

# Employer-mandated COVID-19 Vaccines: Moving from “Can they do it?” to “Should they do it?”

Most agree that, under presently available guidance, an employer can require employees to receive a vaccine as a term and condition of employment, subject to case-by-case exceptions for disability or religious reasons. As COVID-19 vaccine deliveries are set to begin this week in the U.S., employers are grappling not only with the circumstances under which they *can* mandate vaccinations, but also with whether they *should* mandate them. The unique exigencies of COVID-19, including the relative novelty of the virus (and its vaccine), its magnitude, and perhaps, the politicization of the pandemic, will likely impact an employer’s decision-making.

## LEGAL FRAMEWORK

The Equal Employment Opportunity Commission (EEOC)—an agency at the forefront of these issues—has not yet offered any specific guidance regarding mandatory COVID-19 vaccinations. Although the EEOC has suggested, in relation to flu vaccines, that employers should simply encourage, rather than require, employees to get vaccinated, nothing in the law as it stands prohibits an employer from mandating vaccinations subject to exceptions for disability or religious reasons. See [Pandemic Preparedness in the Workplace and the Americans with Disabilities Act](#) (last updated March 21, 2020). Indeed, certain industries have had mandatory vaccination programs for years, e.g., flu vaccinations for healthcare workers. Another agency, the Occupational Safety and Health Administration (OSHA), has previously endorsed mandatory vaccines so long as employees are “properly informed of the benefits of vaccinations.” See OSHA, Standard Interpretations, [Position on Mandatory Flu Shots for Employees](#) (Nov. 2009).

### *ADA Disability Exception:*

An employee may be entitled to an exemption from a mandatory vaccination requirement because he or she has a disability under the Americans with Disabilities Act (ADA) that prevents him or her from safely receiving a vaccine. In such a situation, the employer would be required to explore providing a reasonable accommodation barring undue hardship (meaning, in the ADA context, significant difficulty or expense).

Of course, this assumes that mandatory vaccination programs are acceptable under the ADA in the first place. Vaccination programs do not fit neatly into typical ADA paradigms. Still, some courts have treated such programs as a “medical examination,” meaning that the program must be job-related and consistent with business necessity. In other words, an employer must reasonably believe that the employee’s ability to perform essential job duties will be impaired by COVID-19 or that COVID-19 will pose a significant risk of substantial harm to workplace health or safety that cannot be eliminated by reasonable accommodation.

Assuming a vaccination program passes initial muster under the ADA, employees may seek an exemption based on a disability. Whether an employee has a disability is a fact-specific inquiry. One issue likely to arise is whether

certain “sensitivities” to vaccinations, based, perhaps, on an underlying health condition, rise to the level of a disability. Courts have reached seemingly conflicting conclusions in this regard. *See, e.g., Ruggiero v. Mount Nittany Med. Ctr.*, 736 Fed. Appx. 35 (3d Cir. 2018) (suggesting that sensitivities or anxieties about potential side effects may constitute a disability); *Hustvet v. Allina Health Sys.*, 910 F.3d 399 (8th Cir. 2018) (suggesting that chemical sensitivities or allergies did not constitute a disability). If an employee raises a disability concern, employers must engage in the interactive process and reasonably accommodate unless the accommodation—here, an exemption from the vaccination—poses an undue hardship or the employee poses a direct threat.

It is unclear whether granting exceptions from a COVID-19 vaccination program constitutes an undue hardship on an employer, and whether an unvaccinated person (as opposed to one who has been diagnosed with COVID-19) poses a direct threat. Even if an employer can establish an undue hardship or direct threat, it must still explore alternative accommodations, *e.g.*, telework. Given the highly fact-specific nature of the analysis and the ever-changing COVID-19 landscape, employers with mandatory vaccination requirements must carefully apply their reasonable accommodations procedures in the disability context.

### *Title VII Religious Exception:*

Under Title VII of the Civil Rights Act, if an employee’s sincerely held religious belief, practice, or observance prevents him or her from receiving a vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship (meaning, in the Title VII context, more than *de minimis* cost—a lower standard than under the ADA).

