



# Requiring Workers to Get Vaccinated

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**W**ith the second wave of COVID-19 infections spiking and further workplace disruptions likely, employers are facing 2021 with the question of whether they can, and should, require employees to get a vaccine now that they are available.

A mandatory vaccine program poses legal risks and can affect employee morale.

## The Past May Inform the Present

Employers have been allowed to require employees to get a flu vaccine as long as the requirement is job-related and consistent with the needs of the business or justified by a direct threat. Employees can request an exemption from the vaccine mandate based on an employee's disability under the Americans with Disabilities Act (ADA) or religious beliefs under Title VII and applicable state laws. Such laws protect employees from retaliation for seeking reasonable accommodations.

A vaccine requirement must relate to the employee's particular job and be necessary to the business. Certain workplaces, such as hospitals, health clinics and nursing homes, have a particularly strong case

for requiring vaccinations. In those settings, employees are likely to work with immunocompromised individuals.

## Employee Exemptions

An employee may be exempt from a mandatory vaccine requirement based on a disability that prevents the safe administration of the vaccine. An individual may seek exemption for medical reasons if he or she has a disability that qualifies under the ADA, and there is a reasonable alternative available that does not create undue hardship on the employer or pose a direct threat to the health or safety of individuals in the workplace. An undue hardship under the ADA is defined as a significant difficulty or expense to the employer.

An employee also may be exempt from a mandatory vaccine if he or she, under Title VII, provides notice of a sincerely held religious belief, practice or observance that conflicts with a vaccine requirement. Also, under Title VII, the standard for undue hardship to an employer is lower than the standard under the ADA and is found when the religious accommodation imposes more than a minimal burden on the operation of the business.

## Recent Government Guidance

On Dec. 16, the Equal Employment Opportunity Commission (EEOC) issued guidance concerning mandatory COVID-19 vaccinations in the workplace. The ADA permits an employer to have a job qualification standard that requires an employee not pose a direct threat to the health or safety of individuals in the workplace.

The EEOC's guidance provides that if a COVID-19 vaccination requirement screens out an individual with a disability, the employer must show that an unvaccinated employee poses "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."

If the employer determines that the unvaccinated employee poses a direct threat at the worksite, the EEOC's position is that "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 that the unvaccinated employee does not pose a direct threat."

While an employer may exclude an employee from entering the workplace when

they pose a direct threat, the employer may not automatically terminate them. Employers are required to assess whether the employee has any other rights under applicable laws, including an accommodation to work remotely, prior to taking further action.

Notably, at the outset of the pandemic, the EEOC announced that an individual with COVID-19 or symptoms meets the "direct threat" standard under the ADA, which allowed employers to implement medical inquiries and controls that otherwise would not be permissible, including temperature checks and screening questions for COVID-19 symptoms prior to allowing employees into the workplace.

The EEOC's Dec. 16 guidance did not pronounce that an unvaccinated employee constitutes a direct threat in the workplace and can be excluded. Instead, the EEOC emphasized that employers must conduct an individualized assessment of the direct threat factors, which include "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."

The legal landscape for employers facing COVID-19 challenges is expected to continue to evolve in response to the pandemic. If an employer implements a mandatory vaccine policy, it should contain clear procedures for employees to request exemptions. An employer's decision regarding whether an unvaccinated employee poses a direct threat to the workplace and whether a reasonable accommodation is possible carries legal risk. Employer decisions may later be determined unreasonable and the failure to accommodate the employee deemed discrimination.

Strong encouragement to get vaccinated, with business owners and managers rolling up their sleeves to get vaccinated, instead of a workplace mandate may be the best practice when considering employee morale and legal pitfalls. ■



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