

# COVID-19 Vaccines: What Employers Need to Know

**Presenters:**

Renee C. Mattei Myers, Amy Z. Snyder, Rachel E. King, and Tricia S. Springer

**Moderator:**

Ryan J. Cassidy

[www.eckertseamans.com](http://www.eckertseamans.com)

**ECKERT**  
SEAMANS  
ATTORNEYS AT LAW

© 2021 Eckert Seamans Cherin & Mellott, LLC. All rights reserved.

# COVID-19 Vaccines

---

- The FDA has approved two vaccines for emergency use:
  - Pfizer-BioNTech
  - Moderna
  - Both are mRNA vaccines
- Three more are in Phase 3 clinical trials
  - AstraZeneca
  - Janssen
  - Novavax

# Vaccine Distribution: CDC Recommended Phases

## Phase 1a

- Health care personnel and residents of long-term care facilities

## Phase 1b

- Frontline essential workers
- People aged 75 years and older

## Phase 1c

- People aged 65-74 years
- People aged 16-64 years with underlying medical conditions
- Other essential workers (transportation and logistics, food service, housing construction and finance, information technology, communications, energy, law, media, public safety, and public health)

# Vaccine Distribution: Pennsylvania COVID-19 Phases

## Phase 1a\*

- Long-term care facility residents
- Health care personnel including: Emergency medical service personnel, Nurses, Nursing assistants, Physicians, Dentists, Dental hygienists, Chiropractors, Therapists, Phlebotomists, Pharmacists, Technicians, Pharmacy technicians, Health professions students and trainees, Direct support professionals, Clinical personnel in school settings or correctional facilities, and Contractual HCP not directly employed by the health care facility
- Persons not directly involved in patient care but potentially exposed to infectious material
- Persons ages 65 and older
- Persons ages 16-64 with high-risk conditions

## Phase 1b\*

- People in congregate settings not otherwise specified as long-term care facilities, and persons receiving home and community-based services
- First responders
- Correctional officers and other workers serving people in congregate care settings not included in Phase 1A
- Food and agricultural workers
- U.S. Postal Service workers
- Manufacturing workers
- Grocery store workers
- Education workers
- Clergy and other essential support for houses of worship
- Public transit workers
- Individuals caring for children or adults in early childhood and adult day programs

## Phase 1c\*

- Essential workers in these sectors:
  - Transportation and logistics
  - Water and wastewater
  - Food service
  - Housing construction
  - Finance, including bank tellers
  - Information technology
  - Communications
  - Energy, including nuclear reactors
  - Legal services
  - Federal, state, county and local government workers, including county election workers, elected officials and members of the judiciary and their staff
  - Media
  - Public safety
  - Public health workers

# Can an employer mandate?

---

- EEOC Guidance on COVID-19
  - Updated December 2020
  - Paves way for employer mandates with caveats, including:
    - Americans with Disabilities Act considerations
    - Title VII Religious Accommodation considerations

# Is a mandatory program appropriate for your business?

---

- Factors to consider:
  - industry, workplace, culture
  - alternatives
  - limiting to certain employees, departments, locations
  - whether a voluntary program would provide the same result

# To mandate or not to mandate?

## Protecting Workplace and Community Health

- Will protect the health and lives of employees, customers, clients, vendors, and the community in general

## Compliance Rates

- Voluntary programs with low compliance

## Reduction in Workplace Costs

- Absences, productivity and medical care for employees
- Continued operation for employer

## Liability Considerations

- Failure to take reasonable care to protect
  - employees
  - others on employer's premises
  - contact-intensive industries

# To mandate or not to mandate?

## Employee Morale and Retention

- Will protect the health and lives of employees, customers, clients, vendors, and the community in general

## Administrative Burdens

- Interactive process, accommodation, case-by-case determinations

## Discrimination

- Employees denied exemptions

## Industry-dependent

- Close contact avoidable vs. unavoidable



# Reasonable accommodations under the ADA

---

- Employers must make “reasonable accommodations” for disabled individuals who are otherwise qualified to work
- Exception: The Employer can demonstrate that the accommodation would impose an undue hardship on its business
- Disability may include allergies or sensitivities to an ingredient in a COVID-19 vaccine, other medical conditions or mental health issues

