



Risk Control

Employer COVID-19 Vaccination Policies – Some Risks and Considerations

The much-anticipated distribution of the first two COVID-19 vaccines, pursuant to Emergency Use Authorizations (EUA), has begun throughout the United States. While the vaccines may represent a light at the end of a long, dark tunnel, they present complex issues for both employers and employees. In fact, a recent Gallup survey indicates that approximately 35% of the U.S. population does not plan to take the vaccine.¹ Employers now face the challenge of deciding whether to mandate vaccinations for their workforce and whether to administer vaccines, either on a mandatory or voluntary basis. Employers should carefully weigh the risks and the benefits of mandatory vaccination policies and employer administered vaccines, and should be mindful of the federal, state and local employment laws that may be implicated in such policies. Even if an employer can mandate and provide COVID-19 vaccinations, the more important question may be whether an employer should do so.

Employer-Mandated Vaccinations for Employees and Federal Equal Employment Opportunity Laws

Employer-mandated and/or employer-provided vaccinations may raise issues under a variety of laws, including various equal employment opportunity (EEO) laws such as the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), and Title VII. On December 16, 2020, the Equal Employment Opportunity Commission (EEOC) updated its COVID-19 guidance, "What You Should Know About Covid-19, the ADA, Rehabilitation Act

and Other EEO Laws," (the Guidance) to include information regarding COVID-19 vaccinations.² Generally, the Guidance indicates that an employer mandated vaccination policy does not, on its face, violate federal equal employment laws if exceptions exist for employees who decline vaccinations because of a disability or of a sincerely held religious belief. However, an employer mandated vaccination policy is not without risk.

Risks of Pre-Screening Questions

Although the ADA limits an employer's ability to require medical examinations and/or elicit information regarding its employees' medical conditions and/or disabilities, the EEOC has indicated that the act of administering a vaccine does not constitute a medical exam and, therefore, does not implicate the ADA.³ However, employers should exercise caution if they require employees to be vaccinated and the employer, or someone acting on its behalf, administers the vaccines, because the necessary pre-screening medical questions may elicit disability-related information in violation of the ADA's prohibition on disability-related inquiries, or genetic information in violation of GINA.⁴ If the employer requires employees to be vaccinated and administers the vaccines or contracts with a third party to administer them on the employer's behalf, the employer must show that the pre-screening questions are "job related and consistent with business necessity." To do so, an employer should have a reasonable belief, based on objective medical evidence, that an employee who does not answer the questions or responds in a way which renders them ineligible, and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of the employee or others that cannot be eliminated by reasonable accommodation.⁵ In addition, if the employer is administering the vaccination program, or has contracted with a third party to administer it on the employer's behalf, all medical information must be maintained in a separate, confidential medical file.

¹ <https://news.gallup.com/poll/328415/readiness-covid-vaccine-steadies.aspx>

² <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

³ *Id.*, K1.

⁴ *Id.*, K2. It is unclear what information will be needed for pre-screening. Note that the definition of genetic information under GINA includes family medical history, which may be elicited during pre-screening.

⁵ 29 C.F.R. 1630.2(r).

If the employer has a mandatory vaccination policy, the issue of disability-related screening questions may be avoided by requiring employees to provide proof of vaccination by a third party that does not have a contract with the employer, such as a pharmacy, doctor or other healthcare provider, instead of employer-provided vaccines. Although the EEOC indicates that requesting proof of vaccination is not a medical exam, and therefore is unlikely to implicate the ADA or GINA, asking an employee for the reason they did not receive a vaccination could elicit disability-related or genetic information which may violate those statutes.⁶ To help minimize the risk of making disability-related inquiries which violate the ADA, employers should use caution in asking for additional information and consider advising employees not to provide any medical information in response to the employer's request for proof of vaccination. Cautioning employees not to provide genetic information (which pursuant to GINA includes family medical history) as part of their response, should help minimize the risk of potential violations of GINA. The Guidance indicates that if such a warning is properly provided, any genetic information the employer may receive in response to a request for proof of vaccination should be considered inadvertent, which should not be unlawful under GINA.⁷ Any medical information provided, even if inadvertently, should be treated as confidential. Employers should consider providing training regarding the ADA and GINA to those individuals who will be responsible for obtaining proof of vaccinations so that they understand how to maintain the confidentiality of medical and genetic information and how to avoid questions which may elicit disability or genetic information in violation of the ADA and/or GINA.

