

# COVID-19 Vaccines Receive Emergency Approval: But Can and Should U.S. Employers Force Employees to Take it?

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December 21, 2020

On December 11, 2020, the U.S. Food and Drug Administration (FDA) granted emergency use authorization (EUA) for Pfizer's COVID-19 vaccine. EUA for Moderna's vaccine followed a week later, and other applications for EUA vaccines are expected early next year. Health care employers have already begun vaccinating their frontline employees, and the COVID-19 vaccine is expected to become increasingly available in 2021.

Many employers have been eagerly awaiting a vaccine in the hopes of protecting their workforces and customers and getting closer to "normal." But questions loom regarding an employer's ability to lawfully require vaccination, and, practically, whether and when an employer should do so. This article outlines considerations for U.S. employers regarding the COVID-19 vaccine.

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**Q: Can employers legally require employees to take the COVID-19 vaccine?**

**A: Maybe, depending on the circumstances.**

Mandatory vaccination programs are not new but have been historically limited to health care and education environments. While there is no apparent legal prohibition on mandatory vaccines in the employment context, these programs are subject to several legal exceptions, most notably accommodation for disability, religion and pregnancy.

## **Equal Employment Opportunity Commission (EEOC) Guidance**

On December 16, 2020, the EEOC updated its [COVID-19 technical assistance guidance](#) to express the agency's views on the legal implications of COVID-19 vaccine under the Americans with Disabilities Act (ADA), Title VII and other EEO laws. The EEOC's guidance is not binding on the courts, where discrimination claims will ultimately be resolved, but it is expected to be highly influential. Key takeaways from the guidance are as follows:

1. A vaccine is not a medical examination under the ADA, but pre-vaccination questions answered by an employee as part of an employer's vaccination program may be "disability-related inquiries" under the ADA that should be avoided absent business necessity.

Most importantly, the EEOC weighed in on the side of employers and found that a vaccination, without more, is not a medical examination or a disability-related inquiry under the ADA, as many have previously suggested. This is significant because employers must show that any medical exam or disability inquiry under the ADA is both "job related and consistent with business necessity."

However, if an employer requires employees to receive the vaccine from the employer, or through a third party with whom the employer contracts, then any pre-vaccination questions asked of an employee are likely to constitute ADA disability-related inquiries. In contrast, if both receipt of the vaccine and answering the questions are voluntary, or if the vaccination program is mandatory but employees can obtain the vaccine through their own preferred means (such as their own health care provider), then the pre-vaccination questions will not be deemed "disability-related inquiries" under the ADA. Notably, the EEOC does not consider asking an employee for proof of receipt of the vaccine (or requiring the employee to show it), absent additional follow up, to be a disability-related inquiry.

2. Employers may need to accommodate an employee with a disability who cannot take the vaccine because of that disability.

Consistent with its [2009 H1N1 guidance](#), the EEOC reiterated that employers must seek to accommodate individuals with disabilities as part of any mandatory vaccination program under the ADA. If an employee seeks accommodation from a mandatory vaccine requirement due to a disability, an employer must show that an unvaccinated employee would pose a direct threat due to a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”

The EEOC has *not* adopted a blanket rule that an employee who is not vaccinated for COVID-19 will constitute a “direct threat” to others.<sup>1</sup> Instead, whether an employee constitutes a “direct threat” must be evaluated on a case-by-case basis, and must ultimately result in a determination that the unvaccinated employee will expose others at the workplace to COVID-19. We anticipate that the conclusions an employer reaches regarding whether any particular unvaccinated employee constitutes a “direct threat” will evolve over time, including as more information is learned about COVID-19 and the efficacy of the vaccine, and may vary based on the particular working conditions at the employer’s workplace.

Even if an employee poses a direct threat, the employee cannot simply be excluded from the workplace unless the employer concludes that there is no way to provide a reasonable accommodation (absent an undue hardship) that would eliminate or reduce the risk so that the unvaccinated employee does not pose a direct threat. That in turn likely will require an employer to examine the effectiveness of measures such as social distancing and masking. If that analysis results in a decision that exclusion from the workplace is appropriate, the employer must still evaluate whether other accommodations, such as allowing the employee to work remotely, can be provided.

3. Employers may need to accommodate an employee’s sincerely held religious beliefs, or pregnancy, if either prevents an employee from taking the vaccine.

