

Require Employee Vaccinations Without Facing Costly Lawsuits

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COVID-19 Employee Vaccination Issues for Health Care Employers

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Disclaimer and Note

This outline is provided as general information only. It does not constitute legal advice and should not be used as a substitute for seeking legal counsel.

Outcomes may differ depending on specific facts.

This webinar assumes that as an employer, you have already implemented a COVID-19 screening program and have addressed what to do if an employee either tests positive for or shows signs and symptoms of COVID-19.

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Scenario # 1

Stella runs a physical therapy company, Personal Therapy For You, that employs 35 people, of whom 10 are full-time therapy and field personnel and 5 full-time office personnel (receptionist, biller/coder, etc..). The remaining 20 employees are part-time therapy personnel.

The county where Personal Therapy For You is located has been overwhelmed with COVID-19 cases. Stella wants to mandate that all employees receive the COVID vaccine. Can she do that?

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Employer Mandates and Policies

Generally speaking, an employer has the right to set the terms and conditions of the workplace. This includes setting out expected behaviors and procedures.

Most state laws and Federal law currently permit employers to do this.

Therefore, generally speaking, an employer may require its employees to be vaccinated.

BUT there are boundaries and limits to what an employer can require of its employees.

AND this is a rapidly changing area of the law – as of January 13th, 9 states introduced laws prohibiting discrimination or adverse employment actions on the basis of failure to receive a coronavirus vaccination.

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Main Federal Laws

- Americans with Disabilities Act (ADA) of 1994 – protections for individuals with disabilities
 - Applies to employers with 15 or more employees
- Title VII of the Civil Rights Act of 1964 – protections for individuals with sincerely held religious beliefs
 - Applies to employers with 15 or more employees
- The Rehabilitation Act of 1973 – prohibits discrimination on the basis of disability
 - Applies to employers with 50 or more employees
- Genetic Information Nondiscrimination Act (GINA) of 2008 – prohibits discrimination on the basis of genetic information
 - Applies to employers with 15 or more employees
 - Other federal laws may apply, such as Age Discrimination in Employment Act

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Main Federal Regulators

- Equal Employment Opportunity Commission (EEOC) - <https://www.eeoc.gov/>
- Enforces laws making it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex, national origin, age, disability or genetic information.
 - Most employers with 15 or more employees are subject to EEOC enforcement.

- Occupational Safety and Health Administration (OSHA) – <https://www.osha.gov/>
- Responsible for ensuring safe working conditions

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Americans With Disabilities Act (ADA)

- Resource: www.ada.gov
- Prevents discrimination against individuals with disabilities
- “Disabilities” is defined broadly
- Requires employers to make “reasonable accommodation” for employees where making the accommodation does not create an “undue burden” on the employer.
- This requires making an individualized determination of what is a “reasonable accommodation” and “undue burden”

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Title VII

- Main objection to vaccines under Title VII would be due to religious beliefs
- Resource: <https://www.eeoc.gov/religious-discrimination>
- Prohibits treating somebody differently because of their religious beliefs.
 - Includes somebody who has sincerely held religious, ethical or moral beliefs
 - Also includes treating somebody differently because they are married to or associated with another person of a particular religion

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EEOC Guidance on COVID Vaccinations

- December 16, 2020 – EEOC issued guidance on employers and mandatory COVID vaccinations
- <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- EEOC specifically said that an employer MAY mandate vaccines, but subject to the requirements of the ADA.
- Furthermore, the EEOC says an employer can mandate a vaccine only where an employee poses a “*direct threat*” if they are in the workplace unimmunized.
- Definition of “*direct threat*” = significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.

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EEOC Guidance on COVID Vaccinations

Factors for individualized assessment of “direct threat”:

1. The duration of the risk
2. The nature and severity of the potential harm
3. The likelihood that the potential harm will occur
4. The imminence of the potential harm.

A conclusion that there is a direct threat would include a *determination that an unvaccinated individual will expose others to the virus at the worksite*. 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 action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk, so the unvaccinated employee does not pose a direct threat.

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Reasonable Accommodation

- Both the ADA and Title VII require employers to make “reasonable accommodations” for employees where doing so does not create an “undue burden” on the employer.
 - Employees must make exception request
- Employees must provide reasonable supporting documentation to support the request, if requested by the employer, in relation to a medical-based accommodation
- Analysis differs between ADA and Title VII somewhat
 - Employees cannot automatically be excluded from the workplace just because they refuse to be vaccinated!!

