

MANDATORY VACCINATIONS: WHAT EMPLOYERS NEED TO KNOW



By Bob Dunleavy

It is not a matter of *if*, but *when* a COVID-19 vaccination will become available. With an approved vaccine on the horizon, employers obligated to provide a safe workplace free from recognized hazards naturally are

beginning to question whether, and under what circumstances, they should require employees to get a COVID-19 vaccination.

Although mandatory vaccinations are controversial and have received much national attention in recent weeks, employer-mandated vaccinations are not new. Actually, employers have implemented mandatory vaccination policies for years, most often in healthcare settings where employees often interact with high-risk and vulnerable populations. The **general rule is that mandatory vaccination policies are permissible** in the midst of a pandemic so long as employers consider certain **exemptions**, such as religious and medical accommodations, as required under Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act, respectively.

Neither OSHA nor the EEOC has yet weighed in on an employer-mandated COVID-19 vaccine. But, we can look to past guidance as a predictor for future administrative agency direction and begin planning a course of action now.

During the 2009 H1N1 virus, the EEOC indicated that employers could not compel all employees to take an influenza vaccine without providing exemptions from a mandatory vaccination requirement based on medical conditions that prevent an employee from taking the influenza vaccine or sincerely held religious beliefs and practices – not personal preference or general fear. The EEOC confirmed that, barring an undue hardship of the employer, such as significant difficulty or expense associated with the accommodation, employees may be entitled to an exemption from a mandatory vaccination.

In its 2009 guidance, the EEOC suggested that ADA-covered employers “**consider simply encouraging employees to get the influenza vaccine** rather than requiring them to take it.” This guidance was re-issued in March of 2020 to incorporate updates related to COVID-19, including an acknowledgement that the COVID-19 pandemic meets the ADA’s “direct threat standard,” which permits more

expansive medical inquiries and workplace controls by an employer than the ADA typically allows. But, the basic advice related to vaccines was left unchanged, except to note that a COVID-19 vaccine was not yet available. A “direct threat” finding means that an individual with COVID-19 poses a “significant risk of substantial harm” to others, which permits employers to adopt medical testing and screening methods that the ADA normally would prohibit.

OSHA also weighed in on employer-mandated vaccination programs during the H1N1 virus outbreak in 2009. It said that “an employee who refuses vaccination because of a reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death . . . may be protected under Section 11(c) . . . pertaining to whistle blower rights.” OSHA did not then require employees to take vaccines.

Aside from **exemptions**, employers **should consider a number of other factors before implementing a mandatory vaccination program**, such as objections based on ethical considerations or risks associated with taking a vaccine lacking demonstrated safety protocols or documented side effects and efficacy rates. Employers should also recognize the potential for workers’ compensation claims due to adverse reactions from a mandatory vaccine. Employers with unionized workforces must also consider whether the controlling collective bargaining agreement provides for broad management rights to implement a vaccine policy or whether such a policy requires bargaining with the union. Under either circumstance, “effects” bargaining would be required.

Employers should also consider the potential for civil liability for not mandating a vaccination when one becomes available under the theory that the employer failed to take adequate precautions to protect its workforce. On the other hand, employers will have to balance that consideration with the threat of employee refusals to work or to be vaccinated on the basis of Section 11(c) of the OSH Act.

In addition to the plethora of legal considerations, employers must also contend with the political and cultural implications of such a policy. A number of studies show that approximately one-third of the workforce would refuse a COVID-19 vaccine if one were available. With the large numbers of employees resistant to wearing facial coverings in the workplace, which is far less intrusive than a mandatory vaccine, employers can expect to see similar (or greater) defiance against a mandatory vaccine.

With these considerations at the forefront, employers would be well-served to **take steps now** to prepare for the inevitable release of a COVID-19 vaccine:

- ⇒ Consider whether a mandatory policy is truly necessary and consistent with the employer's business needs, particularly in light of other workplace controls in place (social distancing, facial coverings, remote working arrangements, enhanced cleaning and disinfecting methods, etc.), or whether it is more appropriate to adopt a policy "encouraging" employees to get the vaccine rather than requiring it;
- ⇒ Determine if any of your customers intend to mandate vaccinations of your employees;
- ⇒ If a mandatory vaccination policy is deemed necessary, consider confining the requirement to high-risk worksites or departments where alternative methods of minimizing the risk of exposure are not viable;
- ⇒ Prepare now for accommodation requests by considering the types of accommodation requests and creating the requisite forms to administer those requests;
- ⇒ Consider what you will do if an employee refuses to follow your vaccination policy based merely upon a general fear or personal preference – will you impose mandatory mask wearing, reassignment, teleworking, or layoff?;
- ⇒ Evaluate current health insurance policies and wellness programs for guidance and resources related to workplace vaccinations, including the potential for discounted premiums or other incentives to the employer;
- ⇒ Review all controlling collective bargaining agreements to determine breadth of management rights and health and safety provisions which regulate an employer's right to make policies;
- ⇒ Frequently monitor administrative agency guidance and all federal, state, and local laws related to vaccinations; consider assigning these responsibilities to a well-trained employee or safety committee; and
- ⇒ Consult legal counsel for guidance.

While the above guidance will assist employers in dealing with these complicated issues, please be reminded that this is an overview of developing legal issues and is not intended to be and should not be construed as legal advice. If you desire assistance in determining whether a mandatory vaccine policy is right for your workforce, or if you wish to have a policy prepared, contact experienced labor and employment law attorney **Bob Dunlevey at rdunlevey@taftlaw.com or 937-641-1743.**

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