

# COVID-19 Vaccines: Ten Frequently Asked Questions by Employers

By Lindsey Conrad Kennedy and Karen Elliott

As COVID-19 vaccines become more widely available, many employers are grappling with how vaccinations will impact their workplace and what, if any, vaccination policies they should implement. Below are answers to ten common questions from employers navigating these issues.

## 1. Can we require employees to be vaccinated?

Yes, according to EEOC guidance, employers can generally require that employees receive vaccinations as a term and condition of employment, subject to case-by-case exceptions for disability and religious reasons. Employers must also comply with state and local laws and any industry-specific regulations or guidance.

## 2. Should we require employees to be vaccinated?

Whether employers should implement a mandatory vaccination program involves careful consideration of many factors. Employers should consider their industry, workplace, and culture. For example, are employees working in-person, with vulnerable populations, or in close proximity to the public or to one another such that they are at increased risk? If you make vaccinations mandatory, do you expect most employees to comply, and if not, are you prepared to discipline employees who refuse the vaccine (that is, assuming they are not entitled to a disability or religious accommodation)?

For unionized workforces, employers should keep in mind that imposing a vaccination requirement on such a workforce is likely a mandatory subject of bargaining. Employers should review the applicable collective bargaining agreement and relevant past practice to determine whether there is any basis to conclude that the union has waived bargaining over such a requirement. Even if implementation of a mandatory vaccine program is not subject to decision bargaining under the employer's specific circumstances, an employer may be required to bargain over the effects of the implementation. Considerations may include time off to receive the vaccine or recover from side effects, if any.

Employers weighing these factors should also consider whether the vaccination requirement should apply to all employees, or whether it can and should be limited to certain employees, departments, or locations. Likewise, they should think about the options available in the event they need to accommodate an employee who is required to but cannot receive the vaccine for disability or religious reasons—for example, the availability of remote work, enhanced personal protective equipment, or additional screenings or testing.

Employers should also identify their underlying goals (*e.g.*, protecting the workplace, promoting community health, minimizing liability) and whether a voluntary vaccination program may achieve a similar purpose as a mandatory vaccination requirement.

## Labor & Employment Alert

### **3. If we have a mandatory vaccination policy, how do we handle an employee who cannot or will not be vaccinated because of a medical condition?**

The Americans with Disabilities Act (ADA) requires employers to make reasonable accommodations for employees with disabilities, provided such accommodations do not pose an undue hardship. Although the ADA's definition of "disability" is broad, whether an employee has a "disability" entitling him or her to a reasonable accommodation is a fact-specific question. For purposes of vaccination requirements, and depending on the situation, a disability may include allergies to an ingredient in the vaccine or severe anxieties about receiving the vaccine. Employers may generally require employers to provide documentation from their health care provider to substantiate the disability and need for an accommodation.

Assuming an employee has a disability and requests an accommodation to the mandatory vaccination requirement, the employer must explore whether it can provide a reasonable accommodation that would allow the employee to perform the essential functions of the job. Accommodations that would pose an undue hardship on the employer, meaning significant difficulty or expense, are not required. If an undue hardship is present, an employer would not have to exempt an employee from a mandatory vaccination requirement.

### **4. Under what circumstances can we exclude an employee from the workplace because a disability prevents him or her from receiving the vaccine?**

If an employer determines that an individual who cannot be vaccinated due to disability poses a "direct threat" at the worksite, the employer cannot exclude the employee from the workplace—or take any other adverse action—unless it cannot provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk such that the unvaccinated employee does not pose a direct threat.

The "direct threat" standard is a high one, and involves an individualized assessment of 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. For example, an employer should consider the likelihood that the employee will be exposed to the virus at work, or would expose others in the workplace to the virus.

If there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace. This does not mean, of course, the employer may automatically terminate the worker. Employers must consider, among other factors, whether the employee can work remotely or whether any other existing agreements or policies may impact the employee's status.

### **5. If we have a mandatory vaccination policy, how do we handle an employee who cannot or will not be vaccinated because of a religious belief?**

Title VII of the Civil Rights Act requires employers to provide reasonable accommodations for an employee's sincerely held religious belief unless doing so poses an undue hardship. An undue hardship for purposes of Title VII means more than a *de minimis* cost on the business. So, if an employee has a

## Labor & Employment Alert

sincerely held religious belief that prevents him or her from receiving the vaccine, an employer can refuse to exempt the employee from the requirement if doing so poses more than a *de minimis* burden—for example, it would impair workplace safety or increase the risk of legal liability to the employer. This is a lower standard than under the ADA. Even if an employer determines that exempting an employee from a mandatory vaccination requirement would be unreasonable because it poses more than a *de minimis* cost, an employer should consider other alternative accommodations (e.g., remote work) before excluding the employee from the workplace.

### **6. How do we determine if an employee’s stated religious belief is sincere and qualifies for protection under Title VII?**

Unless there are specific facts suggesting otherwise, employers should generally assume that an employee’s stated religious belief qualifies for protection under Title VII. However, the belief must be 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. It does not include social, political, or economic philosophies, personal preferences, or personal stances on vaccination. If an employer has an objective basis for questioning the sincerity of a religious belief (e.g., the employee’s behavior is inconsistent with the expressed religious belief), it should request additional supporting information from the employee.

