

## EEOC PERMITS EMPLOYERS TO MANDATE COVID VACCINATIONS TO EMPLOYEES: NOW WHAT?



### EEOC Permits Employers to Mandate COVID Vaccinations to Employees: Now What?

As we approach the end of this tumultuous and uncertain 2020, there are strong signs that in 2021, life as we once knew it, will once again return to some level of normalcy. This means employers can look forward to re-opening their doors to employees, clients, patients and customers.

The U.S. Food and Drug Administration ("FDA") has just granted Emergency Use Authorization for two COVID-19 vaccines. With the distribution of these vaccines, employers will now face a different set of challenges as they grapple with the decision of whether or not to require employee vaccination.

As a result, employers must now, possibly at break-neck speed, determine and then draft their new vaccine policy. In doing so, employers must address precisely how to handle an employee who refuses to comply. Most importantly, employers must also determine how to navigate potential legal pitfalls that could lead to costly employment litigation all while attempting to keep their businesses afloat and their workforce safe and healthy.

Under the Federal Occupational Safety and Health Act ("OSHA") and many states' laws, employers are obligated to provide a workplace free from serious recognized hazards. To comply with these requirements, employers have the right to establish legitimate health and safety standards, policies, and requirements so long as they are job-related and consistent with business necessity. Many employers already provide employees with flu vaccinations, which are in many cases mandated in industries such as health and education. However, expanding these same policies and practices to include mandatory COVID-19 vaccinations will bring a sense of calm to most workforces, but could also potentially invite fear and resistance from others. Anticipating the emotional reaction and preparing in advance, are key to protecting against claims.

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### The EEOC's Guidelines Allowing Employers to Mandate Employees Be Vaccinated-- with Exemptions

The U.S. Equal Employment Opportunity Commission ("EEOC") recently released long awaited [updated guidelines](#) indicating that employers can mandate vaccinations in furtherance of creating a safe workplace, see Section K. The EEOC guidelines state that employers may require an employee to receive a vaccination from the employer, or a third party with whom the employer contracts to administer a vaccine.

Importantly, the EEOC clarified that requiring a vaccination in and of itself is not a medical examination under the ADA. The vaccine is not "a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual's physical or mental impairments or health." (See EEOC guidelines, Section K(1)). Because the employer is not seeking information about an individual's impairments or current health status, it is deemed acceptable under this current guidance.

The EEOC identified two principal exemptions to mandatory vaccination requirements. First, an employee may be exempt from compliance with a mandatory vaccination policy if they have a qualifying disability under the ADA, which prevents them from safely receiving the vaccine. Second, an employee may also be exempt from compliance with a mandatory vaccination policy if they have a sincerely held religious practice or belief unless it would pose an undue hardship under Title VII of the Civil Rights Act ("Title VII"), which generally prohibits employment discrimination against an employee because of an individual's religion. It is also important to note that courts have broadly interpreted "religion" in the context of required vaccination policies.

To be exempt for a religious belief, employees must establish a **sincerely held religious belief**, and that not having the vaccination does not impose an undue hardship on the employer. Courts have interpreted "undue burden" under Title VII to mean "more than a de minimis," or trivial cost to the employer. A sincerely held religious belief does not include a personal or political belief. This belief must be honestly held, and can be new, uncommon and separate from a formal religious sect, group, or denomination.

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If an employee declares that they have a medical exemption from being vaccinated the employee needs to identify the ADA recognized disability preventing the employee from taking the vaccine. An example would be a compromised immune system or an allergic reaction to one of the ingredients in the vaccine. Employers must also be mindful that under the ADA, all medical examinations or questions that may elicit information about a medical condition or disability must be job-related and consistent with business necessity.

The EEOC warned that employers should be mindful of pre-screening vaccination questions that may implicate the ADA's provision on disability-related inquiries. Notably, the EEOC states that if an employee receives an employer-required vaccination from a third party that does not have a contract with the employer, such as a pharmacy or other health care provider, the ADA "job-related and consistent with business necessity" restrictions on disability-related inquiries would not apply to the pre-vaccination medical screening questions.

The EEOC also confirmed that employers asking employees for proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry. Employers should be mindful that asking follow up questions regarding why an employee did not receive a vaccination may elicit information about a disability and would implicate the ADA's prohibition against disability related inquiries. To avoid implicating the ADA and to assure the employee that their right to privacy is entirely respected, an employer should assure its' employees that it is not seeking any private medical information as part of the proof of a COVID-19 vaccination. As a best practice, employers must keep all medical records confidential for individuals who receive a vaccine—regardless of whether the employee received the vaccine at work or whether the employee provides proof of compliance.

Employers must also consider individuals who refuse the vaccination, and determine what (if any) accommodations may exist for them. An employer may impose other infection control measures, such as additional personal protective equipment, change in workstation, assignment, or remote work if granting a vaccination exemption. The EEOC expressly confirmed that if vaccination for COVID-19 by an employee is untenable because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace. However, an employer should consider termination carefully and work closely with legal counsel to determine if any other rights

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apply under the EEO laws or other federal, state, and local authorities which may provide further guidance.