# Medical Contraindications

- Persons who should not get vaccinated:
  - severe or immediate allergic reaction to any ingredient in an mRNA COVID-19 vaccine
  - severe or immediate allergic reaction after getting the first dose of the vaccine
- The two approved mRNA vaccines do not contain the following common allergens: eggs, preservatives, or latex
- Individual medical or health conditions

# Reasonable accommodations under the ADA

- Request is made by employee to be exempted from vaccine requirement
- Both employee and employer must engage in an “interactive process”
- Considerations should be made based on individualized assessment
- Accommodation requests and interactive process should be documented
- Process must be appropriately managed (HR?)

# Reasonable accommodations under the ADA

- “Reasonable accommodation” does not require “best possible” or “preferred” accommodation
- Importantly for COVID-19, “reasonable accommodation” may mean working from home for an extended period of time
- May also include exempting employee from a mandatory vaccination requirement
- May include job restructuring, barriers, relocation, enhanced PPE

# **Can you exclude from work an employee unable to receive a vaccination because of a disability?**

---

Must show that an unvaccinated employee would pose a direct threat due to 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.” 29 C.F.R. 1630.2(r).

# “Direct Threat”

- High Standard
  - Either to self or others
- Individualized assessment of 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
- Self
  - Would include the likelihood that an individual will be exposed to the virus at the worksite
- Others
  - Would include a determination that an unvaccinated individual will expose others to the virus at the worksite

# Can the employee be excluded?

- If an employee cannot be vaccinated due to disability, consider:
  - Does the employee pose a direct threat at the worksite?
  - Is there a reasonable accommodation that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat?
- Employers can exclude the employee, but must consider availability of other reasonable accommodations, and employee's rights under other applicable laws

# Is the vaccine an ADA medical examination?

---

- Not a medical examination
  - Medical examination is “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”
- Vaccination is not seeking information about an individual’s impairments or current health status



# Pre-Screening – disability-related inquiry?

- Employer-provided vaccine (or through contracted third party)
- Medical screening questions are likely to elicit information about a disability
- Must be “job-related and consistent with business necessity”
  - Reasonable belief, based on objective evidence, that an employee who does not answer the questions and therefore, does not receive a vaccination, will pose a direct threat to the health and safety of her or himself or others

# When is it not a disability-related inquiry?

---

- Employer offers on a voluntary basis
- Employee receives an employer-required vaccination from a third party that does not have a contract with the employer

# What about proof of vaccination?

---

- Not a disability-related inquiry
- Not likely to elicit information about a disability
- Caution
  - Do not ask WHY an employee did not receive a vaccination
  - Advise employee not to provide medical information as part of proof

# Title VII of the Civil Rights Act of 1964

---

- Prohibits discrimination on the basis of religion
- Requires employers to provide accommodations due to an employee's religion

# Title VII: Religious Accommodation

---

- Sincerely held religious beliefs, observances, and practices when requested
  - Unless
- Accommodation would impose an undue hardship on business operations

# Is the belief religious?

- EEOC Definition - Religion
  - Moral or ethical beliefs as to right and wrong
  - Sincerely held with the strength of traditional religious views
- What about personal or ethical objections?
  - Not all beliefs are protected
  - Religion concerns ultimate ideas about life, purpose, and death
  - Social, political, or economic philosophies, personal preferences are not protected religious beliefs

# Medical Objections – Religious?

- Personal anti-vaccination positions generally not religious in nature
  - Fallon v. Mercy Catholic Med. Ctr., 877 F.3d 487 (3d Cir. 2017) (believed vaccine might do more harm than good)
  - Brown v. Children’s Hosp. of Phila., 794 F. App’x 226 (3d Cir. 2020) (believed she had already proved she would remain healthy due to her African Holistic Health lifestyle)
- Exercise Caution!!