Consistent with its [H1N1 guidance](#) during that pandemic, the EEOC’s guidance confirms that if an employee objects to receiving the vaccine because of the employee’s sincerely held religious beliefs, the employer must provide a reasonable accommodation *unless* those accommodations would pose an undue hardship under Title VII. The analysis under Title VII is different from the ADA, and undue hardships are those that impose more than a *de minimis* burden on the employer. Importantly, social, political and economic beliefs, and a general “anti-vaccine” viewpoint, are not protected classes under Title VII, although they may be under state or local law (and employers should always check all applicable laws to confirm).

Further, the EEOC cautions employers to be mindful that certain pregnancy-related medical conditions can constitute disabilities under the ADA, requiring an employer to proceed through the accommodation and direct threat analysis referenced above. In addition, the Pregnancy Discrimination Act requires an employer to treat women affected by pregnancy, childbirth and related medical conditions the same as others who are similar in their ability or inability to work or, here, in their ability or inability to receive the vaccine. Many state and local laws also require employers to accommodate pregnant women.

As with the ADA analysis above, if an employer determines that an employee who cannot be vaccinated due to religious beliefs or pregnancy must be excluded from the workplace, the employer must evaluate accommodations which may permit the employee to continue to work.

### **Occupational Safety and Health Administration (OSHA)**

To date, OSHA has not taken a position on whether an employer can require the COVID-19 vaccine or must at least offer it to meet statutory safe workplace obligations.

However, as part of [guidance](#) it issued during the 2009 H1N1 flu outbreak, OSHA confirmed that an employer could, under the Occupational Health and Safety Act (OSH Act), mandate the flu vaccine. At the time of that guidance, the H1N1 vaccine was fully approved by the FDA. In contrast, COVID-19 vaccines have only been afforded EUA status, which falls short of a full endorsement that comes after longer study. This critical difference could change OSHA’s analysis. Further, OSHA also highlighted in its guidance that an employee who refuses a vaccine because of a “reasonable belief” that the employee has a medical condition that creates a “real danger of serious illness or death” from the vaccine would be protected from

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<sup>1</sup> In contrast, in previously issued versions of the guidance, the EEOC confirmed that COVID-19 itself was a “direct threat” which justified employers asking employees to confirm if they had symptoms of the illness and requiring them to be tested before coming on site.

retaliation by the employer for exercising his or her health and safety rights, as provided by [Section 11\(c\) of the OSH Act of 1970](#). Accordingly, an employer that mandates the COVID-19 vaccine must carefully investigate medical and safety objections to vaccination before taking action.

Employers should also be mindful of their obligation under the OSH Act's general duty clause to provide a safe and healthful workplace free from serious recognized hazards, including COVID-19. Because it is not 100% effective or widely available yet, the advent of the COVID-19 vaccine, whether mandated by an employer or not, does not relieve employers of their obligations to comply with existing OSHA guidance related to COVID-19, including the requirement to adopt and maintain an infectious disease response and preparedness plan that incorporates public health guidance, PPE requirements and other safety measures.

## **National Labor Relations Act (NLRA) Requirements for Represented Employers**

### **1. A unionized employer may need to bargain over vaccination programs.**

There is no real question that the adoption of mandatory and non-mandatory vaccination programs by unionized employers are a mandatory subject of bargaining. But that does not mean that employers cannot start a vaccination program or require vaccination.

Employers with current union contracts should start by examining the management rights and other provisions of their contract to determine if they are broad enough to waive a union's right to bargain. Even in the absence of a management right to proceed, most employers can still bargain over vaccine program issues with their unions. Most employers will also benefit from keeping their unions involved even if there is a management right to proceed with a vaccination program, as doing so can assist with employee buy in and avoid grievances (and adverse arbitration results).

### **2. Unionized and nonunionized employers must tread carefully in responding to employee objections to the vaccine.**

Unionized and nonunionized employers must remember that their employees are permitted to engage in protected concerted activity under Section 7 of the NLRA, including in terms of discussing dissatisfaction with a mandatory vaccination program among themselves or publicly protesting or opposing such a program. Action taken against employees for engaging in such activity can result in unfair labor practice charges.

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## **Q: Should an employer require its employees to take the COVID-19 vaccine?**

### **A: It depends.**

An employer contemplating mandating the vaccine should consider both the legal and practical implications of such a program.

