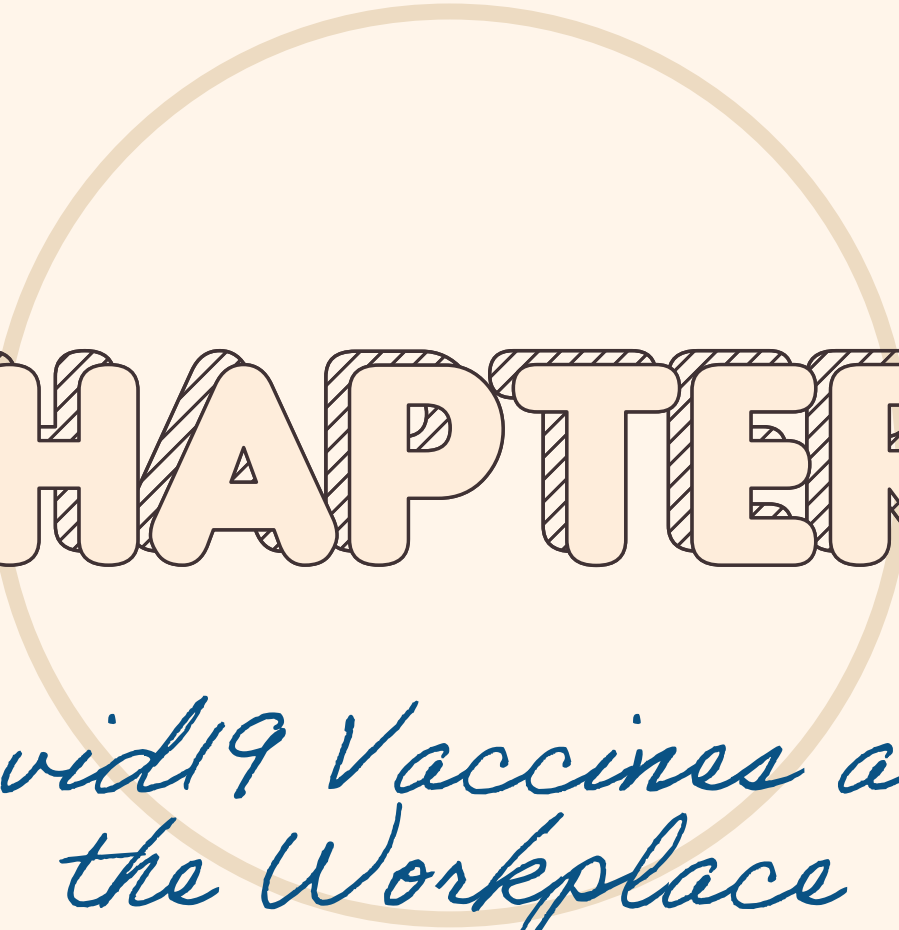


RETURNING WORKFORCES

and Covid-19 Vaccines





CHAPTER 3

Covid19 Vaccines and the Workplace

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COVID-19 vaccines have been, and will continue to be a major topic of discussion amongst employers looking to bring employees back to the office. Specifically, employers may be considering whether vaccination should be encouraged or mandated among their employees.

Employers must navigate the inherent legal risks and logistics of mandating or encouraging employees to receive the COVID-19 vaccines. To do so, employers should seek legal counsel to discuss which course of action is best for their organization. This section provides a general informational overview of considerations for employers.

Government Guidance Related to COVID-19 Vaccines and Workplaces

Government agencies, notably the Occupational Safety and Health Administration (OSHA) and the EEOC, have released guidance regarding the COVID-19 vaccines and workplace laws. Guidance from these and other authorities are likely to change as the COVID-19 pandemic evolves. Therefore, employers should continue to follow the most current information on maintaining workplace safety.

This section includes some of the most recent information available at the time of publication.

OSHA Perspective

Per OSHA, employers can require employees to receive vaccinations for influenza, providing they properly inform employees of “the benefits of vaccinations.” In addition, OSHA states that employees can refuse a vaccination due to a reasonable belief that they have an underlying medical condition that creates a real danger of serious illness or death, and that they “may be protected under Section 11(c) of the Occupational Health and Safety Act of 1970 pertaining to whistleblower rights.” Of course, employees may also refuse to receive the vaccination due to a disability or due to a sincerely held religious belief as discussed below.

EEOC Perspective

The EEOC, which enforces the ADA and Title VII of the Civil Rights Act of 1964 (Title VII), has also issued guidance regarding vaccines in the employment context. Specifically, the EEOC [addressed](#) whether employers covered by the ADA and Title VII can compel employees to receive the influ-

enza vaccine. The commission has since made [additional updates](#) to their guidance regarding the COVID-19 vaccines, specifically.

The highlights of those updates generally clarify that:

- Employers may require employees to receive COVID-19 vaccinations;
- Employers that require vaccinations may need to provide accommodations or show that an unvaccinated employee would pose a direct threat;
- Vaccination-related questions from employers must be job-related and consistent with business necessity; and
- Any medical information obtained in the course of a vaccination program must be kept confidential.

Additionally, the EEOC explained that an employee may be entitled to an exemption from a mandatory vaccine based on a disability that prevents the employee from taking the vaccine. This would be considered a reasonable accommodation, and the employer would be required to grant the accommodation, unless it creates an undue hardship for the employer. The ADA defines an undue hardship as an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources, and the nature and structure of its operation.