In considering a request for a religious-based exemption from a mandatory vaccination program, the threshold inquiry is whether the belief is based on religion. “Religion” generally includes “moral or ethical beliefs as to right and wrong that are sincerely held with the strength of traditional religious views.” EEOC Compliance Manual, [Section 2 - Threshold Issues](#), EEOC-CVG-2000-2. It does not include personal or ethical objections, or social, political, or economic philosophies. EEOC Compliance Manual, [Section 12 - Religious Discrimination](#), EEOC-CVG02008-1. This may preclude so-called “anti-vaxxers” from receiving an exemption under Title VII.

Assuming an employee has a sincerely held religious belief that prevents him or her from receiving the vaccine, under current Title VII case law, an employer can refuse to exempt the employee if it would pose more than a *de minimis* cost on the business. EEOC Compliance Manual, Section 12. Undue hardship can exist where, *inter alia*, the accommodation impairs workplace safety—something that employers are likely to rely on in assessing exemptions to COVID-19 vaccination programs. *See* EEOC, [Questions and Answers: Religious Discrimination in the Workplace](#), EEOC-NVTA-2008-2 (July 22, 2008).

In light of the differing undue hardship standards, and absent the now more conservative-leaning Supreme Court putting a new gloss on the analysis, an undue hardship defense may be more successful in the religious context than the disability context. Even so, both types of exemptions require a very fact-intensive determination.

## **SOME PRACTICAL CONSIDERATIONS**

Even if employers can require employees to receive COVID-19 vaccines subject to the exceptions described above, whether such a requirement is appropriate for a given employer involves different considerations.

As with many other employer mandates, whether employees (at least those not entitled to disability or religious accommodations) will comply depends on the workforce and employee culture. If an employer receives significant backlash, it may face some difficult decisions. Is it prepared to discipline employees who refuse to receive the vaccine? If it keeps these employees out of work, will that create operational problems? For unionized workforces, the problem is compounded, as a mandated vaccination program would likely trigger an

obligation to collectively bargain. Whether this obligation exists depends on the language of the collective bargaining agreement (including the management rights clause), the parties' past practice, and perhaps the employer's health and safety programs. Even in a non-union environment, employers may run into labor law troubles if employees mobilize and challenge a program based on safety or other concerns.

The employer's industry, workforce, and working conditions play a key role in any determination. For example, where employees must work in close proximity to each other, or with members of vulnerable populations, mandatory vaccination requirements may be more appropriate. On the other hand, if employees or a subset of employees are working 100% remotely for the foreseeable future, does a mandatory vaccination requirement align with the employer's objectives? If these employees cannot transmit the virus to coworkers, is the desire to prevent employees from getting sick through their activities outside the workplace sufficient to justify the need for the vaccination requirement? At some point, reducing the risk of fully-remote employees contracting the virus may not be job-related and consistent with business necessity. Additionally, based on their industry, employers may be subject to federal or state vaccination guidance or requirements, e.g., schools or healthcare. Healthcare employers, in particular, have a larger body of case law guidance on which to structure their programs to avoid unnecessary legal risk.

Likewise, employers considering a mandatory vaccination program should consider the options available to them in the event they need to reasonably accommodate an employee who cannot receive the vaccine for disability or religious reasons. Both the ADA and Title VII require employers to explore alternate accommodations if the requested one—here, not receiving the vaccine—is not feasible. For example, certain employers may be able to allow unvaccinated employees to work remotely. Other employers may be able to require an employee to wear additional personal protective equipment and undergo additional testing to reduce the risk. Others may be able to offer reassignment to a different position that is outdoors or does not require contact with others. While none of these alternatives is likely to be a silver bullet, employers should consider their ability to have other accommodation options at the ready.

Finally, the collective comfort level with the vaccine, including the timing of an employer's implementation of its vaccination program vis-à-vis the FDA's blessing of the vaccine, is critical. This is important for both the employer and the employees. Employees who suffer or believe they have suffered an adverse reaction to a vaccine they were required to receive may file a workers' compensation claim, leading to increased employer costs. Similarly, OSHA has suggested that employees who refuse a vaccine based on a reasonable belief that it will create a real danger to their health may be protected as a whistleblower under the Occupational Safety and Health Act. We expect additional information about the safety and efficacy of the vaccine to emerge once large-scale vaccination efforts are underway.

As with other COVID-19 topics, we anticipate that guidance on mandatory vaccination programs will continue to evolve. Until then, employers considering implementing such programs have plenty to ponder, both from a legal and practical standpoint.