An employer may be able to avoid the requirement that disability-related screening questions need to be "job related and consistent with business necessity" if the employer encourages, but does not require vaccinations, or offers vaccinations to employees on a voluntary basis rather than a mandatory one, where employees may choose whether to be vaccinated, and the employee's decision to answer pre-screening, disability-related questions is voluntary as well.⁸ For such a policy to be considered voluntary, if an employee refuses to answer pre-screening questions, the employer may decline

to provide a vaccination to the employee, but may not take any adverse employment action or retaliate against, interfere with, coerce, intimidate or threaten the employee for refusing to answer such questions.⁹

Exceptions to a Mandatory Vaccination Program

Even if an employer requires all employees to become vaccinated, some may refuse a vaccination because of a disability.¹⁰ In that case, under the ADA, the employer should determine whether the employee, if unvaccinated, poses a "direct threat" to the health and safety of themselves or others. The EEOC notes that employers should engage in an individualized analysis to determine whether the unvaccinated employee poses a direct threat, including an evaluation of the following 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.¹¹

If an unvaccinated employee does pose a direct threat, the employer should try to accommodate the employee. Reasonable accommodations may include additional PPE, adjustments to the employee's workspace, or remote work. It may be easier to demonstrate a direct threat where the employee's job duties require public contact, such as healthcare and retail, than where the employee has less contact with the public or other employees, such as in an office, where additional PPE and the configuration of the workspace might mitigate the risk.

An employer does not have to offer accommodations which pose an "undue hardship" to the employer. The EEOC indicates that an undue hardship pursuant to the ADA is something that is a significant difficulty or expense.¹² Among other things, the employer may consider the workplace prevalence of employees who already have received a COVID-19 vaccination and contact with others whose vaccination status is unknown, such as the general public, as well as the employee's job duties and nature of the particular workplace.¹³ The employer should engage in an interactive process with the employee to determine whether an accommodation exists that is not an undue hardship.

Other employees may refuse vaccination because of a sincerely held religious belief, practice or observance. The EEOC notes that the definition of "religion" is broad, and may include beliefs, practices and/or observances with which the employer is unfamiliar, and advises that employers should accept an employee's belief unless the employer has an objective basis for questioning either the religious nature or sincerity of the belief, practice or observance,¹⁴ in which case the employer might be justified in asking more questions.

However, if the employer does not have an objectively reasonable ground for disputing the employee's religious objections, the employer should consider whether it is possible to provide an accommodation to that employee that is not an undue hardship. The Guidance notes that under Title VII, "undue hardship" in the context of religious accommodation

6 <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>, K3.

7 See 29 CFR 1635.8(b)(1)(i) for model language that can be used for this warning.

8 42 U.S.C. 12112(d)(4)(B); 29 C.F.R. 1630.14(d).

9 <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>, K2. See also 29 CFR § 1630.14(d)(2)(iii).

10 Although the EEOC Guidance is silent about accommodating pregnant employees, employers should exercise caution and consider accommodating pregnant employees who do not want to be vaccinated, as to date there is insufficient evidence regarding the safety of the current vaccinations for pregnant women.

11 29 C.F.R. § 1630.2(r).

12 <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>, K5.

13 The Job Accommodation Network (JAN) (www.askjan.org) may assist in exploring potential accommodations. JAN's COVID-19 materials are at <https://askjan.org/topics/COVID-19.cfm>.

14 An employee who rejects vaccination because of a personal belief that is not religious in nature, however, does not need to be accommodated.

is something more than a *de minimus* cost or burden, which is a lower threshold than “undue hardship” under the ADA.¹⁵ With this in mind, an employer should engage in an interactive process, similar to that which is done pursuant to the ADA, to determine if a reasonable accommodation exists for the employee’s religious belief, absent undue hardship to the employer.

If a reasonable accommodation for an employee’s disability or religious belief cannot be found, then the employer generally may exclude the employee from the workplace – but may not be able to immediately terminate the employee. The employer should consider whether other employment laws, such as the FMLA, state leave laws and/or state EEO laws, apply to the situation. Employers should document the accommodation process. Generally, if there is no reasonable way to accommodate the employee to adequately mitigate the threat, and no other laws prohibit termination, then the employer may terminate the objecting employee.

