

The do's and don'ts of mandatory COVID-19 vaccines

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This content is not to be considered legal advice. We recommend that you speak with legal counsel specializing in labor and employment law about employment law issues related to COVID-19 vaccines.

Encouraging people to get vaccinated is good for public health — and supporting employees in getting vaccinated is also a good public health practice. However, whether or not to **mandate** vaccines for employees is a complex topic that implicates classic employment issues, including the duty to provide reasonable accommodations for employees' disabilities and for their sincerely held religious beliefs. In this whitepaper, we will examine key issues that are relevant for employers to consider as they navigate this complex territory.

Emergency Use Authorization (EUA). Many employers do not realize that the current approval status of the vaccines by the U.S. Food and Drug Administration may impact their ability to mandate vaccines. All three vaccines (Pfizer, Moderna and Johnson & Johnson) have only been granted emergency use authorization (EUA). These vaccines will not be considered for full licenses until sufficient data has been collected to evaluate whether the vaccines are safe and effective, which could take a year or longer. ([Pfizer](#) announced on May 4th that it intends to file for full FDA approval by the end of May 2021.) Until then, guidance under the Federal Food, Drug and Cosmetic Act (FD&C Act) is clear: all promotional material related to the EUA-Approved vaccines must clearly and conspicuously state that the product has not been approved or licensed by the FDA but has only been authorized for emergency use and that recipients of the vaccine must be informed that they have the option to accept or refuse the vaccine. Dr. Amanda Cohn, the executive secretary of the CDC's Advisory Committee on Immunization Practices has advised that vaccines cannot be mandatory. It is not clear whether the prohibition on mandates in the FD&C Act applies in the workplace. There are also questions as to what is a functional equivalent of a mandate. For example, if an employer permits employees to telework (work from home) and only requires a vaccine for those who want to work in the office, it is not clear whether that would be deemed a mandate, and the strength of the company's work from home program may be a deciding factor. Further, some employers have discussed the concept of "vaccine passports" that would allow an employee to gain access to certain privileges, such as on-site work or travel without quarantine. While vaccines in these programs may be described as "voluntary," there may be circumstances where the adverse consequences of declining a vaccine are sufficiently severe to constitute a mandate and create legal exposure for employers. There is at least one case pending in which an employee has alleged that an employer mandate was unlawful given the EUA status of the vaccines. [Legaretta v. Fernando Macias](#) (Case 2:21-cv-00179 D. New Mexico 2/28/21).





Centers for Disease Control (CDC) guidance.

On March 16, 2021, the Centers for Disease Control [released guidance](#) that the FDA does not mandate vaccination and the issue of whether an employer may require or mandate a COVID-19 vaccination is a matter of state or other applicable law. Some state employment laws prohibit retaliation against an employee for raising concerns that an employer has violated federal law. It is possible that an employee could argue that an employer COVID-19 vaccine mandate violates the spirit, if not the letter, of the FD&C Act regarding EUA. Hence, it is not clear the extent to which the EUA limitations on mandates carries over into the employer-employee relationship. Moreover, the CDC does not necessarily speak for the FDA and, therefore, while the CDC guidance is helpful insight about how the current federal administration perceives vaccine mandate issues, it is not definitive.



EEOC guidance about mandatory vaccines.

In December 2020, the U.S. Equal Employment Opportunity Commission (EEOC), which enforces the Americans with Disabilities Act (ADA) and other federal antidiscrimination laws, [issued guidance](#) about whether COVID-19 vaccine mandates are acceptable for the workplace. The EEOC guidance acknowledges that the vaccines are in EUA status but does not comment on the import of this status. The EEOC notes that the ADA allows an employer to have a qualification standard that includes “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.” The EEOC advised, however, that if a safety-based qualification standard, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat due to a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” The EEOC recommends the same approach if an individual requests an accommodation because being vaccinated violates a sincerely held religious belief. Once an employer is on notice that an employee’s sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act.



The EEOC notes that courts have defined “undue hardship” under Title VII as having more than a de minimis cost or burden on the employer. The EEOC advises that the prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration. The EEOC makes clear that employers must conduct an individualized assessment of four factors in determining whether a direct threat exists: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and 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. The prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration.

OSHA guidance on reporting adverse effects of vaccines.

On 4/20/21, OSHA issued guidance regarding employers’ obligations to record adverse reactions to the COVID-19 vaccine. In its [FAQs on COVID-19](#), OSHA posed and answered three vaccine-related questions advising that if an employer adopts a mandatory vaccine policy, and an employee has an adverse reaction to the vaccine, this incident will automatically be deemed to be “work-related,” which is one of the factors that can trigger a duty to record. OSHA explained the adverse reaction will be recordable in the employer’s OSHA log if it: (1) led to the employee missing more than one day of work; (2) required medical treatment beyond first aid; or (3) resulted in restricted work or transfer to another job. In contrast, OSHA said that if an employer recommends but does not mandate the vaccine, the employer does not need to record adverse reactions. OSHA emphasized that the employee’s choice must be truly voluntary, and that the employee’s choice to accept or reject the vaccine cannot have any negative impact on the employee, including any negative impact on a performance rating or professional





advancement. OSHA commented: “If employees are not free to choose whether or not to receive the vaccine without fearing adverse action, then the vaccine is not merely recommended.”