## **Employee Distrust, Objections and Morale**

An employer contemplating a vaccine mandate should take into account the fact that while many employees will embrace vaccination without reservation, a large percentage of Americans are reportedly hesitant to take the vaccine. That hesitancy is likely driven by a number of factors, including the speed with which the COVID-19 vaccines have been developed, the relatively short period of testing, the granting of EUA for the vaccines rather than full FDA approval, fear of side effects, a broader philosophical opposition by some to vaccinations more generally, and even disagreement over the risk posed by COVID-19 infections.

While likely not binding on employers, employers should also keep in mind that there are unresolved issues created by the EUA status of the current vaccines. Under the laws allowing emergency use, any individual offered an EUA vaccine must be notified that the vaccine is voluntary and that the individual has a right to refuse it. That right of refusal is detailed in the [Pfizer FDA Fact Sheet](#) and [Moderna FDA Fact Sheet](#) that will be provided before vaccination. Nothing in the fact sheets, or statutory EUA requirements, addresses a private employer's ability to mandate the vaccine despite its "voluntary" nature. Most anticipate that the FDA and the Centers for Disease Control and Prevention will emphasize the voluntary nature of the vaccines, at least while they have EUA status, and that those agencies will be less likely to publicly support mandatory vaccination programs.

In light of these concerns, many large companies (Walgreens, Ford and GM) and hospital systems have issued statements that they will *not* require employees to take the vaccine, at least at this time, which may make it more difficult for other employers (particularly smaller employers in less high-risk environments) to justify requiring that their own employees be vaccinated.

Employers contemplating mandatory vaccination programs should take into account all of the above issues. They may consider the benefits of starting with a voluntary vaccination program that is paired with carefully planned education sessions and well thought out written communications. They must also assess their ability to evaluate and methodically assess accommodation requests on a case-by-case basis, and identify the stakeholders who will ensure that requests are handled in a consistent and lawful manner. These employers further need to evaluate various practical issues, including whether employees will be excused from work to take the vaccine and whether absences due to side effects from the vaccine will be excused and paid for by the employer. Finally, employers must determine how to best obtain employee buy in for the vaccine, and carefully evaluate the negative impact that disciplining or terminating an employee who refuses it (subject to the accommodation obligations above) is likely to have on employee retention and morale.

### **Legal Liability for Injury**

Although significant side effects are expected to be rare, an injury or illness—including a severe allergic reaction requiring medical treatment—which occurs due to a COVID-19 vaccine required by an employer likely will be compensable under state workers' compensation statutes. Employers may want to consult their carriers regarding coverage, and they certainly should process and report to their workers' compensation carriers any injury claims resulting from voluntary or mandatory workplace vaccination programs.

Notably, the Public Readiness and Emergency Preparedness Act ("PREP Act") may provide employers with protection from tort liability arising for an injury or illness experienced by an employee who takes the COVID-19 vaccine at the employer's direction. Under the [PREP Act](#) and the [Fourth Amendment to the Secretary of Health and Human Services' Declaration under the PREP Act](#), a company that administers vaccines itself, provides facilities for vaccine administration or which contracts with a pharmacist to provide the vaccine will likely be a "covered person" under the PREP Act and granted immunity for illness or injury resulting from the vaccine absent "willful misconduct" as defined by that Act. Importantly, for immunity to apply, the vaccine must be administered consistent with the manufacturer's instructions and regulatory approval (which may or may not include the requirement that the employer allow vaccine administration to be voluntary) and only to the appropriate "population" for which the vaccination is approved (currently 16 and older for Pfizer and 18 and older for Moderna).

In addition to the above considerations, state and local laws may affect an employer's ability to legally mandate vaccination. Given the rapidly changing legal landscape, employers are encouraged to consult with legal counsel with respect to employee vaccinations. If you have any questions regarding the topics discussed in this article, please contact, please contact **Elizabeth N. Hall** at +1 (312) 609-7795, **Thomas G. Hancuch** +1 (312) 609-7824, **Patrick W. Spangler** at +1 (312) 609-7797, **Kenneth F. Sparks** at +1 (312) 609-7877, **Kathryn A. Rosenbaum** at +1 (312) 609-7973, or any Vedder Price attorney with whom you have worked.

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