Determining whether an employee is a direct threat is further complicated by the fact that to date, it is unclear whether an individual who receives a vaccination can still transmit the virus to others.¹⁶ If that is the case, it will be difficult for employers to argue that an unvaccinated employee constitutes a direct threat, if a vaccinated employee may also be able to spread the virus. It is also important to note that the Guidance is not law, and may change as the pandemic progresses. Because of the complex nature of these determinations, and the fluid nature of the Guidance and law in this area, employers should consult with an employment attorney regarding vaccination policies, reasonable accommodations, and/or terminating an individual’s employment for failure to comply with the company’s vaccination policy.

Pending State Laws Should be Monitored

It is important to note that certain pending state laws may impact an employer’s decision on whether to mandate vaccination. A handful of states have legislation pending that would prohibit state or local governments from requiring vaccinations, and at least three states, South Carolina, Washington and Minnesota,

have bills which focus on employers.¹⁷ The South Carolina bill prohibits an employer from taking adverse action against an individual who refuses vaccination, while the Washington state legislation would prevent an employer from requiring an employee to receive the COVID-19 vaccine as a condition of employment if they make a verbal or written medical, philosophical or religious objection. In fact, the proposed Minnesota legislation makes it a felony, carrying a minimum sentence of ten years in prison, for any agent of a business to “treat differently, single out, deny opportunity, ostracize, stigmatize or discriminate against an individual” because of their decision on whether or not to receive a vaccine.¹⁸

Emergency Use Authorization

Under the EUA, healthcare providers are directed to inform individuals, prior to vaccination, of their option to decline receiving the vaccine.¹⁹ Although employees in most states are employed at will and can be terminated for any reason other than one that is contrary to law, one exception to the employment at will doctrine is for terminating an employee for exercising a statutory right. While it is unclear whether courts will determine that an employee who refused a vaccine was exercising a statutory right, and whether this would prohibit employers from mandating vaccination, it presents yet another obstacle and potential for liability for employers who want to mandate vaccinations.

A Workplace Free from Recognized Hazards

The Occupational Safety and Health Act (OSH Act) requires employers to provide a workplace “free from recognized hazards that are causing or are likely to cause death or serious physical harm.”²⁰ To date, the Occupational Safety and Health Administration (OSHA) has provided limited guidance on COVID-19 vaccinations, and has not weighed in on whether employers should mandate vaccinations.²¹

Although an employer may want its employees to be vaccinated in order to limit the spread of COVID-19 in the workplace, at this time it is unclear the extent to which vaccinations will prevent the spread of COVID-19. Although over time the vaccinations may work to eradicate COVID-19, the vaccines do not appear to be a short-term solution to employers’ current problems regarding returning employees to the physical workplace in a safe manner. Thus, even if an employer requires employees to be vaccinated, COVID-19 health protocols such as masks, sanitizing and physical distancing should remain in effect for some time.

Exercise Caution with Incentives

Many employers are considering policies which encourage, rather than mandate, vaccinations.²² An employer may encourage vaccinations in a variety of ways, such as through an internal communication campaign which provides vaccine information from the Center for Disease Control (CDC) and urges employees to follow the CDC’s recommendations regarding vaccinations. In recent guidance, OSHA suggested that, as part of an effective COVID-19 prevention program, employers should make “a COVID-19 vaccine or vaccination series available at no cost to

15 <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>, K6.

16 Fortune, *COVID vaccine recipients may still be infectious. When will we know for sure?* December 22, 2020 at <https://fortune.com/2020/12/22/covid-vaccine-infectious-face-masks-transmission/>.

17 Bloomberg Law, *Some States Put Brakes on EEOC’s Stance on Mandating COVID-19 Vaccine*, January 13, 2021, at <https://news.bloomberglaw.com/safety/some-states-put-brakes-on-eeocs-stance-on-mandating-covid-19-vaccine>.

18 Minnesota HF 41, @ https://www.revisor.mn.gov/bills/text.php?number=HF41&version=0&session=ls91&session_year=2020&session_number=7.

19 CDC, *COVID-19 Vaccine Emergency Use Authorization (EUA) Fact Sheets for Recipients and Caregivers* at <https://www.cdc.gov/vaccines/covid-19/eua/index.html>.

20 29 USC 654(a)(1), at www.osha.gov/laws-regs/oshact/completeoshact.

21 Occupational Safety and Health Administration, *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, January 29, 2021 at <https://www.osha.gov/coronavirus/safework>.