### **Employers Will Have to Weigh Risk Whether to Mandate Vaccinations if Public Skepticism of the COVID Vaccination Exists**

In a recent Gallup poll as of December 14, 2020, 42 percent of U.S. residents indicated that they were not inclined to get the COVID vaccination. The public health experts raise concerns that if this percentage stays consistent it would result in herd immunity taking much longer to obtain. Based on the outcome of this poll and other similar polls, it is possible that an employer will have to make the decision whether to mandate that only vaccinated employees may continue employment.

Employers may be scratching their heads asking what the potential risks would be if they (the employer) mandate vaccinations? Is it possible that an employee suffers a severe-side effect from the employer-mandated vaccine and files a workers' compensation claim? Could an employer face a public backlash that could directly affect an employer's business? As discussed further below, the employer may also have to conduct an analysis as to whether it is unduly burdensome (on the employer) for the employee not to get the vaccination. Yet, on the other hand, an employer may also be taking on risk if it does not mandate vaccinations for its employees. For example, if there are several employees who are not vaccinated then the risk of COVID affecting the workplace remains high. This leads to an unsafe working environment for employees, customers, vendors, and clients. The employer may also have employees who do not feel safe to be at work where other employees are not vaccinated, thereby creating an unsafe workplace. The employer may also face backlash from the public for not using its influence in working towards obtaining herd immunity. Employers will have to make the decision that is best for its organization. If the decision is to mandate COVID vaccinations then the EEOC has provided the guidance.

If an employer decides to mandate COVID vaccinations before returning to work, how does an employer handle an employee who refuses the vaccine? The employer will have to evaluate whether the basis of the refusal is rooted in a religious or medical reason. When an employee holds a sincere religious belief the employer must then explain to its' employee how not being vaccinated is unduly burdensome to the employer and its business. This burden must be more than minimal.

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Therefore, an employer who states that the employee refusing the vaccine will jeopardize the health and safety of his or her colleagues, clients, or customers, would likely satisfy the undue burden element. However, this argument is not absolute. If the unvaccinated employee holds a position or is qualified for a position that could be performed remotely to allow for physical separation from the workplace, then it could appear that non-vaccination is only a minimal burden in the employer.

Similarly, if an employee declares he or she has a medical exemption from being vaccinated the employee needs to identify how he or she has an ADA recognized disability preventing the employee from taking the vaccine. An example would be a compromised immune system or an allergic reaction to one of the ingredients in the vaccine. The undue hardship is the same as for religious exemption where the employer needs to show that there is a difficulty to providing an accommodation.

After vigorous engagement in the interactive process and concluding that the employee's refusal to receive the vaccine does not fall within one of the exemptions, and/or there are no reasonable accommodations, the employer may legally terminate the employee. Keep in mind that employers risk a retaliation claim when an employee asserts one of the exemptions and challenges the unduly burdensome defense.

Employers could also invoke a middle of the road approach to the vaccination of its employees, by "strongly encouraging" its employees to be vaccinated. The employer could create incentives for the employees to obtain both doses of the vaccination. Incentives should be something that makes receiving the vaccine easy to get and cost-efficient. Employers should of course be mindful of properly calculating any additional financial incentives to avoid potential wage and hour implications.



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## Best Practices for Employers

Whether mandating vaccinations or not, below are best practices an employer should have in place to ensure protection from liability.

- The vaccine rollout and distribution is happening relatively slowly. It will take many months for all U.S. residents to have the opportunity to be vaccinated. During this time, employers must remain vigilant with requiring face-masks, hand-washing, and social distancing for the safety of the employees and other third parties.
- With the EEOC guidance in place, now is the time to begin discussion of whether or not to mandate the vaccine and to determine company policy and procedure.
- Employers should follow state and local municipality positions on mandating vaccines. It is very likely that some states and/or municipalities will mandate vaccinations, removing the decision away from the employer.
- Once a decision is made on whether or not to mandate vaccination, employers should then distribute a written policy outlining the employer's position on mandating/not-mandating the vaccine to its employees. The employer should include in the policy the reasoning behind the employer's position. If the policy is to mandate vaccination, it will be important to explain the purpose for the limited pre-screening questions and consequences for the employee if he/she refuses vaccination and does not fall within one of the exemptions. Employer must assure that no retaliation ensues.
- In a policy that is mandating vaccinations, the employer should ensure it applies to all employees equally to avoid a discrimination claim. Employers should also include the religious and medical exemption and expressly state that it will engage in the interactive process with employees who refuse to take the vaccination to determine if a reasonable accommodation is possible. The employer should document all such efforts.

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Ultimately, employers will need to proceed with caution and should always consult with trusted legal counsel to confirm both that the policies and practices are legal or before making a decision on whether to take any adverse action against an employee for refusing to comply with a vaccine policy. Employers should be ready to adjust and refine these policies and practices as the legal landscape related to COVID continues to evolve (possibly considerably) in the next year.

### COVID-19 Task Force

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#### Source: GRSM COVID-19 HUB

<https://www.grsm.com/publications/2020/eec-permits-employers-to-mandate-covid-vaccinations-to-employees-now-what>



Last Updated: December 2020

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