

COVID-19 Vaccinations and Legal Considerations for Employers

March 12, 2021

With nearly 34 million people, or more than one in 10 Americans, fully vaccinated against COVID-19, most employers can expect vaccination to soon become available to their general workforce. Besides being eager to return to some semblance of “business as usual,” employers may want employees to get COVID-19 vaccinations for workplace morale and safety reasons. It is important for employers to start considering what their vaccination policies will be and how to implement them not only to suit their business needs but also to be legally compliant. In so doing, employers need to take into consideration the rights, responsibilities, and risks associated with employee vaccinations.

Workplace Safety

The Occupational Safety and Health Act commands employers to ensure that the workplace is “free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees.” This “general duty clause” may impose a duty on employers to take steps to prevent employees from contracting or spreading COVID-19 in the workplace. On January 29, 2021, the Occupational Safety and Health Administration (OSHA) updated its guidance entitled *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, explaining how vaccines fit into an effective workplace COVID-19 prevention program. OSHA recommends that employers include the following elements in their plans:

- Making vaccines available at no cost to all eligible employees;
- Providing information and training on the benefits and safety of vaccinations; and
- Uniformly applying safety standards and protective measures, such as wearing face coverings and social distancing, to vaccinated and unvaccinated employees

Anti-Discrimination Laws

Employers considering implementing COVID-19 vaccination policies must be cognizant of their obligations under federal and state anti-discrimination laws. On December 16, 2020, the Equal Employment Opportunity Commission (EEOC) updated its guidance, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws*, to address how COVID-19 vaccination interacts with the legal requirements of the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act (Title VII), and the Genetic Information Nondiscrimination Act (GINA). The updated guidance applies previous EEOC Guidance to several COVID-19 specific issues:

Medical Examinations and Inquiries

- The administration of a COVID-19 vaccine to an employee by an employer (or a third party with whom the employer contracts to administer a vaccine) is not a “medical examination” for purposes of the ADA.
- Pre-vaccination medical screening questions asked by the employer or a contractor on the employer's behalf for mandatory COVID-19 vaccination are subject to the ADA standard for disability-related inquiries, which requires a showing that the questions are “job-related and consistent with business necessity.”
- Asking or requiring an employee to show proof of receipt of a COVID-19 vaccination is not a disability-related inquiry. However, follow-up questions such as why an individual did not receive a vaccination may elicit information

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about a disability and thus would be subject to the ADA's standard that they be "job-related and consistent with business necessity."

Direct Threat/Reasonable Accommodation Analysis Under the ADA

- If an employer mandates COVID-19 vaccinations in the workplace and an employee indicates that he or she is unable to receive a COVID-19 vaccination due to a disability, the employer must conduct an individualized assessment to determine if the employee who cannot be vaccinated due to a disability poses a direct threat to the workplace.
- If an employer determines that an employee who cannot be vaccinated because of a disability poses a direct threat, the employer must determine whether a reasonable accommodation can be provided to reduce the direct threat without causing undue hardship. Note that this determination will depend on an individualized assessment that takes into consideration factors such as whether the employee can be isolated from other employees, whether everyone else in the workplace is vaccinated, and the like.
- If the direct threat cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean that the employer may automatically terminate the employee. Rather, the employer must determine if there is any other reasonable accommodation available, such as being able to work remotely or take leave provided by laws and workplace policies.

Religious Objections to Vaccination

- If an employer requires COVID-19 vaccinations and an employee indicates that he or she is unable to receive a COVID-19 vaccination because of a "sincerely held religious practice or belief" (as opposed to simply being against or afraid of vaccinations), the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII. This is a much lower standard than under the ADA, and generally requires only a "de minimis" accommodation.
- If an employer cannot exempt or provide a reasonable accommodation to an employee who cannot comply with a mandatory vaccination policy because of a sincerely held religious practice or belief, the employer may exclude the employee from the workplace. However, this does not permit automatic termination of employment; instead, the employer will need to determine if any other rights apply under non-discrimination laws or other federal, state, and local authorities.

