



MANDATORY COVID-19 VACCINATION

By our Labor and Employment Practice Group

After a long, slow, hopeful decline in both cases and fatalities, the COVID-19 pandemic reignited in the United States beginning in November of 2020. Although the curve, thankfully, is now rapidly trending down, the massive increase in cases has highlighted the question of the legal standing of employers who want their employees vaccinated. With over 50 million vaccinations administered nationwide, this has become a live issue. We will thus address it in this article.

The answer is complex. On one hand, employers have a legal obligation to keep workplaces safe for their employees, which includes not exposing them to a potentially deadly virus on the job. On the other, their ability to mandate the vaccines that would accomplish this is hemmed in by a host of statutes, including (but not limited to) the Americans with Disabilities Act (ADA); Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA), and the Genetic Information Non-Discrimination Act (GINA).

Some clarity was provided at the end of 2020. On December 16, 2020, the Equal Employment Opportunity Commission (EEOC), the federal agency most responsible for regulating the issue, provided updated Guidance concerning the interplay between all these statutes, and the evolving legal responsibilities and liabilities of all concerned.

As an initial observation, it's important to note that from a management perspective, mandating vaccinations should be a last resort for any business. Not only does it unleash a host of potentially complex and expensive legal issues, but it also can generate ill-will and resentment from employees and blur the line between personal and work-related topics.

It is far better to encourage and support vaccination, while making it optional, than mandate it. Techniques for doing this effectively range from presentations and information sessions, to senior management modeling the desired behavior by obtaining vaccines themselves, to being generous with leave and flexible scheduling to make vaccines as easy as possible. If, however, this approach is unworkable for some reason, the EEOC's December guidance provides some clarity around the legality of mandating vaccines for the workplace.

The bottom-line, subject-to-a-million-exceptions principle (i.e., there's always an exception to any rule) is that yes, employers can require employees to obtain vaccines and exclude from the workplace those that refuse. That being said, and again emphasizing the point that mandating vaccinations is not a great strategy, there are numerous issues and potential loopholes. Always, always obtain legal counsel before embarking on the process of requiring COVID-19 immunizations.

In the past, the EEOC has allowed compulsory vaccination programs. Two examples of this are mandatory flu vaccines for healthcare workers and hepatitis vaccination in the wastewater treatment industry. The ability to mandate COVID-19 vaccines seems to fall into that same category, with a number of notable exceptions.

Many of the exceptions are extremely specific, and beyond the scope of this article. If a workplace is unionized, for example, mandatory vaccination programs may require renegotiation of extant collective bargaining agreements. What follows, then, is a very basic overview of a complicated, ever-changing set of questions.

The first and most important legal framework that applies is the Americans with Disabilities Act. Under the ADA, an employer can have a qualification standard including “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.” So far, so good. If you’re not vaccinated, you could give your coworkers COVID, or contract it, neither of which is good for health or safety.

That being said, the qualification standard cannot disproportionately affect people with disabilities. Individual employees can also attempt to opt out of a vaccination program if they can claim a disability that makes them wish to not be vaccinated. In either situation, the employer must then show that an unvaccinated employee is 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.”

A direct threat requires assessing four factors: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm. If someone poses a direct threat at the worksite, the employer can’t take any action, including keeping them away, unless there is no way to provide a reasonable accommodation that would eliminate or reduce this.

Another exception may arise where an employee has a sincerely held religious belief that prohibits receiving a vaccination. In that case, the employer must provide a reasonable accommodation unless it would pose an undue hardship under the Civil Rights Act. Courts have defined “undue hardship” as having more than a *de minimis* cost or burden on the employer.

If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace. If the direct threat an employee poses cannot be reduced to an acceptable level, the employer can physically exclude the employee from work, but can’t automatically terminate them.

They may be eligible for leave, for example, under the Families First Coronavirus Response Act, under the FMLA, or under the employer’s policies. While terminating an employee who refuses to be vaccinated is theoretically possible, it should only be done with great care, and after a thorough review of the legal implications on a case-by-case basis.

Since Covid restrictions were first imposed in 2020, we at Coleman & Horowitz have strived to provide you with information to help your business navigate the pandemic. If you have any questions, please feel free to call Darryl J. Horowitz or Gregory J. Norys at (559) 248-4820.

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