# Is the belief sincerely held?

---

## Considerations:

1. Employee behavior inconsistent with the professed belief
2. Is the requested accommodation a desirable benefit
3. Is the timing of the request suspicious
4. Other information that suggests the accommodation is not sought for religious reasons



# Beliefs change over time?

---

- Prior inconsistent conduct is relevant to the question of sincerity
- However, beliefs – or degree of adherence – may change over time
- EEOC v. Ilona of Hungary, Inc., 108 F.3d 1569 (7th Cir. 1997)
- Cooper v. Oak Rubber Co., 15 F.3d 1375 (6th Cir. 1994)

# Would a reasonable accommodation impose undue hardship?

---

- Factors
  - type of workplace
  - nature of the employee's duties
  - identifiable cost of the accommodation in relation to the size and operating costs of the employer
  - number of employees who will need a particular accommodation

# What is “undue hardship” under the ADA and Title VII?

- Standard – Title VII
  - “more than *de minimis* cost”
- Standard – ADA
  - “significant difficulty or expense”
- Title VII standard presents lower burden

# Undue hardship can exist ...

---

- Where the accommodation ...
  - diminishes efficiency in other jobs
  - infringes on other employees' job rights or benefits
  - impairs workplace safety
  - causes co-workers to carry the accommodated employee's share of potentially hazardous or burdensome work
  - causes or increases safety risks or the risk of legal liability for the employer

# Vaccines and reasonable accommodations

- Robinson v. Children's Hospital, No. 14-10263-DJC, 2016 WL 1337255 (D. Mass. Apr. 5, 2016)
  - Exemptions to a mandatory flu vaccine would have posed an undue hardship because allowing one employee to forgo a mandatory vaccine “could have put the health of vulnerable patients at risk”
- Horvath v. City of Leander, 946 F. 3d 787 (5th Cir. 2020)
  - Fire Department reasonably accommodated the driver/pump operator by offering two accommodation options:
    - (1) reassignment to a different position that did not require vaccine, and
    - (2) remaining in the same position if the employee “agreed to wear personal protective equipment, including a respirator, at all times while on duty, submit to testing for possible diseases when his health condition justified, and keep a log of his temperature”

# Leave vs. Termination

---

- According to the EEOC, “if an employee cannot get vaccinated for COVID-19 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. This does not mean the employer may automatically terminate the worker. Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.”

# National Labor Relations Act

- Private sector
- Section 7 of the National Labor Relations Act (NLRA) protects employees' right “to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection”
  - If an employee or group of employees mobilize co-workers to challenge a mandatory vaccine policy, this could be viewed as “protected concerted activity”
  - Collective bargaining considerations

# Pregnancy

---

- Pregnancy Discrimination Act
  - Similar protections as the ADA for employees with temporary disabilities related to their pregnancy or childbirth
  - Consider possible reasonable accommodations such as
    - Leave
    - Exemption from requirement during pregnancy-related disability



# Workers' Compensation

---

- Adverse reaction to an employer-mandated vaccine
- May be compensable injury

# OSHA

---

- Provide a place of employment “free from recognized hazards that are causing or are likely to cause death or serious physical harm”
- Potential liability for failure to provide a safe workplace

# OSHA – on Flu Vaccines

---

- OSHA does not require employees to take vaccines, but employers may do so
- Employees to be properly informed of benefits
- Exception for reasonable belief that medical condition creates a real danger of serious illness or death

# Privacy and Public Policy

---

- Violation of privacy interests
- Bertha Hunter v Ahmed Health, Case No. 2010 CP 0403433 (S.C. Court of Common Pleas, Filed 9/24/10)
  - Class action against a health care facility, and a network of hospitals and health care facilities in South Carolina
  - Claiming that mandatory flu vaccination requirements constituted an unreasonable invasion of privacy under that state's constitution and common law

# State Laws

---

- Small number impose specific requirements regarding mandatory vaccination programs
  - Health care employees
- Some states may prohibit mandatory vaccination programs

# When implementing vaccination program employer should/could ...

---

- Educational campaign
  - Explain the “why”
  - Increase buy-in
  - Give employees time to meaningfully share views
- Prepare to address accommodations and objections