State agencies weigh in on mandatory vaccines.

Some state agencies have expressed views about whether vaccines can be mandated. On March 4, 2021, the **California Department of Fair Employment and Housing (DFEH) advised** that employers may mandate vaccines so long as the employer does not discriminate against or harass employees or job applicants on the basis of a protected characteristic, provides reasonable accommodations related to disability or sincerely held religious beliefs or practices and does not retaliate against anyone for engaging in protected activity (such as requesting a reasonable accommodation). The California guidance notes that the current vaccines are approved for EUA only and specifically states that it is not providing guidance on whether and to what extent an employer may mandate a vaccine within its workforce. On March 19, 2021, the **New Jersey Department of Health advised** that an employer may require an employee to obtain a COVID-19 vaccine before entering the workplace unless the employee cannot get the vaccine because of a disability, is pregnant or breastfeeding or because of a sincerely held religious belief, practice or observance. Both of these guidance also indicate that an employer can require proof that a vaccine was given and that, if retained, this record must be kept as a confidential medical record.



Proposed legislation addressing mandatory vaccines.

In an expanding number of states, legislation has been proposed to prohibit or place limitations on an employer’s ability to mandate a vaccine. Arizona SB 1648 would prohibit employers from requiring that an employee receive a vaccine and also from requiring that an employee disclose whether or not they had a vaccine. Kentucky SB 98 prohibits discrimination based on an individual’s decision to not receive a vaccine and prohibits employers from requiring vaccination as a condition of employment. Illinois HB 3682 would prevent employers from creating, implementing or enforcing a workplace vaccination program. Indiana has two bills pending, one of which would prohibit requiring a vaccine if employees object on the grounds of conscience (SB 74) and the other would prohibit



mandatory vaccines that have only received EUA approval (HB 1488). As of April 23, 2021, more than 40 states had seen legislation introduced to curtail an employer’s right to mandate vaccines.

On April 2, 2021, Florida Governor Ron DeSantis issued **Executive Order 21-81** which prohibits businesses from requiring patrons and customers show proof of vaccination to gain access to, entry upon or service from the business. The order also prohibits any Florida governmental entity from issuing “vaccine passports, vaccine passes or other standard documentation for the purpose of certifying an individual’s COVID-19 vaccination status to a third party, or otherwise publish or share any individual’s COVID-19 vaccination record or similar health information.” The order does not address the rights of employers or employees.

Requesting proof of vaccination. Aside from the issue of mandating a vaccine, some employers want to know whether they can request proof of vaccination. In short, yes, but be careful. The EEOC and the California DFEH have advised that employer can request proof and that this request, standing alone, is not a disability-related inquiry. You also should not pry into why an employee has not been vaccinated, though you need to be open to engaging in the interactive process if they advise you that they declined because of their own disability or because of sincerely held religious beliefs. A follow-up question may also elicit genetic information in violation of the Genetic Information Nondiscrimination Act (GINA). Employers should advise employees to delete any and all medical information from the proof that is provided. Moreover, any proof that is required must be treated as confidential medical records and stored securely and separately from other personnel records. You also need to request proof on a nondiscriminatory basis and, therefore, should not require certain groups of employees to provide proof but not others unless you are confident there is a legitimate nondiscriminatory reason for differentiating between the two groups.





Conclusion. Employers need to be cautious about mandating vaccines, especially given the current EUA status of all available vaccines. Some believe that it is unethical, if not unlawful, to require employees to obtain vaccinations that have only been approved under an EUA. Employers also need to be cautious in terms of their understanding of what might be considered a mandate. If an employee can only take advantage of certain privileges and benefits, such as travel or on-site work, if they are vaccinated, this could be deemed the functional equivalent of a mandate. Employers also need to accommodate individuals with disabilities or with religious objections to vaccinations and need to remain up-to-date



on specific state legislative developments. It is acceptable to provide incentives for vaccines, including paid time off to get the vaccine or to recover from its effects or even a modest reward, such as a gift card. An increasing number of employers are adopting this approach.

The U.S. is at an interesting turning point. As the number of vaccinated individuals increases, the risk from any one individual not being vaccinated may actually decrease. The underlying premise for the special pandemic employment rules issued by the EEOC is that the pandemic creates a direct threat to the safety of the employee or others and, therefore, some of the usual strict ADA rules are relaxed. As we advance toward herd immunity, it may be harder to justify more extreme measures with regard to vaccinations.

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