
COVID-19: Vaccination Policies – What Employers Need to Know

February 9, 2020

As COVID-19 vaccinations become increasingly available to the general public, employers are considering whether to mandate or encourage their workers to get vaccinated. Below we share some common vaccine-related questions we have fielded recently from clients grappling with the legal and practical challenges around this issue. Please note—the assessment of the below questions may change and evolve as additional guidance becomes available from the Equal Employment Opportunity Commission (EEOC), Occupational Safety and Health Administration (OSHA), the Centers for Disease Control (CDC), and federal, state, and local governments.

1. Can our company require that our workers get vaccinated?

Generally, yes. The Equal Employment Opportunity Commission (EEOC) issued updated [guidance](#) stating that private employers may implement a mandatory vaccination policy once a COVID-19 vaccine becomes widely available, provided any such policy meets certain requirements under federal anti-discrimination laws (a very significant caveat). However, there remains some uncertainty as to whether an employer can currently require vaccinations, considering that the available vaccines have only been granted Emergency Use Authorization. More on that below.

2. Can our company terminate (or take other action against) an employee who refuses to get a vaccine?

Generally, yes. Employers can terminate at-will employees for any non-discriminatory reason, with or without notice. Accordingly, an employer may make getting vaccinated a condition of on-site employment and elect to terminate at-will workers who, based on a *general* objection to vaccines, refuse to comply. However, employers should consider the potential implications of such an uncompromising approach. According to recent [polling](#), 24% of Americans say it is likely they will

never get the COVID-19 vaccine if they can avoid it. Even assuming that a work-based requirement would persuade some of those individuals to get vaccinated, it is likely that a significant number of workers will refuse (especially in certain parts of the country), and employers that choose to terminate those workers may face both operational and reputational challenges, even where acting lawfully.

However, even where employees are at-will, employers must explore the basis of an employee's objection to getting vaccinated before terminating. Under federal, state, and local laws, an employer must consider accommodations for workers who refuse to get vaccinated due to a sincerely held religious belief or medical disability.

There are also additional considerations with respect to employees who are unionized and covered under a collective bargaining agreement which usually provides for termination only upon "Just Cause," who are not at-will (e.g., employed under fixed-term contracts), or who are entitled to severance upon a termination without Cause. In the union context, employers will need to consider whether a vaccine mandate must be collectively bargained and/or whether a refusal to comply with a vaccine mandate provides sufficient grounds for discharge. And in instances where the concept of "Cause" is contractually relevant (whether as a basis for discharge or severance), an employer must assess whether an employee's refusal to get vaccinated (in the absence of a medical or religious objection) constitutes Cause. Relatedly, it remains to be seen whether employers who terminate an employee for refusing to get vaccinated would be able to successfully contest claims for unemployment brought by such workers.

3. How do we handle religious objections?

Under Title VII of the Civil Rights Act (and analogous state and local laws), an employer must provide a reasonable accommodation for an employee whose sincerely held religious beliefs prevent them from receiving a COVID-19 vaccine, unless doing so would pose an undue hardship. Courts interpret the definition of religion broadly, so employers should assume an employee's request is based on a legitimate religious belief. However, if the employer has an objective basis for questioning the employee's sincerity, the employer may require additional supporting information.

Once an employee establishes a religious objection to getting vaccinated, the employer must engage the employee in an interactive process to determine whether any reasonable accommodation—that would not pose an undue burden on the employer—could allow the unvaccinated employee to continue working safely. For example, depending on the nature of the business and the employee's position, the employee may be able to telework, or they could be given a private office, separated from other workers. A critical question for many employers may be whether providing such accommodations imposes an undue burden on its business.

4. What about workers who cannot get vaccinated for medical reasons?

Under the Americans with Disabilities Act (ADA) (and state and local analogs), an employer cannot *automatically* terminate an employee who has a disability which prevents them from getting vaccinated. Instead, the employer first must perform an “individualized assessment” to determine whether having the unvaccinated employee at the worksite would pose a “direct threat” to the health and safety of other workers. When conducting the direct threat analysis, employers must consider (1) the duration of the risk posed; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. If the employer determines that the unvaccinated employee poses a direct threat, the employer must then consider whether any reasonable accommodation could reduce the threat, absent undue hardship to the employer.