# When implementing vaccination program employer should/could ...

---

- Standardize procedures
- Make obtaining vaccine as easy as possible
- Cover costs associated with vaccination
  - Health care cost and time off if necessary
- Consider incentives to employee who get vaccinated
  - Understand legal limitations

# Steps – Putting a Vaccination Program into Practice

---

1. Policies and Procedures
2. Process for Exemption Requests
3. Interactive Process
4. Make Determination Regarding Applicability of Exemption
5. Make Determination Regarding Accommodation
6. Employee Notice
7. Recordkeeping & Confidentiality



# Step 1 – Policies and Procedures

---

- For handling requests for medical and religious accommodations
- Existing job descriptions should also be reviewed to confirm they include all aspects of the job and include any requirements for mandatory vaccinations

# Step 2 – Process for Exemption Requests

- ADA versus Title VII
- Personal preference – not protected
  - Employer should reiterate the company policy and the consequences for not complying with the vaccination mandate
- Employees do not need to use the word “accommodation”
  - Managers and supervisors should understand how to recognize a request for accommodation and who to relay the information to within the company

# Step 3 – Interactive Process

## Medical Exemption

- Engage with employee and health care provider
- Share information about nature of disability
- Documentation regarding:
  - Nature of impairment
  - Duration of need for accommodation
  - Extent to which the impairment conflicts with the employer's vaccination requirement.

## Religious Exemption

- Religious Exemption
- Engage with employee and religious leader
- Share information about religious belief
- Documentation regarding:
  - Explanation of sincerely held religious belief
  - Extent or manner in which religious belief conflicts with the employer's vaccination requirement.

- Good faith effort by employee and employer to discuss specific circumstances
- Purpose to determine what (if any) accommodations may be needed

# Step 4 – Make Determination of Applicability of Exemption

Medical Exemption	Religious Exemption
<ul style="list-style-type: none"><li data-bbox="239 683 993 808">▪ Does the employee have a disability?</li></ul>	<ul style="list-style-type: none"><li data-bbox="1094 683 1864 873">▪ Does the employee have a sincerely held religious belief?</li></ul>

# Step 5 – Make Determination Regarding Accommodation

Medical Exemption	Religious Exemption
<ul style="list-style-type: none"><li>▪ Undue Hardship<ul style="list-style-type: none"><li>▪ Significant difficulty or expense</li></ul></li><li>▪ Direct Threat</li></ul>	<ul style="list-style-type: none"><li>▪ Undue Hardship<ul style="list-style-type: none"><li>▪ More than <i>de minimis</i> cost or burden</li></ul></li></ul>

- Employers should seek input from the employee's supervisor, who has knowledge about the duties of the position and the worksite, to help determine the feasibility of what may be a “reasonable” accommodation, including alternative accommodations to the one requested by the employee

# Step 6 – Employee Notice

---

- Notify employee in writing that requested accommodation has been approved or denied
  - If denied
    - Communicate any available alternative accommodations

# Step 7 – Recordkeeping & Confidentiality

---

- Maintain all copies of accommodation requests, supporting documentation and communications regarding accommodations to employees in a separate file from the personnel file
  - Protect confidentiality for both ADA and Religious Preference information
- Managers and supervisors must understand that it is unlawful to disclose that an employee is receiving a reasonable accommodation or to retaliate against an employee for requesting an accommodation

# Thank you.

Renee C. Mattei Myers, Esq.  
717-237-7163  
rmyers@eckertseamans.com

Rachel E. King, Esq.  
215-851-6623  
rking@eckertseamans.com

Amy Z. Snyder, Esq.  
215-851-8433  
asnyder@eckertseamans.com

Tricia S. Springer, Esq.  
717-237-7189  
tspringer@eckertseamans.com

Ryan J. Cassidy, Esq.  
215-851-8531  
rcassidy@eckertseamans.com

[www.eckertseamans.com](http://www.eckertseamans.com)

**ECKERT**  
SEAMANS  
ATTORNEYS AT LAW

© 2021 Eckert Seamans Cherin & Mellott, LLC. All rights reserved.