



# COVID-19 ALERT: REQUIRING EMPLOYEES TO VACCINATE

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As the race for a COVID-19 vaccine gains momentum (and seems to be approaching the finish line), many employers are still wondering whether or not they can require employees to get vaccinated. Generally speaking, employer-mandated vaccination requirements are legal, but they are also subject to exemptions and limitations. Before implementing a mandatory vaccination policy, employers should be aware of restrictions imposed by employment discrimination laws and consider the labor relations issues, administrative costs, and liability risks associated with such policies.

## Exemptions Arising under Employment Discrimination Laws

Given the unprecedented nature of the COVID-19 pandemic, it is difficult to predict exactly how administrative agencies and courts will view employer-mandated COVID-19 vaccination policies. However, existing regulations and court opinions addressing flu vaccination requirements can provide us with some insight.

The Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII) place restrictions on an employer's ability to implement "blanket" vaccination requirements for all employees. More specifically, under the ADA, an employer may need to exempt employees from a mandatory vaccination policy who have pre-existing medical conditions that would prevent them from being vaccinated. Additionally, under Title VII, an employer may need to exempt employees with sincerely held religious beliefs that are offended by vaccination. These situations must be addressed on a case-by-case basis.

In 2009, the Equal Employment Opportunity Commission (EEOC) issued guidance on pandemic preparedness in response to the H1-N1 influenza (swine flu) pandemic, in which the EEOC recommended, based on the ADA and Title VII exemptions, that employers encourage, but not require, employees to get the flu vaccine.

The EEOC has since re-issued and updated its guidance to address the COVID-19 pandemic. Notably, the EEOC's updated guidance dodged the issue of employer-mandated COVID-19 vaccination requirements by noting that a vaccine is not yet available. However, other recent developments and EEOC guidance related to employee COVID-19 screenings suggest that the

EEOC will likely permit relatively more extensive workplace controls in response to the COVID-19 pandemic than were previously allowed. In that regard, the EEOC's more permissive treatment of other workplace measures during the COVID-19 pandemic indicates that the agency may recognize mandatory COVID-19 vaccination policies as a permissible temporary workplace measure. That said, unless and until the EEOC actually issues guidance to that effect, employers should defer to the EEOC's updated 2009 guidance and assume that the ADA and Title VII exemptions apply to mandatory COVID-19 vaccination requirements, including with respect to employees with medical conditions and religious beliefs opposed to vaccinations.

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## Labor Relations

Employers with union-represented employees face additional legal hurdles under federal labor law. These employers, or the associations to whom they have assigned their bargaining rights, will be required to notify and bargain with union representatives before implementing mandatory vaccination policies. Generally, employers and employer associations may only be excused from their duty to notify and bargain in two situations. The first situation arises where a management rights clause in a collective bargaining agreement (CBA) contains clear and unequivocal language establishing that the employer has the right to unilaterally implement a vaccination requirement. Employers and employer associations must tread carefully when reviewing the terms of their CBAs before jumping to the conclusion that they have such a broad management right.

The second situation arises where an employer implements a mandatory vaccination policy pursuant to a non-discretionary government mandate. In that case, the employer must show that a local, state, or federal law or regulation mandates the employ-

er's vaccination policy and that, under the relevant government mandate, the employer lacks discretion to decide how to implement the policy. If the government mandate allows the employer to decide any terms of implementation, such as the timing or location of vaccination, the method of confirming employee vaccination, or the consequences for an employee's failure to get vaccinated, the employer or the association representing it must notify and bargain with the union's representatives before implementing such terms. Thus, even in this second situation, union employers or their employer associations will most likely be required to notify and bargain with union representatives before implementing a mandatory vaccination policy.

**Additional Considerations**

Employers should also consider the practical consequences of implementing mandatory vaccination policies. Employers who choose to implement such policies should anticipate a flood of exemption requests from employees covered under the ADA or Title VII, as well as those with safety or ethical objections to vaccination. The time and energy associated with processing these requests and training human resources personnel to do so may be substantial. Employers should also consider liability risks

associated with a vaccine requirement, including liability under the ADA and Title VII for potentially mishandled exemption requests and liability for workers compensation claims based on adverse reactions to an employer-mandated vaccination.

Given the likelihood of numerous exemption requests, limitations, costs, and potential liabilities associated with employer-mandated vaccination policies, employers should at least consider adopting the EEOC's advice and encourage, but not require, COVID vaccination by hosting on-site vaccination clinics or by incorporating COVID vaccination into their employee wellness programs. Ultimately, however, it is up to every employer to decide what policy is right for their business and for the safety and well-being of their employees. Should you have any questions about mandatory vaccinations or any other issues related to the COVID-19 pandemic and your workplace, please do not hesitate to contact Jonathan Landesman, Esquire or Hope E. Kildea, Esq. at Cohen, Seglias, Pallas, Greenhall & Furman, P.C.

*About the Authors. . . Jonathan Landesman, Esq. and Hope E. Kildea, Esq. are members of the Labor and Employment Group where they focus their practice on representing contractors and subcontractors in all matters relating to the workplace, including employment litigation, human resources counseling, and labor relations.*

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