



COVID-19 Vaccine on the Horizon – But Can Employers Require It?

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On November 9, Pfizer made history by presenting preliminary data indicating that their COVID-19 vaccine was over 90 percent effective.¹ On November 16, Moderna made a similar announcement about their own vaccine.² Both Pfizer and Moderna have applied for emergency approval by the US Food and Drug Administration. Another 52 pharmaceutical companies currently are in various phases of testing as part of the race to produce a safe and effective vaccine to the coronavirus.

With the promise of a vaccine on the horizon, employers who have navigated the array of health and safety requirements during the pandemic are now considering whether they can require their employees to get the vaccine to continue to perform their work in or return to the workplace. The Equal Employment Opportunity Commission (EEOC) released guidance on December 16, 2020 stating that mandatory vaccination policies generally are permissible during a pandemic with some limitations.³ Mandatory vaccination is not a new issue and the EEOC's guidance confirms guidance issued in the past. While there are some limitations to making vaccination mandatory under federal and state laws, it is not unusual for employers in the medical field, for example, to implement such policies in the context of the influenza vaccine.

However, employers must permit two limited but significant exceptions to any mandatory vaccination policy. Employees who refuse to take the vaccine on the basis of a medical condition or sincerely-held religious belief are entitled to request a "reasonable accommodation" from getting the vaccine. Under federal law or applicable state laws, an employee may have a legal right to decline to take the vaccine and the employer must consider and provide, if appropriate, a reasonable accommodation to allow the employee to maintain an equal opportunity to perform the essential functions of the job or enjoy equal benefits and privileges of employment.⁴

¹ See <https://www.nytimes.com/2020/11/09/health/covid-vaccine-pfizer.html?smid=tw-share>.

² See <https://www.nytimes.com/2020/11/16/health/Covid-moderna-vaccine.html?referringSource=articleShare>.

³ Available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

⁴ Specifically, the Americans with Disabilities Act (the ADA) regulates disability-related inquiries and medical examinations for all applicants and employees, including those who do not have ADA disabilities; prohibits covered employers from excluding individuals with disabilities from the workplace for health or safety reasons unless they pose a "direct threat" (i.e. a significant risk of substantial harm even with reasonable accommodation); and requires reasonable accommodations for individuals with disabilities (absent undue hardship).

In these circumstances, potential accommodations may include offering an alternative form of the vaccine that does not include objectionable ingredients or ingredients that could trigger an employee's medical condition (such as a vaccine that does not contain egg, swine, or fetal cell products), increased use of personal protective equipment, modification of duties to remove at-risk activities, or temporary or permanent transfers to other positions or work areas (such as permitting an employee to telework). An employer may deny an accommodation request only if fulfilling it poses an "undue hardship," as it is defined by the applicable law. As a best practice, employers should consult with an experienced legal practitioner prior to denying requests for accommodations with respect to mandatory vaccine programs.

The EEOC has stated that employers may permissibly implement certain medical testing and other screening measures that applicable federal law would otherwise prohibit, given the "significant risk of substantial harm" to others posed by COVID-19. The EEOC also provides guidance on situations in which employers provide the vaccine to their employees.

A clear benefit of requiring the vaccine for all employees in the workplace is the generation of confidence and trust in the employer's efforts to maintain a safe workplace. To do so in a compliant manner, employers should be prepared for the administrative burden involved in implementing a clear, consistent, and well-executed policy, and remain flexible to changes that may come from additional guidance offered by federal and state agencies. Note, as an alternative, employers may choose not to mandate the vaccine, and encourage it instead, which may circumvent some of the administrative hurdles of a mandatory policy, and still yield positive results, depending on employees' willingness to vaccinate and sustain other necessary safety precautions while the virus remains a threat.

For employers considering a vaccine mandate, here are seven tasks worth undertaking:

1. ***Carefully consider and document business justifications*** for a mandatory policy and the positions or departments for which the mandatory vaccination program is applicable. Ensure that any vaccine mandate is based upon objective facts and related to job duties and workplace needs and identify positions or alternative work arrangements which would not require mandatory vaccination.
2. Before rolling out a mandatory vaccination requirement, ***clearly communicate the process*** for employees to request accommodations. A thoughtfully-written vaccination policy should describe that process or reference existing accommodation processes, so employees understand where to turn if they need to ask for an accommodation. Then, be prepared to review accommodation requests and engage in what will be a fact-intensive and interactive process. Managers and Human Resources professionals should be trained to recognize and respond to requests for accommodation, even where the employee does not use the word "accommodation."
3. The vaccination program should consider ***all applicable legal requirements, be clearly communicated*** to employees and ***uniformly enforced***. To the extent the vaccination is a requirement to perform the employee's job, employers should consider reimbursement requirements under applicable state law. Also, employers

may be obligated to pay employees for time spent getting the vaccination if outside of working time.

4. Any adverse physiological reactions to an employer-mandated vaccine could lead to a workers' compensation claim. Employers should review *state workers' compensation laws* and current *employer insurance policies*.
5. Where the workforce is *unionized*, employers must consider any applicable collective bargaining agreements to determine the extent of their duty to bargain with the unions regarding a vaccine program.
6. Any medical information must be kept *confidential* and maintained separate from an employee's personnel file.
7. Finally, federal and state authorities may issue additional guidance that could alter relevant standards under the applicable laws. Employers should *stay alert* for any such recommendations and adjust their vaccination program accordingly.

Step toe's cross-disciplinary team of lawyers can help with these employment law issues and the countless legal and policy issues that companies are now navigating.