

Vaccinate Or Terminate – US Mandatory Vaccination As Workplace Policy



The discovery, testing and mass deployment of a COVID-19 vaccine are welcome developments in potentially ending the Coronavirus pandemic. A safe and widely available vaccine will also allow employees to return to the physical workplace. The benefits of an inoculated (and presumably safe and healthy) workforce are obvious. Employees immune from COVID-19 will experience fewer absences because they are healthy and so are the people that they care for (or that care for them). Offices and other facilities will avoid pandemic-related closures and disruptions associated with deep cleaning and other infection control measures. Inoculated individuals will be able to travel and participate in service, customer and other people-facing positions without fear of becoming ill or perpetuating an outbreak and making others ill. And while less obvious, incidents of mental health disorders and other very real but debilitating anxiety-related illnesses should wane in the face of actual progress in fighting the pandemic. If a fully or near fully inoculated workforce could materially reduce and even eliminate the direct threat the pandemic poses to the workplace, it seems natural to implement a mandatory vaccination program as soon as a COVID-19 vaccine is widely available – after health care workers, first responders and others at high risk are vaccinated – to ensure employee health and safety.

While the benefits of a fully immune workforce seem clear, what is less obvious are the legitimate objections that employees may have regarding a mandatory vaccination program and the legal basis for those objections. If a vaccine makes most individuals immune, then the fact that some unvaccinated individuals may carry or potentially transmit the virus does not create the same direct and wide threat the current pandemic inarguably poses now to the greater population that is largely susceptible and not immune. In addition, some individuals may be medically unable to be vaccinated or they may have sincere religious objections – both of which grounds may provide a legal basis upon which to refuse vaccination. As a result, private employers considering making COVID-19 vaccination a gatekeeping employment condition should proceed with caution.

Mandatory Vaccination and Disability and Religious-Related Issues

The EEOC first tackled mandatory vaccination in 2009 in response to the H1N1 (“swine flu”) pandemic and incorporated into its guidance established law concerning medical testing and religious objections. In its publication Pandemic

Preparedness for the Workplace, the EEOC provided guidance regarding disability-related medical inquiries and medical examinations that might be relevant in a pandemic. As part of the 2009 guidance, the EEOC unequivocally concluded that both the ADA and Title VII prohibited an employer from compelling its employees to be vaccinated for influenza regardless of their medical condition or religious beliefs – even during a pandemic.

The 2009 EEOC guidance counseled, in accordance with the ADA, that an employee with underlying medical conditions should be entitled to an exemption from mandatory vaccination (if one was requested) for medical reasons. Similarly, Title VII, according to the 2009 guidance, protects employees with sincerely held religious beliefs from being forced to undergo vaccination if vaccination legitimately offends an employee's religious beliefs. Accommodation for those individuals could include, for example, minimizing interactions with other employees or the general public, or otherwise examining ways in which the individual could perform their work without coming into contact with others, such as virtual or home-working arrangements. But in the event an accommodation is required, the interactive process requires that a discussion about those accommodations actually takes place.

COVID 19 Updates to the 2009 Guidance

Since the onset of the Coronavirus pandemic, the EEOC has updated its Pandemic Preparedness in two ways relevant to mandatory COVID-19 vaccination: First, the EEOC acknowledged that the COVID-19 pandemic met the ADA's "direct threat standard" that permits more extensive medical inquiries and controls in the workplace than the ADA previously allowed. A "direct threat finding" means that having someone with COVID-19 or symptoms of it in the workplace poses a "significant risk of substantial harm" to others in the workplace. That finding permits employers to put in place certain medical testing considerations and measures the ADA would not typically permit, such as taking employee temperatures, a measure that has been widely adopted since the pandemic's onset.

Second, when the EEOC updated its prior guidance prohibiting mandatory vaccination, it noted the somewhat self-evident fact that as of its March 2020 update, when the guidance was updated, **there was no COVID-19 vaccine available.**

Given the reports that a fully deployed vaccine may be available as early as the end of this year (if not before), the EEOC may yet update this guidance concerning mandatory vaccination. But until that guidance is updated, employers should consider the present guidance as the basis for any mandatory COVID-19 vaccination program. State Law Issues

Federal law does not provide the sole guidance regarding mandatory vaccination programs for the private, non-healthcare workforce. State law, which often raises the bar considerably above the Federal statutory floor, especially for small employers, should also be consulted before putting a mandatory vaccination program in place. The CDC lists many of the current state vaccination laws related to healthcare workers (who are generally required to undergo a variety of mandated vaccines) as well as educational requirements for students.

Political and Policy Considerations – The Anti-Vax Movement

Mandatory workplace vaccination programs not only implicate potential medical or

religious objections, but they also implicate a significant but growing social movement against vaccination. Adherents to this movement – “anti-vaxxers” – believe that mandatory vaccination poses objectionable moral, ethical and public health issues. While the anti-vax movement largely currently focuses on mandatory vaccination of children for common childhood diseases, a natural migration to the private employment sphere might result in the face of COVID-19 vaccination programs as conditions of employment. Given the speed with which the COVID-19 vaccine is being developed and the natural inability to time-test its safety and efficacy, adherents to this movement may play a role in the development of public policy in the private workplace sphere. While a recent poll suggests 72% of Americans will readily be vaccinated, that means a fairly sizeable proportion would not (and apparently, that percentage is even higher among younger people).

Establishing a Legally Compliant “Mandatory” Vaccination Program

Absent further guidance from the EEOC, employers considering a mandatory COVID-19 vaccination program once the vaccine is considered safe and widely available as a condition to permitting employees to return to the physical office, for terminating employees from employment for refusing to be vaccinated, or for job applicants to begin employment, should consider some fundamental precepts prior to adopting such a program:

- Vaccine costs, if not fully health insurance-funded, should be borne entirely by the employer to avoid financial barriers to employment;
- The program should allow employees to opt out entirely if they have medical or religious objections to vaccination;
- In the event of a medical or religious objection, an interactive dialog should be established with the objector to determine whether the individual’s objections can be accommodated in light of the position for which the individual is applying or currently holds;
- Fully trained human resources professionals should be responsible for this process, versus line managers who may lack such training;
- Job descriptions should be updated to provide for essential functions, which may include travel, customer-facing positions, close interaction with other employees, or other factors that might compel mandatory vaccination;
- Employers should pay particular attention to recordkeeping given the ADA mandate that medical records be kept separate from general personnel files and the importance of data integrity and limited internal access to medical information.
- Employers should keep in mind that a vaccine is not a fail-safe for an employer’s general obligation to provide a safe working environment, and COVID-19 has taught some hard workplace lessons regarding the prevention against and mitigation of easily transmittable but hard to discern dangers such as viruses and bacteria in the workplace.

Summary

To some, a COVID-19 vaccine will be a welcome development that will permit employment to return to the pre-pandemic paradigm. Others, however, may legitimately believe that a vaccine threatens their health or spiritual well-being. A widely available vaccine that immunizes the population generally may well support individual opt-outs from vaccination, but these factors should be accounted for in designing and deploying a mandatory COVID-19 workplace

vaccination program.

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