### **7. If an employer provides vaccinations, how should it handle the pre-screening questions?**

Pre-screening vaccination questions may elicit information about an employee’s disability and, therefore, implicate the ADA’s restrictions on disability-related inquiries. Pre-screening questions presently recommended by the CDC would elicit such information. If an employer administers the vaccine—or contracts with a third party to administer the vaccine on the employer’s behalf—any pre-screening questions must be job-related and consistent with business necessity. This means that the employer must reasonably believe, based on objective evidence, that failure to answer the pre-screening questions and, therefore, failure to receive the vaccine, will pose a direct threat.

However, if the employer is making the vaccine available to employees on a voluntary basis, as opposed to a mandatory vaccination requirement, the employee’s decision to answer such pre-screening questions must also be voluntary. Thus, if an employee chooses not to answer the pre-screening questions, the employer may decline to administer the vaccine but not otherwise retaliate against the employee. An employer can avoid pre-screening issues by requiring employees to receive vaccinations elsewhere and require proof thereof.

Any pre-screening information, or other medical information obtained by an employer through a vaccination program, must be maintained as a confidential medical record under the ADA.

### **8. Regardless of whether we provide or require vaccines, can we ask employees to show proof that they have been vaccinated?**

Yes. Asking or requiring an employee to show proof of a vaccination is not a disability-related inquiry subject to the ADA’s requirements and limitations. However, follow-up questions such as why an individual did not receive a vaccination may elicit disability-related information and be subject to “the job-related and

## Labor & Employment Alert

consistency with business necessity” standard described above. Employers requiring proof of vaccination should advise the employee not to provide any medical information along with such proof.

### **9. Apart from the ADA and Title VII, what other laws might come into play regarding employee COVID-19 vaccinations?**

A number of different laws may apply to workplace vaccination policies and requirements, including but not limited to the following:

- The Occupational Safety and Health Administration (OSHA) has not specifically weighed in on COVID-19 vaccinations under the Occupational Safety Health Act (OSH Act), but the OSH Act subjects employers to potential liability for failure to provide a safe workplace to its employees. In light of its previous advice about flu vaccines, OSHA would appear to endorse an employer vaccination requirement, so long as employees are properly informed of the benefits and an employer makes exceptions for employees who refuse the vaccine because of a medical condition.
- The National Labor Relations Act likely requires employers with unionized workforces to bargain over the implementation of a mandatory vaccination program. Even in the absence of a unionized workforce, employers must be careful not to infringe on employees’ “protected concerted activity,” which could include, for example, group efforts to challenge a mandatory vaccination policy.
- State workers’ compensation laws will likely apply to employees who suffer, or believe they suffer, an adverse reaction to a vaccine their employer required them to receive. These employees may file claims for benefits, which may, in turn, increase an employer’s costs.
- State laws may impose specific requirements regarding mandatory vaccinations (including industry-specific requirements), or may prohibit them altogether.
- See Question 10 for ERISA, HIPAA and COBRA considerations.

### **10. Vaccination Incentives and Programs: May I give a financial incentive to encourage employees to take the vaccination? Do I have to worry about ERISA, HIPAA or COBRA regarding any vaccination incentive or program?**

Employers interested in offering vaccination programs to employees should consider whether doing so creates issues under the Employee Retirement Income Security Act (ERISA) and/or the privacy and security provisos of the Health Insurance Portability and Accountability Act. Employer-sponsored plans that provide or pay for medical care for employees are considered group health plans subject to ERISA, and in many cases are also subject to HIPAA. Similarly, the operation of an onsite medical clinic can be considered a group health plan under ERISA. A stand-alone COVID-19 vaccination program in which the employer directly pays for, or provides vaccinations to employees should be reviewed as to ERISA and HIPAA applicability. ERISA comes with many compliance requirements — for example, reporting, disclosure and fiduciary obligations. In addition, group health plans must also comply with COBRA. Providing more than a minimal financial incentive in combination with providing certain types of vaccine programs may also trigger rules pursuant to Wellness Plans.

## Labor & Employment Alert

An employer who requires employees to receive vaccines as a condition of employment, but does not provide vaccines onsite or pay for the cost of vaccines from a third party should not be viewed as creating a stand-alone group health plan. The requirement to report a vaccination record to the employer as an employment condition, without more, should not trigger HIPAA requirements. Providing an employee with the day off to obtain the shot should also not trigger ERISA, HIPAA or COBRA under the foregoing scenario. Nonetheless, your program should be reviewed by counsel prior to implementation.

### **TIPS: What are some tips and best practices if we decide to require COVID-19 vaccinations?**

If, after weighing the considerations identified above, employers decide to implement a COVID-19 vaccination program, there are certain best practices they should adopt.

Employers should first educate their workforce as to the vaccine and why the employer is requiring it. Clear communication about the new vaccination program and how and when it will be implemented is a key step in avoiding both cultural backlash and potential legal claims. Once carefully drafted policies and procedures are in place, employers must prepare to address objections and accommodation requests, and train any relevant human resources or other employees involved in the program. Part of this training may include, for example, a refresher on ADA reasonable accommodation procedures and the importance of properly documenting the process. Standardized, consistent application of the policies and procedures will help ward off potential claims.

Employers should stay abreast of the vaccination supply and distribution in their area, and make obtaining the vaccine as seamless as possible. This includes covering costs associated with the vaccine (e.g., payment for the time it takes to receive it or recover from any potential side effects). At the present time, vaccines are being administered without cost, but should this change, employers should reimburse employees for the cost. Employers should also review their other related policies, such as record-keeping policies, to ensure confidentiality of any medical information they receive as part of the mandatory vaccination program.