

Employer-Mandated COVID-19 Vaccines: Tips, Pitfalls, and Other Considerations

19 Apr 2021

, [John J. Matteo](#)

President Joe Biden recently announced that all adult Americans will be eligible for a COVID-19 vaccine by April 19. That day has arrived, and all 50 states now allow all adults age 16 and older to register for the vaccine. As the pace of vaccinations continues to accelerate, and case numbers appear to be stable in most regions of the country, employers have started announcing plans to reopen their offices, while others are working through these decisions with their management teams. As employers grapple with the many issues surrounding reopening, the paramount question being asked by all employers is “Can I require employees to be vaccinated before they return to the office?”

Employers Can Mandate the Vaccine

The Equal Employment Opportunity Commission (EEOC) has confirmed that employers have the right to require employees to show proof of receipt of a COVID-19 vaccination. In fact, subject to religious and disability-related exceptions, the EEOC has given its stamp of approval for employer-mandated COVID-19 vaccines. Some employers may effectively mandate vaccines by adopting policies that prohibit unvaccinated employees from entering the workplace or attending work-related functions in person.

If an employer chooses to mandate COVID-19 vaccines, it must provide reasonable accommodations to employees with disabilities or sincerely held religious beliefs and cannot retaliate against employees who request or receive accommodations. Employees who refuse the vaccine for reasons other than a disability or sincerely held religious belief are not entitled to reasonable accommodations and may be subject to disciplinary action by the employer.

Caveats and Exceptions to the General Rule Allowing Mandated Vaccines

Employers adopting vaccine mandates must tread carefully to avoid running afoul of the Americans with Disabilities Act (ADA). While employers can require proof of vaccination, they cannot ask any follow-up questions that might elicit disability-related information. Even a simple inquiry into why an employee does not have proof of vaccination could implicate the ADA, as the employee could be unvaccinated because of a disability. Accordingly, employers requiring proof of vaccination must take steps to ensure that their inquiries do not solicit or elicit any medical or disability-related information from their employees.

The ADA allows employers to require, as a qualification standard, that individuals not pose a direct threat to the health or safety of individuals in the workplace. While a COVID-19 vaccine mandate is a clear-cut example of such a safety-based qualification standard, if it tends to screen out individuals with disabilities, the employer must show that unvaccinated employees 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.” According to the EEOC’s guidance on employer-mandated vaccines, an employer’s determination that unvaccinated individual will expose others to COVID-19 in the workplace is sufficient to satisfy the “direct threat” requirement.

To determine whether an employee poses a direct threat, the employer should consider four factors: (i) the duration of the risk; (ii) the nature and severity of the potential harm; (iii) the likelihood of the potential harm occurring; and (iv) the

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EMPLOYER-MANDATED COVID-19 VACCINES: TIPS, PITFALLS, AND OTHER CONSIDERATIONS

imminence of the potential harm. In evaluating the second and third factors, the employer might need to consider the increased threat unvaccinated employees would pose to any immunocompromised employees who are not eligible for the vaccine or in cases where the vaccine is ineffective. If an employer knows or should know that its workforce includes immunocompromised individuals, failing to consider that reality when conducting the four-factor analysis could expose the employer to liability for creating unsafe working conditions.

Even if an employer concludes an employee who is unvaccinated because of a disability poses a direct threat, it cannot exclude the employee from the workplace unless there is no other reasonable accommodation that would eliminate the direct threat posed by the unvaccinated employee (or reduce it to an acceptable level). Instead, the ADA requires the employer to engage in an interactive process with the employee to identify a reasonable accommodation that will enable the employee to perform his or her job, without excluding them from the workplace, in a manner that does not pose a direct threat.

Employers must make similar exceptions for employees who cannot receive the COVID-19 vaccine because of sincerely held religious beliefs. In accordance with Title VII of the Civil Rights Act, if an employer knows an employee has a sincerely held religious belief that prohibits him or her from receiving the vaccine, the employer must provide a reasonable accommodation unless doing so would pose an undue hardship on the employer. As with unvaccinated individuals with disabilities, employees who are unvaccinated for religious reasons cannot be excluded from the workplace unless there is no reasonable accommodation the employer can provide.

III. Unintentional Discrimination Against Unvaccinated Employees

While an employer can exclude an unvaccinated employee from the workplace if the employee poses a direct threat and there is no other reasonable accommodation available, requiring an unvaccinated employee to work remotely could still expose the employer to liability on the basis of discrimination.

Imagine that a hypothetical employer adopts a policy requiring employees to get vaccinated before returning to the workplace. Most employees receive the vaccine and return to the office. However, two are unable to receive the vaccine due to a disability and a religious belief. The employer conducts a risk assessment and determines that allowing the unvaccinated employees on site would pose a direct threat to the workplace. After concluding that there's no reasonable accommodation that would enable these employees to safely work on site, the employer offers them the option of working remotely, which they accept.

In this example, the two remote workers will spend less time with the company's decision-makers than their on-site colleagues. The remote workers will have fewer opportunities to meet clients, present at conferences, or take the lead at events where their colleagues are present in person. The vaccinated individuals can put in face time with supervisors, clients, and business leads and they gain opportunities that are not available to their remote colleagues. The employer likely has no intention of treating the employees differently or denying unvaccinated remote workers opportunities that are available to their vaccinated counterparts. Intentional or not, however, the result is that two employees are not receiving the same opportunities as their colleagues because of the fact that they could not obtain the vaccine due to a disability or religious belief. These are just some examples of how even the best intended policy could lead to unintentional discrimination in the workplace, or at least present employers with the risk of such a claim.

While the issue has yet to be decided by the courts, it is certain to be there soon. In the meantime, all employers, regardless of their business activities, would be well advised to consult with attorneys proficient in workplace discrimination issues to craft vaccine and workplace return policies to ensure compliance with applicable law and diminish the risk of unwanted claims of discrimination.

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EMPLOYER-MANDATED COVID-19 VACCINES: TIPS, PITFALLS, AND OTHER CONSIDERATIONS

Jackson & Campbell is prepared to advise employers on these important policies and to handle accommodation requests.

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