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Reasonable Accommodation

ADA

- Employers must grant accommodation unless accommodation creates significant difficulty or expense

Title VII

- Employer must grant accommodation unless accommodation creates undue hardship to employer.
- Undue hardship is more than a minimal cost or burden
- Examples of common religious accommodations are flexible scheduling, job reassignments, modifications to workplace policies or practices.
- Note: Under both ADA and Title VII, process of determining what is a reasonable accommodation should be a flexible, interactive process.

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Reasonable Accommodation - ADA

Factors to consider in evaluating a reasonable accommodation request:

1. What is the employee's limitation?
 - Under the ADA, the employer only needs to provide a reasonable accommodation to permit the employee to perform the job, not the specific accommodation requested by the employee.
2. What is the employee's job?
 - How might the job affect accommodations? For example, could the job be performed remotely?
3. Will the accommodation pose safety risks for the employee or others?

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Reasonable Accommodation – Title VII

Factors to consider in evaluating a reasonable accommodation request:

1. What is the employee's limitation?
 - Under the ADA, the employer only needs to provide a reasonable accommodation to permit the employee to perform the job, not the specific accommodation requested by the employee.
2. What is the employee's job?
 - How might the job affect accommodations? For example, could the job be performed remotely?
3. Will the accommodation pose safety risks for this employee or others? And what about patients?

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EEOC guidance on other vaccines

- In relation to the influenza vaccine, the EEOC has suggested that employers strongly encourage vaccination but not require it.
- In relation to most vaccines, the EEOC will look to the CDC's guidance on vaccine recommendations and state laws.
 - ❖ CDC's guidance on vaccines for healthcare providers:
<https://www.cdc.gov/vaccines/hcp/index.html>

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Risks for Mandating Vaccinations

1. Denying accommodation requests may lead an employee to make a claim for failure to accommodate. These can be expensive to defend, even if the employer wins in the end. In addition, the question of what is an “undue burden” in relation to COVID-19 is not well defined or litigated, increasing risk.
2. An employer is open to discrimination claims as so much of the decision whether to accommodate is an individual-specific analysis. An employer needs to work with its HR department or legal counsel to ensure that reactions to accommodation requests are coordinated and similarly situated individuals are treated similarly.
3. Terminating an employee for failure to vaccinate may cause a claim for wrongful termination.

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Risks for Mandating Vaccinations (*cont.*)

4. There will be additional administrative expenses, as employers will need to conduct individualized assessments, document the assessment, ensure comparable treatment for comparable employees, and then track compliance with the mandate.
5. The latest stimulus bill did not contain liability protections for employers for mandatory COVID vaccines. Presumably, any injuries would be covered by the state worker's compensation laws. The Public Readiness and Emergency Preparedness Act (PREP Act) may also offer some liability protections, but this will require an employer-specific analysis.

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Benefits for Mandating Vaccinations

1. Mandatory vaccination can increase employee participation, making the care provided and the workplace safer for all and ending the pandemic sooner.
2. Widespread vaccination will lessen the spread of the disease to vulnerable populations.
3. It may result in less time off or sick time taken by infected employees.
4. It has marketing and PR value in relation to patients and referral sources.
5. Avoiding a claim that your agency violated OSHA for failing to provide a safe workplace.

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Evaluation of Scenario # 1

- **Personal Therapy For You** can mandate vaccines for its employees. However, it has 35 employees, so the ADA and Title VII apply.
- Therefore, if an employee requests an accommodation, the agency must analyze whether the job is such that the vaccine mandate is job-related and whether the employee's request is reasonable and whether the accommodation presents an undue burden for the agency.

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Scenario # 2

One of Middletown Medical Practice's employees, Elizabeth, a billing specialist, has objected to the vaccine requirement, stating that she is allergic to ingredients in many vaccinations. She requests to work from home.

What should the agency's response be?
What steps should the agency take to respond?