If after conducting this analysis, the employer determines that there is no reasonable accommodation available (e.g., social distancing, changing shifts) which could reduce the direct threat, the employer may exclude the employee from the worksite. However, the employer cannot immediately terminate the employee. Instead, the employer will need to determine whether any other rights apply under federal state, and local authorities. For instance, the employee may be eligible for unpaid leave under the FMLA or other state equivalent.

Whether the threat posed by an unvaccinated worker can be reduced without undue hardship will likely vary by industry. For example, an unvaccinated meatpacker or assembly line worker may pose a direct threat due to their unavoidable proximity to others, while the same may not be true for a financial planner working in office space where they can maintain proper social distancing (or work remotely) and still perform their job duties. Employers should consider how their pandemic operations could affect a determination of whether unvaccinated workers pose a direct threat (e.g., considering whether an employer maintained onsite operations throughout the pandemic) or whether accommodating employee requests impose an undue hardship (e.g., considering whether employees had been able to perform all of the essential functions of their jobs while working from home).

5. Are there special considerations for pregnant employees?

Yes. Currently, the CDC reports that there is limited data on the safety of COVID-19 vaccines administered during pregnancy. Consequently, some pregnant employees may be reluctant to take the vaccine. If an employer requires vaccines for all employees, the employer will need to inquire about the reason for an employee’s refusal of the vaccine. Often pregnant employees prefer not to disclose their pregnancy until later in their pregnancy and therefore a vaccination mandate may force an earlier disclosure than desired.

6. Can we provide vaccinations at the worksite?

Yes. Employers may administer vaccines to employees at the worksite, either by entering into an agreement with state and local health departments to become a closed point-of-dispensing site or by contracting with a third-party vendor. Recent [guidance](#) from OSHA recommends that employers make COVID-19 vaccines available at no cost to all eligible employees, and establishing an on-site clinic would be an efficient means to do so. But employers who choose to administer vaccines to their workforce, either directly or through a vendor, should proceed cautiously. The EEOC warns that pre-vaccination screening questions are disability-related inquiries, triggering ADA compliance requirements. Employers would need to establish that any such questioning is job-related and consistent with business necessity. Relatedly, any medical information the pre-screening questioning yields must be kept confidential. Employers can avoid these issues by requiring that workers procure a vaccination on their own by going to their health care provider, a pharmacy, or local vaccination site.

7. If we want to mandate the vaccine, when should we do so?

We recommend that employers hold off on implementing a mandatory vaccination policy until their entire workforce is eligible to receive a vaccine. This timing will likely differ depending on the industry. Employers in the health care space may be able to get their entire staff vaccinated relatively soon, while office-based employers may have to wait until the fall. By requiring only currently eligible employees to get vaccinated—for example, employees 65 or older or those deemed medically vulnerable—an employer runs the potential risk of a discrimination claim. When the time comes to roll out the vaccine mandate, we recommend adopting and disseminating a policy that communicates the mandate and the date by which employees are required to be fully vaccinated and also explains the process for requesting an accommodation.

8. Does it matter that the currently available vaccines do not have full FDA approval?

Unclear. Presently, the two vaccines available in the United States—the Pfizer vaccine and the Moderna vaccine—have been granted Emergency Use Authorization (EUA) as opposed to regular FDA licensure. The EEOC has not provided a clear answer to whether employers can require that employees take a vaccine without full FDA approval. In one part of its guidance, the EEOC refers to COVID-19 vaccines that have been approved or *authorized* by the FDA, but elsewhere the guidance mentions that the FDA has an obligation to ensure that recipients of a vaccine under an EUA are informed “that they have the option to accept or refuse the vaccine.” This raises a key concern: whether an aggrieved employee could assert that refusing the vaccine is legally protected activity and any employer policy to the contrary is in violation of public policy.

Absent full FDA approval and clear guidance from the federal government, it remains uncertain whether courts will countenance adverse actions taken against employees for refusing a vaccine.

9. If we decide not to require vaccines, can we still ask employees if they've been vaccinated?

Yes. According to the EEOC, asking about vaccination status—or requiring that employees provide proof of vaccination—is not a disability-related inquiry under the ADA. But employers should avoid asking any follow-up questions, such as asking why an individual did not get vaccinated, which could elicit medical information. If an employer asks for proof of vaccination, they should warn the employee not to provide any additional medical information to avoid implicating the ADA. And, employers should be aware that any such proof of vaccination would constitute a medical record under OSHA standards. Such records must be retained by employers for the duration of the worker's employment, plus 30 years, and confidentiality and access requirements also may apply.

