



Employer Issues Related to COVID-19 Vaccination

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COVID-19 has forced employers to consider issues of employee health and safety as never before. As the vaccination roll-out gains speed, employers will need to consider whether to mandate the vaccine, reasons employees may decline to be vaccinated, and how employees may be incentivized to be vaccinated.

Can an Employer Require the Vaccine?

Yes. The Equal Employment Opportunity Commission (“EEOC”) issued guidance in December clarifying that employers may require COVID-19 vaccination as a condition of employment. An employer who mandates the vaccine must have a reasonable belief that vaccination is necessary to ensure that workers do not pose a direct threat to the health and safety of themselves or others.

Employers should, however, be aware that the vaccines are only available under an emergency use authorization and that availability and eligibility are currently limited. While the Food and Drug Administration (“FDA”) recommends vaccination, it has not given final approval to any of the COVID-19 vaccines. Employees may not be comfortable taking a vaccine that does not have final approval.

Employers may be able to provide vaccination on site, either directly or by a contractor. While providing a vaccine is not a “medical examination” for purposes of the American with Disabilities Act (“ADA”), the pre-screening questions required could reveal information about employee disabilities. Therefore, employers must demonstrate that the pre-screening questions are “job-related and consistent with business necessity.” This requirement applies whether the vaccine is provided directly by the employer or by a contractor on the employer’s behalf.

May Employees Decline to be Vaccinated?

Yes. Employees may refuse to be vaccinated due to a disability or for religious reasons.

While most employees will eventually be eligible for the vaccine, some employees may be advised by their doctors that they should not be vaccinated due to their personal medical condition. The ADA permits employers to require that “an individual shall not pose a direct threat to the health or safety of individuals in the workplace.” However, the employer must be able to show that an unvaccinated employee would pose a direct threat due to a significant risk of substantial harm to the health or safety of another that cannot be eliminated or reduced by reasonable accommodation. Similarly, Title VII of the Civil Rights Act requires an employer to accommodate an employee’s sincerely held religious belief unless it would pose an undue hardship on the employer. Employers should consider whether work from home will be a reasonable accommodation, whether social distancing and mask wearing can be offered as a long term accommodation, and the rationale for mandating the vaccine, including whether the work environment requires contact with others who cannot be vaccinated or are particularly vulnerable.

For employees with religious needs, an accommodation must be provided so long as it does not create an undue hardship, which is defined as more than a de minimus cost or burden on the employee. These requests would need to be analyzed on a case by case basis along the same lines as disability accommodation requests, although the standard for rejecting an accommodation is lower.

How can an employer encourage vaccination?

Employers may decide that a vaccination mandate is impractical at the current time, but still desire to encourage their employees to get vaccinated as soon as possible.

Employers concerned about vaccine refusal among employees may invite employees to share with their peers when they are vaccinated and why they chose to do so, although employers should remember that vaccination is a personal medical issue and should not require disclosure of vaccination status. Employers should be conscious that vaccine reluctance among some may be grounded in a shameful history of some protected groups that were used as medical test subjects without proper safeguards and consent.

The EEOC has yet to issue clear guidance on how an employer may incentivize vaccination without implicating ADA concerns. The EEOC has expressed concern with high value incentives for vaccination out of concern they may coerce employees into participating in a wellness program, but regulations to that effect have not been issued. Many employers are proceeding with offering incentives in the absence of any clear prohibition on doing so, typically for modest dollar amounts or simply by providing employees with extra paid time off to accommodate scheduling the vaccine.

Riker Danzig is here to help if you need assistance of any kind. Please do not hesitate to contact [Scott Ohnegian](#), [Adam McInerney](#), [Fiona Cousland](#), or any member of Riker Danzig's [Labor & Employment Group](#) if you have any questions regarding this or any other employment-related legal issue.

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