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Evaluation of Scenario # 2

1. The agency should evaluate (and preferably should have already evaluated) the nature of Elizabeth's job. Is it something that can be performed from home?
2. The practice can ask for documentation of her allergies to vaccines
 - Make sure to keep the information secure – you don't want a possible HIPAA issue!
3. The practice should evaluate whether having Elizabeth work from home creates an undue burden on the practice.
4. If working from home creates job difficulties or an undue burden, is there some other way to accommodate her request to be exempt from vaccines? For example, what if she only works in the mornings, or she works in an isolated office?

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Scenario # 3

One of In-N-Out Surgery Center's registered nurses, Maria, has objected to the vaccine requirement, stating that her religion prohibits vaccinations. Her supervisor, Anna, doesn't believe for one minute that Maria's religion prohibits vaccinations. Anna has never heard Maria say anything about her religious beliefs and thinks Maria is objecting because the vaccine's approval was "rushed" through the FDA.

What should the AC's response be?
What steps should the ASC take to respond?

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Evaluation of Scenario # 3

1. The ASC should evaluate (and preferably should have already evaluated) the nature of Maria's job. Is a vaccine job-related?
2. If Anna truly has an objective basis for believing that Maria is not sincere, she may ask for additional information, such as written materials about the faith practices or a statement from a faith leader.
3. The ASC should be careful to avoid engaging in excessive documentation requests, which could be viewed as denying a reasonable accommodation, retaliation or harassment.
4. Once Maria provides documentation, the ASC must work with her to reach a reasonable accommodation.
 - This could be extra PPE, it could be limiting her contact with certain patient populations, it could be bringing her into the office away from patients to perform another function such as utilization review.

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Scenario # 4

One of Perfect Smile's dental assistants, George, has objected to the vaccine requirement. He thinks the COVID pandemic has been vastly exaggerated, the disease is not worse than the flu for a healthy 42-year-old like him, and the vaccines are fraudulent.

What should the dental practice's response be?
What steps should the dental practice take to respond?

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Evaluation of Scenario # 4

1. The dental practice should evaluate (and preferably should have already evaluated) the nature of George's job. Is a vaccine job-related?
2. George does not have a sincerely held religious belief, so he can be required to receive the vaccine.
3. The dental practice does not need to work with George to reach a reasonable accommodation.

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Scenario # 5

Mrs. Townsend is one of Caring Hands for Grandma's patients. Caring Hands is a home health agency. Mrs. Townsend is very concerned about the COVID pandemic. She has numerous underlying medical conditions.

She wants to know if the RN visiting her has been vaccinated against COVID. She states that she will not let any unvaccinated personnel into her house.

What should the agency's response be?

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Evaluation of Scenario # 5

1. Educate Mrs. Townsend about the status of vaccine availability in your area and what you have been doing to ensure that relevant employees have been vaccinated.
2. If Mrs. Townsend's regular RN has requested an exemption, whether under the ADA or Title VII, you must accommodate the RN.
3. But since patient care is paramount, you should determine if you can substitute another RN for the regular RN.
4. Note that you should not tell Mrs. Townsend why the regular RN is not vaccinated. If you reveal it was due to a medical exemption, you may be improperly disclosing this information under the ADA.

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Privacy Issues Regarding Vaccines

- ADA requires that an employee's medical information must be stored separately from the employee's personnel records. How to do this?
 - Separate folders for medical information, if held physically
 - Separate documents for medical information, if held electronically
 - This information may only be disclosed to supervisors or managers who need to know about work restrictions or limitations
- GINA also requires genetic information to be held separate from employment records, in a separate file
 - Unlike under the ADA, this information cannot be shared with supervisors or managers
- HIPAA does NOT apply to medical information held or acquired by a health care provider in its role as an employer

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An Employer's Vaccine Policy

- ✓ Policy should be written
- ✓ Cannot be a blanket mandate for all employees
- ✓ Vaccine requirements should be job-related, addressing business necessity or justified by “direct threat”
 - This will have to be done on a job-by-job basis
 - EEOC has already determined that COVID-19 is a “direct threat,” so include that in your policy.
- ✓ Be prepared to address requests for reasonable accommodations
- ✓ Can require proof that employee received vaccination
- ✓ Keep good documentation!

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Keys to Successful Implementation of Vaccine Policy

1. Repeatedly educate your employees about COVID, the vaccines and your policy.
2. Strongly encourage vaccination, instead of mandating it, if possible.
3. Be open to hearing employees' request for reasonable accommodation.
4. Document, document, document!

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Questions?



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