10. Can we provide incentives to encourage workers to get vaccinated?

Generally, yes. Instead of requiring vaccination, some employers have been offering incentives to encourage their workers to get vaccinated. Small incentives that are meant to ease the burden of getting vaccinated, such as paid time off to get vaccinated, pose no legal risk. However, some employers are offering more substantial incentives, such as bonus payments for employees who provide proof of vaccination. Although this incentive may be well-intentioned, employers who implement these bonuses potentially could face discrimination claims from employees who are unable to get vaccinated due to a medical disability or religious belief. For this reason, employers may want to consider incentive programs that would not automatically exclude these employees, such as providing cash bonuses to specific departments—or the entire workforce—once a certain percentage of employees have been vaccinated.

11. What happens if a worker has a negative reaction to a vaccine?

It is unlikely that an employer would be held liable under any tort theory for an employee's vaccine-related injury or illness (which occurrences are reported as rare). Because receiving an employer-mandated vaccine could be considered work-related, under most state laws, an adverse reaction may be covered by workers' compensation. Employers should check with their workers' comp insurance carrier to ensure injuries and illness from mandated vaccines are covered.

If an employer encourages vaccines, rather than requiring them, workers' compensation would not apply, and an injured employee could conceivably file a negligence claim. However, considering COVID-19 vaccines are authorized by the FDA and promote public safety, it is highly unlikely that an employee could establish that the employer acted unreasonably by encouraging vaccination.

12. Are we required to give employees additional PTO for the day they receive and/or the day after they receive a dose of the vaccine?

No. Employers are not currently required to provide additional PTO to employees who miss work to receive the vaccine or those who need time off to recover afterward. But employers should keep abreast of new federal, state, and local government rules, which may require such benefits. As noted above, employers may want to offer additional PTO for vaccination-related leave as an incentive, but they are not required to do so. That said, employees should be permitted to use any accrued PTO or state mandated sick leave to get vaccinated.

13. Can we eliminate or decrease our other COVID-safety protocols if employees are vaccinated?

No. Recent OSHA guidance cautions employers to continue requiring spread-controlling measures regardless of whether workers are vaccinated until more is known about the protection that vaccines provide. Moreover, even if your workforce is mostly or fully vaccinated, caution counsels in favor of maintaining protective measures, such as wearing a face covering and remaining physically distant, at least until OSHA, CDC, and other relevant guidance adjusts. This is true for several reasons: (1) even after vaccination, some people may contract COVID, albeit a milder version of the disease; (2) it is unclear whether vaccinated people can still spread the virus; (3) researchers do not know how long immunity from the vaccine will last; (4) new genetic variants of the coronavirus may be resistant to current vaccines; and (5) current guidance from federal, state, and local governments and public health agencies dictates that such continued vigilance is necessary and largely required.

Thus, employers should keep their COVID-19 response plans in place for the foreseeable future.

Next Steps

As is the case with most employment law and HR issues, the right vaccine approach for your business may depend on many factors, including the nature of your workforce, operational concerns, financial considerations, geographic sensibilities and industry requirements.

WilmerHale's employment and environmental/OSHA teams are available to answer developing questions and help companies navigate their compliance obligations during this crisis, including to tailor best practices to unique operational circumstances and applicable requirements.

Contributors



**Jonathan
Rosenfeld**

PARTNER
CHAIR, LABOR AND
EMPLOYMENT PRACTICE
GROUP

jonathan.rosenfeld@wilmerhale.com

+ 1 617 526 6941



**Laura E.
Schneider**

PARTNER

laura.schneider@wilmerhale.com

+ 1 617 526 6846



Peggy Otum

PARTNER
CO-CHAIR, ENERGY,
ENVIRONMENT AND
NATURAL RESOURCES
PRACTICE

peggy.otum@wilmerhale.com

+ 1 628 235 1161



Andrew Stauber

COUNSEL

andrew.stauber@wilmerhale.com

+ 1 617 526 6815



Bonnie L. Heiple
COUNSEL

bonnie.heiple@wilmerhale.com

+ 1 617 526 6745



Michael J. Lenzi

ASSOCIATE

michael.lenzi@wilmerhale.com

+ 1 617 526 6235