22 The National Law Journal, *Vaccine Incentives: How Employers Can Encourage Employee Vaccination*, January 13, 2021 at <https://www.natlawreview.com/article/vaccine-incentives-how-employers-can-encourage-employee-vaccination>.

all eligible employees ... [and should] provide information and training on the benefits and safety of vaccinations."²³

Employers should exercise caution if they provide incentives, such as a gift card or paid time off, to employees who become vaccinated. If an employer decides to provide an incentive, the employer may need to provide a reasonable accommodation to employees who refuse vaccinations because of a disability or a sincerely held religious belief. Under the ADA, for example, a disabled employee is entitled "to enjoy equal benefits and privileges of employment as are enjoyed by similarly situated employees without disabilities."²⁴ Employers should consider identifying potential accommodations in advance of instituting an incentive program. Potential accommodations could include requiring the employee to watch a training video, to review CDC recommendations regarding COVID-19, and/or to be frequently tested for COVID-19 in order to receive the incentive.

Second, it is unclear whether an employer-provided vaccination incentive programs will constitute a wellness program and therefore be subject to the EEOC's wellness program rules.²⁵ A wellness program refers to health promotion and disease prevention programs and activities offered to employees either as part of an employer-sponsored health plan or separately as a benefit of employment. Employer-sponsored wellness programs that require employees to provide health information or medical examinations are subject to the ADA and GINA and should be voluntary. Although the EEOC's new wellness program rule is not final, the EEOC has generally taken the position that if an incentive or penalty is too high, it has the effect of coercing employees to provide medical information and, therefore, is not voluntary. If an employer or someone on its behalf administers the vaccines, the pre-screening health questions will most likely be attributed to the employer. In that case, if incentives are

offered, the program may trigger the EEOC's wellness program rule which may limit the incentives to a *de minimus* level.²⁶ To help avoid issues regarding wellness plans, employers should consider policies in which an independent third party provides vaccinations, as in those situations the pre-screening medical inquiries are unlikely to be attributed to the employer and the wellness program rule generally should not apply. If the employer or someone on its behalf administers the vaccine, consider offering only a *de minimus* incentive to mitigate the risk of running afoul of the wellness program rule, as it is unclear what level of incentive will be permissible.²⁷

Workplace Culture and Morale

The impact on employee morale and productivity should be a consideration in determining the employer's vaccination policy. How will employees react to a mandated vaccine? Could the employer potentially lose valuable employees who don't want to be vaccinated? Although an employer with a mandatory vaccination policy may be able to discipline an employee who violates that policy by refusing to become vaccinated for reasons other than a disability or a sincerely held religious belief, terminating employees for failing to take the vaccine may be a blow to employee morale and in some circumstances may create staffing problems. And, if an employer requires vaccinations but only terminates the employment of some unvaccinated employees and not others, it may lead to discrimination claims. On the other hand, will employees who are vaccinated be concerned about working with unvaccinated employees? Will customers decide not to patronize a business that doesn't require employee vaccinations? The only thing that is clear is that there is no easy answer. Each employer should weigh the many issues in light of its particular industry and workforce.

What Should Employers Do Now?

Although to date vaccinations are not available to most of the population, making it almost impossible to mandate vaccinations at this time, employers should use this opportunity to consult with employment counsel to address the myriad of issues regarding vaccination policies and to plan for the future. Even if there comes a time when there is a sufficient supply of vaccines, many employers may decline to implement a mandatory vaccination policy because of the many risks highlighted above. Regardless of whether an employer implements a mandatory or voluntary plan, there is less risk if an independent third party administers the vaccines. As the law in this area is complex and unsettled, federal, state and local legislation, case law, and agency guidance in this area should be carefully monitored.

23 Occupational Safety and Health Administration, *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, January 29, 2021 at <https://www.osha.gov/coronavirus/safework>. Covering the costs of vaccinations may raise issues under federal and state law, including the Fair Labor Standards Act and similar state laws, which are beyond the scope of this article. See Fisher Phillips, *Charting The Risk Associated With Common Workplace COVID-19 Vaccine Incentive Programs*, January 26, 2021, at <https://www.fisherphillips.com/resources-alerts-charting-risk-associated-common-workplace>.

24 29 CFR § 1630.2(o)(1)(iii).

25 <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

26 *Id.* The EEOC suggests that a water bottle or a gift card for a nominal amount would constitute *de minimus* incentives.

27 For additional information regarding incentives for vaccination programs, see Fisher Phillips, *Charting The Risk Associated With Common Workplace COVID-19 Vaccine Incentive Programs*, January 26, 2021, at <https://www.fisherphillips.com/resources-alerts-charting-risk-associated-common-workplace>.