The EEOC also states that, under Title VII, employees with sincerely held religious beliefs may be entitled to an exemption from a mandatory vaccination, which is considered a reasonable accommodation, unless it creates an undue hardship for the employer. Note that undue hardship under Title VII is defined as a "request that results in more than a de minimis cost to the operation of the employer's business." This is a much lower standard than under the ADA.

Because of these exemptions and the discrimination risk posed by mandating employees to receive any vaccine – including the COVID-19 vaccines – it is strongly advised that employers simply encourage vaccination rather than mandating it.

Deciding Between a Mandatory or Voluntary Vaccination Policy

A mandatory vaccination policy (or even a voluntary policy, for that matter) may not be best for every organization. Employers will need to consider a number of factors before deciding which direction to head. This section includes considerations for employers who are weighing their policy options.

General Employer Considerations

There are a host of considerations employers need to review before coming to a decision on whether to encourage or require employees to receive a COVID-19 vaccination.

Employers should consider the following when reviewing their options:

- Evaluating undue safety burdens—Employers will face the challenge of determining whether an employee poses an undue safety burden on co-workers by choosing not to get vaccinated (if the employer is simply encouraging receiving the vaccines) or being exempt from a mandated vaccination. When evaluating this consideration, employers will need to decide whether there are other precautions that can be put into place to protect employees, which may include:
- Assessing and granting exemptions—If employers decide to require employees to get a COVID-19 vaccine, they will need to be prepared to determine whether an individual worker qualifies for a reasonable accommodation in the form of an exemption from receiving the vaccine under the ADA or Title VII. This assessment would need to be done on a case-by-case basis and could potentially leave an employer open to legal action should there be missteps at any point in the process. In addition, the employer will also have to navigate protecting the rest of the workforce should an employee be exempt from being vaccinated.
- Evaluating legal risks of requiring vaccines—Employers need to consider the possibility that they may be sued if they require employees to be vaccinated and an employee experiences an adverse reaction to the vaccines or develops subsequent health problems. There will likely be many pending cases on this subject in the future, but currently, there is no definitive answer as to how these situations will be handled in court.
- Sorting out the logistics of requiring or recommending vaccination—Regardless of whether employers require or mandate COVID-19 vaccination, there are logistical elements to consider, including:
 - ◆ Will employers hold on-site vaccination clinics?
 - ◆ What vaccine, as more than one is available on the market, will be used?
 - ◆ Who will pay for the vaccine?
 - ◆ Will the company require or cover the costs of vaccination for the employee’s family?
 - ◆ How long after the vaccine becomes available must workers receive the vaccine, if vaccination is mandated?

In addition to the considerations explained above, employers should consult legal counsel to determine whether there are unique risks to consider for their specific organization.

The Case for Mandatory Workplace Vaccination

Below are some of the arguments in favor of requiring that employees be vaccinated against COVID-19:

- Offers greater level of protection to employees, customers and all other workplace stakeholders—Vaccines are the most significant way to help prevent the spread of COVID-19 by far.

- Ensures that employees will actually be vaccinated—Instead of hoping that employees protect themselves (and the organization at large) against COVID-19, a mandatory vaccination program would force them to do so. Given the current state of affairs, there is much misinformation regarding vaccinations on the whole. A mandatory program could educate employees on its importance and increase opt-in rates.
- Saves the organization's bottom line—Even if an employee quickly recovers from COVID-19, that won't prevent other organizational costs, such as absenteeism, lost productivity and potentially higher health plan expenses. Moreover, experts still don't understand the long-term effects COVID-19 can have on an individual. As such, it's possible someone who recovered from the disease may still experience long-term health complications and, subsequently, greater medical costs.
- Keeps the organization running—Depending on the organization, a single COVID-19 infection in the workplace may be enough to cease all operations. If all workers were vaccinated, this would be much less of a concern.
- May provide some protection against civil liability. Employers are generally responsible for their employees' well-being in the workplace. That means, if an employee contracts COVID-19 (or is exposed to it) during the course of their job duties, they may have grounds to sue their employer. Having a mandatory vaccination policy in place may help mitigate this potential.

Of course, there is still potential for legal liability down the line due to adverse vaccine reactions or, for example, missteps in the accommodation process.

The Case for Voluntary Workplace Vaccination

Below are some of the arguments in favor of a voluntary vaccination program.

- Maintains good employee relations—Employees may hold strong convictions about vaccines, preferring to quit over getting vaccinated. A voluntary vaccination policy could circumvent these negative reactions by allowing employees to act in accordance with their beliefs.
- Simplifies the policy administration—There are several workplace laws relevant to vaccination policies. In particular, the EEOC has made it clear that reasonable accommodations must be provided to employees in certain circumstances, which come with specific steps that must be taken on a case-by-case basis. This can create more administrative trouble than an employer deems worthwhile. A voluntary program would avoid these legal pitfalls.
- Provides some protection against discrimination claims—Similar to the previous point, employees may seek an accommodation from a mandatory COVID-19 vaccination policy. If they are denied, they may seek legal recourse, regardless of whether the employer is at fault. A voluntary vaccination program would not cause these concerns.
- Makes sense for some industries—Certain employers may not need all their workers vaccinated for a number of reasons. For instance, if employees can work remotely, if the staff size is small or if employees can adequately avoid close contact, it may not make sense to mandate vaccinations.

