

# *COVID-19 Legal Update*

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## **TO REQUIRE VACCINATION OR NOT REQUIRE VACCINATION - THAT IS THE QUESTION**

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### **Introduction**

As public health officials across the country gear up to administer Pfizer's COVID-19 vaccine, many questions have been raised regarding the safety, efficacy, and distribution of such a vaccine. While there currently is no law that specifically and explicitly prohibits employers from compelling their employees to take a COVID-19 vaccine, employers face no shortage of legal and employee relations challenges doing so, especially given that the vaccine has only been authorized for emergency use thus far. Business owners have been particularly curious about the impact of a vaccine on their determination to return to business as usual. In their effort to create a safe work environment, some employers face the question whether they may or should compel their employees to receive a COVID-19 vaccine as a condition of employment or certain job functions. Guidance documents from the Food and Drug Administration (FDA), the Occupational Safety and Health Administration (OSHA), and the Equal Employment Opportunity Commission (EEOC) provide a nuanced framework for the conditions under which an employer may compel employees to be vaccinated, but the jury is still out on this issue. The safest course of action for employers may be simply to recommend that employees follow Centers for Disease Control (CDC) guidelines with respect to any COVID-19 vaccine.

### **Labor and Employment Considerations**

Most employees in the US are at-will and employers are free to determine the terms and conditions of their employment within the bounds of federal and state laws. The EEOC has not released specific guidance for a COVID-19 vaccine. Its previous guidance, however, suggests that anti-discrimination laws, such as the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII), may stand in the way of an employer's effort to mandate vaccinations for its employees. For example, an individual may be exempt from mandated vaccinations due to a disability under the ADA or a sincerely held religious belief protected by Title VII. If an employee were to refuse a vaccination under these circumstances, a covered employer could be required to provide the employee with a reasonable accommodation, such as the ability to work from home or additional personal protective equipment, unless such accommodation would cause undue hardship. Whether an accommodation is reasonable is determined on a case-by-case basis. Healthcare workers, for example, will have difficulty demonstrating that they can safely perform their jobs without the vaccine. Many of them are already required to receive a flu shot every year. Employers with unionized workforces may find that vaccination is subject to negotiation under a collective bargaining agreement. Even employers with non-unionized workforces should bear in mind that the concerted protest of a mandatory vaccination policy by their employees may qualify as protected activity under the National Labor Relations Act. Given the foregoing, the best course for employers may be to recommend, but not require, that their employees be vaccinated.

### **OSHA Considerations**

While OSHA has yet to provide any guidance with respect to mandatory COVID-19 vaccinations, the agency's 2009 letter of interpretation during the H1N1 outbreak provides some insight. The letter of interpretation stated that OSHA does not require employees to take seasonal flu or H1N1 vaccines, but

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employers may do so subject to an employee's reasonable belief that a serious medical condition creating a real danger of serious illness or death prevents the employee from taking the vaccines. While OSHA has never done so in the past, some in the legal community speculate whether the agency may utilize its power under the General Duty Clause of the Occupational Safety and Health Act to issue citations to any employers who fail to offer COVID-19 vaccines. OSHA's power to issue such citations will depend on the CDC's guidance on COVID-19 vaccines in the workplace and the extent to which an employer follows other COVID-19 safety guidelines from public health officials. Although issuing citations may be within OSHA's power, many legal commentators believe doing so would be a bridge too far for the agency. It will be important to continue to monitor developments on this issue, particularly under the incoming administration.

### **Additional Risks of Requiring Vaccinations and Potential Limits on Liability**

Given that companies like Pfizer and Moderna developed their vaccines in mere months, rather than the usual timeline of years, employees may perceive the risk of side effects as greater than vaccines that have been subjected to a longer development, testing, and approval process. In addition to potential claims under federal and state laws, an employer may face workers' compensation claims if a COVID-19 vaccine has undesirable side effects from mandatory vaccinations. Depending on state law, there is a possibility that an employee or an employee's family member might make arguments regarding the workers' compensation exclusivity bar if the employer's intentional act or reckless conduct results in an employee's illness or death.

For certain employers with a COVID-19 vaccine administration program, the Public Readiness and Emergency Preparedness Act (the "PREP Act") may offer additional protection specific to the administration program. The PREP Act affords "Covered Persons" protection from liability related to the distribution, administration, or use of COVID-19 vaccines, including any vaccine authorized for emergency use. Employers may be considered "Covered Persons" if they administer vaccines or provide facilities for vaccine administration. To receive the full protections of the PREP Act, an employer must administer the vaccine in accordance with FDA guidelines and obtain an authorization from the federal government or a state or local health authority.

Yet another approach might be for an employer not to require its employees to be vaccinated but to offer them an incentive if they are vaccinated. For example, an employer might offer employees a bonus or other remuneration if they receive FDA approved COVID-19 vaccinations and substantiate that they have done so.

### **Conclusion**

Employers face a challenging balance between protecting their employees and those who they may come into contact with by requiring employees to receive a COVID-19 vaccine as a condition of presence in the workplace and the still-evolving limits on how far an employer may go. The practical limits on a mandatory vaccination program for employees will depend on guidance or rules issued by the EEOC and OSHA as well as evolving state and federal law. In other words, there are currently more questions than answers, but we can expect to receive more guidance as COVID-19 vaccines become more widely available. In the meantime, for assistance navigating employer and employee rights and potential employer liability resulting from employee vaccine policies and programs, contact your legal counsel.

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