

The Employer's Dilemma: To Mandate, or not to Mandate?

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After a year of economic hardship and disruption caused by the pandemic, employers are understandably eager to reopen fully and safely welcome back employees and customers. In most areas, the COVID-19 vaccine will soon be available to all who want it. Employers may be tempted to require their employees be vaccinated.

Can they? Yes, with exceptions. Should they? It's complicated.

Recent EEOC Guidance

In December 2020, the EEOC issued updated COVID-19 Technical Assistance, which included guidance about employer-mandated vaccinations. The guidance addresses ADA and Title VII issues regarding mandatory vaccinations, and is consistent with past EEOC guidance specific to mandatory flu vaccination programs. But the COVID-19 vaccine, unlike the flu vaccine, currently is approved only under an Emergency Use Authorization (EUA) by the FDA. Nevertheless, all signs point to the permissibility of employer-mandated COVID-19 vaccination programs.

The EEOC also addresses how an employer who requires vaccinations should respond to an employee that indicates that he or she is unable to receive a COVID-19 vaccination because of a disability or sincerely held religious belief, or membership in another protected class. In other words, employers must treat individuals who request a reasonable accommodation for a refusal to be vaccinated like any other employee who requests a reasonable accommodation based on the employee's protected class. Most employers are likely already well-equipped to manage a request for reasonable accommodation—but, without question, the challenge falls in the implementation of that reasonable accommodation.

Of course, like any policy an employer considers putting in place, a mandatory COVID-19 vaccination policy has both upsides and downsides.

First, an employer should conduct a self-assessment before determining whether to mandate a COVID-19 vaccine for its employees. Some questions to consider include:

- What is the current climate of the community where the employees work?
- Do your employees interact with the public regularly? How about with customers, or other third parties?
- Does your industry engage in in-person events, whether for networking, volunteering, or otherwise?
- What does your employees' workspace look like? Are they in an office building with individual offices or cubicles? Are they on a construction site? Are they in a retail or hospitality workspace? Are they in a healthcare setting?
- Do you plan to maintain other precautions such as masking, social distancing, screening, and testing protocols?
- Do you have a plan to accommodate employees who refuse the COVID-19 vaccine?
- What is the culture in the workplace?
- Do you have a pulse on your customers' concerns and expectations?

Having conducted a self-assessment, an employer is better equipped to consider whether to implement a mandatory COVID-19 vaccination policy.

The upside

- **Customer Confidence** – Customers may feel more comfortable attending in-person events or otherwise patronizing your business when they know that 100% of the employees they will interact with have been vaccinated.
- **Employee Morale** – The intangible value of in-person interactions cannot be overstated. Employees may feel more comfortable returning to an in-person work environment, hosting clients, and attending team-building events if they know that the employees they will interact with are 100% vaccinated.
- **High-Risk Employees Returning to Work** – High-risk employees who have been isolating likewise may feel more comfortable returning to an in-person environment.
- **Building Loyalty** – Customers and employees who know that you take their health, safety, and welfare seriously, may have greater loyalty to your company.

The downside

- **Lawsuits** – There is already at least one lawsuit challenging an employer's mandatory vaccine program, and it won't be the last; although litigation of flu vaccine mandates suggests most will be unsuccessful, businesses don't want to be sued.

- **Privacy** – Employers will need to ensure that any confidential medical information related to COVID-19 or otherwise that an employee discloses is stored and maintained properly.
- **Employer or Third-Party Contractor Pre-Screening Questions** – Where a third-party contractor on behalf of the employer administers the vaccine, certain questions will be asked to ensure that a medical reason does not prevent the employee from receiving the vaccine. These questions are likely to elicit information about a disability or other sensitive medical information, and the questions must comply with the ADA and the Genetic Information Nondiscrimination Act (GINA).
- **Collective Bargaining Agreements** – Employers with unionized work forces need to read their collective bargaining agreement(s). These agreements may contain steps the employer must take before implementing any vaccination policy. It is likely the employer will have to bargain with unionized employees before implementing a mandatory vaccine program.
- **Employee Perception** – As with any mandate, some employees might resent being told that they have to get vaccinated. This is especially so given the vaccine hesitancy that persists among many people.
- **Customer Perception** – Customers who have doubts about the safety of the vaccine might be less likely to patronize a business that enacts a vaccine mandate.

Incentives as alternative to mandates

Well-intentioned employers may opt for incentives to encourage employees to get vaccinated, instead of requiring it. This approach is similar to employee wellness programs that encourage weight loss or smoking cessation, for example. Some businesses taking this approach have gotten creative, offering their employees paid time off to get vaccinated, paid ride-shares to vaccine sites, and gift cards as a reward for vaccination. But this approach, too, has its problems.

First, employees who cannot get vaccinated due to a medical condition and those with a religious exemption may complain they are excluded from these benefits. Employers who wish to offer incentives must comply with anti-discrimination laws, including making accommodations for employees who cannot participate due to disabilities or religious practices. Moreover, these programs might run afoul of the ADA and GINA by requiring employees to disclose medical conditions or family medical history. Both statutes provide exceptions to these otherwise prohibited practices, if the individual's participation in the program is "voluntary."

Furthermore, the EEOC's position on incentive programs is not clear. Previously, the EEOC appeared to disfavor incentives; in January, it proposed two new rules regarding the limited permissible incentives employers may offer as part of a wellness program without violating these statutes. It withdrew those proposed rules in mid-February as part of the change in administration, leaving employers with little guidance as to what they can, and should, do.

Employer encouragement

The most conservative—albeit, likely least effective—approach is to encourage employees to become vaccinated by providing **information** about the vaccine, and where to get it. The CDC has created a tool, **VaccineFinder**, which provides information on COVID-19 vaccine availability in most states.

Conclusion

Although mandatory COVID-19 vaccine policies are not prohibited under the current EEOC guidance, the implementation of a mandatory policy requires consideration of numerous factors, some legal – like reasonable accommodations requested by employees, the evolving nature of the COVID-19 pandemic and the EUA of the COVID-19 vaccine – and others practical -- like unintended impacts on the employer/employee relationship. The better approach is to adopt a voluntary COVID-19 vaccine policy—keeping in mind the considerations described above.

Whichever approach a business takes, it will benefit from reviewing the most up-to-date guidance from **OSHA** and the **CDC** for making their workplaces safe for employees and customers. Providing employees with clear and consistent guidance is key.

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