
Can My Employer Require Me to Get a COVID-19 Vaccine?

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In this blog:

- *Generally, employers can require employees to receive an available vaccine as a condition of continued employment.*
- *If the mandatory vaccination policy tends to exclude employees with disabilities from the workplace, the employer must make an individualized assessment as to whether the unvaccinated employee constitutes a “direct threat.”*
- *Once a direct threat is determined, the employer must seek reasonable accommodations.*
- *Employees objecting to the vaccine under a sincerely held religious belief must be provided a reasonable accommodation if one is available without placing undue hardship on the employer.*
- *Exclusion from the workplace should not automatically trigger termination.*
- *Employers can require documentation of vaccination without it being an ADA-related request.*
- *Unionized employers should check with the terms of any collective bargaining agreement prior to announcing a mandatory vaccination policy.*

The short answer? Yes – with some caveats. In December, the Equal Employment Opportunity Commission (EEOC) released guidance on the COVID-19 vaccines receiving Emergency Use Authorization from the FDA. In the guidance, the EEOC confirmed as a general principle that employers may require employees to receive a COVID-19 vaccine when one becomes available to them as a condition for continued employment. (*Whether* employers will actually choose to mandate a vaccination remains to be seen and likely depends on the specific industry.) That being said, employers still need to consider employee protections afforded in the Americans with Disabilities Act and Title VII of the Civil Rights Act when implementing the policy.

Mandatory Vaccines and the Americans with Disabilities Act

The ADA recognizes “qualification standards” so that “an individual shall not pose a direct threat to the health or safety of individuals in the workplace.” In the context of COVID-19, a policy that employees without the vaccine will be excluded from the workplace is a qualification standard aimed to protect the health and safety of other employees and customers.

However, if the “qualification standard” that non-vaccinated employees be excluded from the workplace tends to exclude employees with disabilities (because such employees cannot receive a vaccine) there may be an ADA violation. When that happens, the employer can exclude the employee from the workplace only when 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 “direct threat” analysis looks to whether the individual can “safely perform the essential functions of the job.” The ADA regulations instruct employers to consider four factors:

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.

29 C.F.R. § 1630.2. Analysis of these four factors will depend on the industry, the employee, and the current COVID-19 climate.

If an employer determines that an individual who cannot be vaccinated due to disability poses a “direct threat” at the worksite, the employer can still only take action if there is no reasonable accommodation, without undue hardship, that would eliminate or reduce the risk so that the unvaccinated employee does not pose a direct threat. The EEOC has already opined that the prevalence in the workplace of employees who already have received a vaccination, and the amount of contact with others whose vaccination status could be unknown, may impact the undue hardship consideration.

If the disabled, unvaccinated employee poses a direct threat, and there is no reasonable accommodation without undue hardship, the employer may exclude the employee from the workplace. However, this does not trigger an automatic termination. The employer should consider other protections in state and federal law prior to seeking termination.

Mandatory Vaccines and Title VII of the Civil Rights Act

If an employee objects to the vaccine on the basis of asincerely held religious belief, the employer must provide a

reasonable accommodation unless it would pose an undue hardship under Title VII of the Civil Rights Act. Undue hardship under Title VII is when the accommodation is more than a de minimis cost or burden to the employer. Note: this is a lower standard than “undue hardship” in the ADA.

Similar to the ADA, the absence of a reasonable accommodation without undue hardship does not trigger termination, but exclusion from the workplace is appropriate.

Other Considerations

While disability-related inquiries require certain considerations under the ADA, requiring an employee to show proof of vaccination is not considered a “disability-related inquiry” by the EEOC. However, follow up questions such as *why* the employee has not been vaccinated may be disability-related if the reason is based on the employee’s disability. Best practice may include warning employees not to provide any additional medical information as part of their proof of vaccination.

Employers with employee unions should carefully examine the terms of any collective bargaining agreement prior to issuing or implementing a mandatory vaccination policy.

Will some employers be required to require vaccinations? Employers are required to provide a safe workplace for employees. There is some debate as to whether this means certain employers *must* require that all employees receive a vaccination and whether failure to do so can be used by an employee in an OSHA claim after contracting the virus. This would certainly be a novel approach and depend heavily on the industry. This is a developing story: on January 21, 2021, President Biden issued an Executive Order directing the Secretary of Labor to issue OSHA guidance on COVID-19 workplace safety, including considering whether mask requirements should become an emergency temporary standard and to review OSHA enforcement efforts related to COVID-19. While that guidance did not opine on *requiring* employers to require a COVID-19 vaccine as part of providing a safe workplace, it did recommend providing vaccinations to employees at no cost and to continue transmission mitigation protocols with vaccinated employees.

Employers are allowed to require employees to receive an approved and available COVID-19 vaccination before their return to the workplace. Whether employers will actually require a vaccination or whether such a policy is practical is another question. However, as is common in the employer-employee relationship, this ability is not without limitations. Employers should proceed with caution to make sure any mandatory vaccination policies do not infringe on employees’ rights under the ADA or Title VII. If you have any specific questions, please reach out to an attorney for guidance. As with all things COVID, and especially with a new administration, this is a fluid situation and YMH attorneys are continuously monitoring any developments.

The information contained in this article is of a general nature and is not intended as, nor should it be relied upon for, legal advice. No action should be taken in reliance upon the information contained in this article without obtaining the advice of an attorney.

Visit our COVID-19 Resource Center for more information related to the Coronavirus outbreak.

Related Links:

- Jefferson P. Whisenant

- Executive Order on Protecting Worker Health and Safety
- Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace

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