

What employers need to know about making the COVID-19 vaccine mandatory

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The United States Food and Drug Administration recently granted two Emergency Use Approvals for the first set of COVID-19 vaccines. As more become available to the public, employers face a number of critical legal and operational questions. Can an employer mandate that its employees be vaccinated? What if an employee refuses? Can they be disciplined or terminated? Must an employer provide medical and/or religious accommodations? What other legal issues should employers be thinking about?

The short answer is that employers likely can mandate vaccinations, with exceptions. Although there are many different legal issues bearing on this question, there is no uniform federal or state law outright prohibiting general workplace vaccine mandates. The law does, however, limit how those mandates may be executed.

Below we highlight the current legal guidance around the issue of workplace vaccine programs, including where guidance may be forthcoming, and provide key takeaways for organizations heading into an uncertain 2021.

Legal guidance

- **EEOC:** According to the Equal Employment Opportunity Commission (EEOC) as recent as December 16, 2020, the laws that it enforces do not prohibit employers from mandating COVID-19 vaccinations, so long as the employer aligns its requirements with its obligations under the Americans With Disabilities Act (ADA), Title VII of the Civil Rights Act (Title VII), and the Genetic Information Nondiscrimination Act (GINA). Under the ADA, employers must grant reasonable accommodations to employees who have a qualified disability unless the accommodation would impose an undue hardship on the employer or would present a direct threat to the workforce or public. The ADA also requires that employers protect the confidentiality of health information obtained from employees in the course of the vaccination process. Under Title VII, employers must grant reasonable accommodations to employees on the basis of sincerely held religious beliefs unless those accommodations would present an undue hardship on the organization. GINA prohibits certain kinds of inquiries related to family health histories. Determining whether an employee poses a “direct threat” for failing to take a vaccine may present unique challenges under the ADA because organizations may need to undertake an individualized assessment as to the unique risk posed by the particular employee. Questions around whether sensitivity to a vaccine is a qualified disability under the ADA, and whether opposition to taking vaccines is, in each particular instance, a sincerely held religious or merely a general or ethical objection may also present challenges for employers. Ultimately, any workplace vaccine program, whether mandatory or voluntary, will require the organization to be nimble in how it interacts with employees, be in a position to respond to requested accommodations, and ensure its practices and procedures align with federal and state law.
- **CDC:** In 2018, the Centers for Disease Control and Prevention (CDC) recommended workplace vaccination policies for critical infrastructure sectors in a document called “Roadmap to Implementing Pandemic Influenza Vaccination

of Critical Workforce.” Whether and to what extent the CDC will extend a similar recommendation for essential workforces, or whether state and local health authorities will do the same for a broader set of organizations, remains an open question. Employers may also look to CDC guidance as it relates to what kinds of accommodations may be effective and reasonable under the ADA, Title VII, or related state and local laws.

- **OSHA:** Although the Occupational Safety and Health Administration (OSHA) has not yet issued guidance on the issue, it appears the agency generally defers to the position that employers may undertake mandatory vaccination programs so long as those programs align with federal law. OSHA also allows for whistleblower protection if an employee complains about an employer taking an adverse employment action in retaliation for making an accommodation request. OSHA is actively encouraging its inspectors to get vaccinated when vaccines become available. But an open question remains as to whether the failure to implement a mandatory vaccination program will implicate obligations under the OSH Act, or related state laws, for maintaining a safe and healthy work environment.
- **State / Local:** States in the past have issued guidance on mandatory vaccines for children attending schools, day care centers, or public facilities. Based on the active role state and local health officials have taken thus far during the COVID-19 pandemic, we may see further guidance at the state and local level relating to mandatory workplace vaccine programs.

Key takeaways

- **Takeaway #1 - Proceed with caution:** Although the EEOC’s most recent guidance confirms that vaccine mandates may, in certain circumstances, be permissible, employers should proceed with caution. Before implementing a mandatory vaccine program, organizations should consider undertaking an individualized risk assessment to determine whether and to what extent a mandatory program aligns with the organization’s needs, risk profile, and capabilities. Organizations should be sure they are in a position to monitor, implement, and track compliance, oversee appropriate privacy protections, and align the program with business necessity. Ultimately, organizations with in-person operations where employees work in close proximity to each other will likely have a heightened business justification for a mandatory program than organizations whose workforce can largely remain remote. But there is no one-size solution for all organizations.
- **Takeaway #2 - Update policies and procedures:** Regardless of whether your organization chooses to mandate or make voluntary the taking of a COVID-19 vaccine, employee-facing policies and procedures should be updated and clear, and should anticipate employee queries. Organizations should also ensure their internal stakeholders, including those on the front lines, HR, privacy, security, legal, and operations are all aligned with and trained on the organization’s approach to vaccines, and are positioned to handle external and internal questions on the issue. Clear and consistent communication is critical to mitigating risk.
- **Takeaway #3 - Consider additional areas of exposure:** As your organization considers whether a mandatory vaccine program is appropriate, additional legal issues may require analysis, including but not limited to: (1) whether costs associated with getting the vaccine are compensable as a business expense; (2) if the workforce is covered by a collective bargaining agreement, whether the employer must bargain with the union prior to implementing a mandatory vaccination program; (3) privacy and confidentiality concerns around disclosures of sensitive information and medical records under state and federal law; (4) whether time spent obtaining the vaccine is compensable under state and federal wage and hour laws; and (5) potential workplace safety reporting and recording obligations.

If your organization would like more information about the above, or would like to undertake an individualized risk

Dentons COVID-19 resources

Dentons has been helping clients address the challenges COVID-19 has presented since the outbreak started. We will continue to do all we can to support our clients and communities at this time. Our COVID-19 Client Resources Hub is updated regularly and includes links to a variety of practice and sector insights. We chose to make these resources available to you on a complimentary basis because sharing with those in need is simply the right thing to do.

Our offerings include a New dynamic – Global employment tools and trackers hub where you will find a range of resources and insights as well as webinar and podcast recordings prepared by the Employment and labor team to help companies manage the workforce and succeed in the new dynamic. We add content all the time – so please check back regularly.

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