GINA Considerations

- Administering a COVID-19 vaccination to employees or requiring employees to provide proof that they have received a COVID-19 vaccination does not implicate Title II of GINA. However, if administration of the vaccine requires pre-screening questions that ask about genetic information, the inquiries seeking genetic information, such as family members' medical history, may violate GINA.

Employers must also ensure that their policies and practices regarding employee vaccination comply with state anti-discrimination law.

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Other Legal Issues

Other legal considerations concerning employee vaccination exist outside the discrimination context, including but not limited to:

- Public employers should be mindful of the limitations of governmental actions imposed by federal and state constitutions. These include the protection against regulation of religious beliefs in the First Amendment to the U.S. Constitution and the protection against state deprivation of certain liberty interests in the Fourteenth Amendment to the U.S. Constitution.
- Employers having a mandatory vaccination policy should ensure proper payment of wages under the Fair Labor Standards Act for the time taken by employees to get vaccinated.
- Worker's compensation laws may require the employer to pay for vaccine-related injuries if the employee is vaccinated at the employer's request.
- Under state tort law, employers may owe a duty of care to employees, vendors, and clients who enter the workplace and business. The actual duty depends on what is considered "reasonable" at any given time. At the moment, vaccines are not required, and therefore a reasonable employer could choose not to mandate them. However, the standard may change over time.
- Employers should be mindful of the potential issues with workplace vaccination policies under the National Labor Relation Act (NLRA). Employers looking to require vaccination should ensure that such an action is permitted under any applicable collective bargaining agreement. A unionized employer may need to bargain with the union before implementing a vaccination policy. On a related note, the employer must evaluate whether it would violate the NLRA to issue corrective action to employees (unionized or not) who engage in protected concerted activity in opposition to an employer's mandatory vaccination policy.
- State and local laws may require employers to provide paid leave for employees to get vaccinated. In Michigan, the Paid Medical Leave Act requires covered employers to provide paid leave for eligible employees to obtain "preventative medical care," which could include getting the COVID-19 vaccine. Employers may also consider offering paid leave for employees to get vaccinated, as has been suggested by the Centers for Disease Control and local health authorities and for which employers may be eligible to obtain payroll tax credit under the recently enacted American Rescue Plan Act of 2021.
- Employers should also review and ensure compliance with any privacy laws in mandating a vaccination requirement.
- Instead of mandating COVID-19 vaccination, employers may choose to implement a voluntary vaccination program with incentives, which may be considered a wellness program. Accordingly, employees should be aware of requirements relating to wellness programs under the ADA and GINA. Recently, the EEOC proposed Rules to address what level of incentives employers may lawfully offer to encourage employee participation in wellness programs (including those providing COVID-19 vaccine incentives). However, upon the arrival of the Biden administration, the proposed Rules were withdrawn and are currently "under consideration," leaving some uncertainties about what incentives, if any, may be offered to employees.

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CDC Recommendations for Fully Vaccinated People

Employers should consider and continue to monitor guidance developed by the CDC and local health authorities in developing workplace vaccination policies. On March 8, 2021, the CDC issued *Interim Public Health Recommendation for Fully Vaccinated People*. The guidance provides that fully vaccinated people can start visiting other fully vaccinated people or unvaccinated people from a single household with low risk for severe COVID-19 disease indoors without wearing masks or social distancing. Additionally, the guidance recommends some quarantine requirements that are more relaxed for fully vaccinated individuals. Particularly, fully vaccinated employees of non-healthcare congregate settings and other high-density workplaces do not need to quarantine following an exposure if asymptomatic (but testing is still recommended). The CDC, however, continues to recommend fully vaccinated people, among other things, to take precautions such as mask-wearing and social distancing and follow guidance issued by individual employers.

If you have questions about legal considerations for implementing COVID-19 vaccination policies in the workplace, please contact your Miller Canfield attorney or the authors of this alert.

This information is based on the facts and guidance available at the time of publication and may change.