemed to be a work task, isolated use by an employee of his or her personal vehicle in getting vaccinated likely would not make the vehicle a “tool of the trade.” And such trips may not cause an employee’s wages to drop below minimum wage in any event. However, state law may require reimbursement where vaccination is mandated. Under either federal or state law, reimbursement likely would not be required for expenses incurred by employees getting vaccinated voluntarily.

Do employees need to be paid for time spent getting vaccinated?

Whether time spent by an employee getting vaccinated is compensable under the FLSA likely depends on when vaccination occurs and whether vaccination is mandatory. The U.S. Department of Labor (DOL) has not expressly opined on whether time spent getting vaccinated is compensable. However, the DOL interprets the FLSA as requiring that, whenever an employer imposes “special tests, requirements

or conditions” that an employee must meet (such as physical examinations, fingerprinting and drug testing), “time he or she spends traveling to and from the tests, waiting for and undergoing these tests, or meeting the requirements is probably hours worked.” Vaccination is arguably a “special requirement” that the DOL would treat similarly to drug testing if mandated. Additionally, if vaccination occurs on the employer’s premises at a time when the employee would otherwise be working, the DOL may view such time as compensable, even if vaccination is voluntary. Some state laws may require compensation in these circumstances as well. By contrast, voluntary vaccination that occurs outside of normal working hours or away from the employer’s premises would not be compensable.



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