

Professional Perspective

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**Bloomberg
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Covid-19 Vaccines and Workplace Challenges

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As Covid-19 vaccines become widely available, employers will face a critical set of challenges, ranging from whether they can—or will want to—mandate all or some employees get vaccinated, to what liability may attach to mandating vaccination, and even whether the Occupational Safety and Health Administration (OSHA) could require a vaccine program.

While uncommon, mandatory vaccination policies are not new. For example, many health-care employers have implemented mandatory flu vaccination programs to protect staff and patients. The size and scope of the current pandemic, coupled with the desire to swiftly return employees to the physical workplace, however, means that more employers across various industries will likely consider mandating that their employees receive a Covid-19 vaccine once one becomes available to their employees.

Employers need to stay ahead of workplace Covid-19 vaccine issues with awareness and planning, so they can adapt their policies to meet the moment. Following are several of the most common questions employers should be prepared to answer in considering Covid-19 vaccination programs.

Can employers require employees to receive the vaccine?

For employers with represented (unionized) workforces, a mandatory vaccination program may constitute a mandatory term and condition of employment, which the employer arguably could not unilaterally impose. Thus, these employers should review their rights under the applicable collective bargaining agreements (CBA) and, if the issue is not addressed, evaluate the breadth of the management rights provision. In any event, employers should consider discussing vaccination now with any unions to reach a written memorandum of understanding (MOU).

Absent an applicable CBA restricting an employer's decision to require a vaccine, employers may unilaterally implement mandatory Covid-19 vaccination programs, provided they accommodate certain employees who raise objections under the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act.

In [updated guidance \(What You Should Know About Covid-19 and the ADA, the Rehabilitation Act, and Other EEO Laws\)](#) released December 16, 2020, the Equal Employment Opportunity Commission makes clear that administration of a Covid-19 vaccine to an employee itself does not constitute a “medical examination” for the purposes of the ADA. The pre-screening vaccination questions that accompany each vaccine, however, may implicate the ADA's provision on disability-related inquiries and Title II of the Genetic Information Non-Discrimination Act (GINA). Therefore, if any employer requires an employee to receive a Covid-19 vaccine, administered by the employer or its third-party contractor, then the employer must show that the disability-related screening inquiries are “job related and consistent with business necessity.” In other words, the employer must have a reasonable belief, based on objective evidence, that an employee who does not answer the questions, and, therefore, does not receive a vaccination, would pose a “direct threat” to the health and safety of himself or others.

An employer can avoid implicating the ADA, and therefore avoid the “job related and consistent with business necessity” standard of the ADA, however, under two circumstances:

1. *The employer requires only proof of vaccination from its employees.* If the employee receives an employer-required vaccination from a third party that does not contract with the employer, such as a pharmacy or other healthcare provider (e.g., primary care physician), then the ADA “job related and consistent with business necessity” standard would not apply to pre-vaccination medical screening questions.
2. *The employer offers vaccination on a voluntary basis (e.g., encourages but does not mandate vaccination).* If the employer offers the vaccination to employees on a voluntary basis, then the employee's decision to answer the pre-screening questions must also be voluntary. The employer may not retaliate against, intimidate, or threaten the employee for **refusing to answer the questions.**

Where the pre-vaccination screening questions do not include questions about genetic information such as family medical history, Title II of GINA would not be implicated. If, however, the screening questions inquire about family history or other

genetic information, the updated EEOC guidance suggests that employers consider requesting proof of vaccination instead of administering the vaccine themselves. Proof of vaccination alone does not involve the use, acquisition, or disclosure of genetic information, and thus does not implicate Title II of GINA.

Requesting proof of receipt of a Covid-19 vaccination is likewise not a disability-related inquiry, because such a request would not elicit information about a disability. Asking why an individual did not receive a vaccination, however, potentially implicates medical conditions and therefore would be subject to the pertinent standard that the inquiry be “job related and consistent with business necessity.” The updated EEOC guidance also advises that employers consider warning employees against providing medical information as part of submitting their proof of receipt of a Covid-19 vaccination from a pharmacy or their own healthcare provider.

If mandating vaccination, how should employers respond to employee objections about vaccination?

Even in a pandemic, employers cannot institute a blanket vaccination requirement without making exceptions for medical conditions or religious beliefs. Employees may be entitled to an exemption from a mandatory vaccination requirement based on an ADA-covered disability or a sincerely held religious belief, practice, or observance. In each case, the employer must analyze whether it can provide a reasonable accommodation.

If an employer is on notice that an employee is prevented from receiving the Covid-19 vaccination due to a sincerely held religious belief, practice, or observance, then the employer must provide a reasonable accommodation unless it would pose an undue hardship. While the employer should ordinarily assume that an employee’s religious accommodation request is based on a sincerely held belief, an employer may request additional supporting information if it has an objective basis for questioning either the religious nature or sincerity of the belief, practice, or observance.

Similarly, if the employer determines that an individual who cannot be vaccinated due to a disability poses a “direct threat” as set forth in the applicable [ADA regulations](#), the employer must attempt to provide the employee with a reasonable accommodation that would eliminate or reduce the risk posed by the unvaccinated employee. If the risk posed by the unvaccinated employee cannot be reduced to an acceptable level by a reasonable accommodation, the employer may exclude the employee from physically entering the workplace. Under those circumstances, the employer may not automatically terminate the worker, because the employee may be entitled to an alternative accommodation, such as performing the current position remotely, and the employer must determine whether any other rights may apply under the laws enforced by the EEOC or other federal, state, and local laws.

In the case of Covid-19, a reasonable accommodation could include telework or wearing a face mask or shield and physical distancing, or something else. In *Horvath v. City of Leander*, [946 F.3d 787](#) (5th Cir. Jan. 9, 2020), the U.S. Court of Appeals for the Fifth Circuit held that the two accommodations the defendant city offered to the firefighter plaintiff were reasonable: transfer to a position that did not require vaccination; or wear a respirator and other equipment while on duty, submit to testing for possible disease when warranted, and monitor and record his temperature.

Employers should engage in a flexible, interactive process with employees to identify workplace accommodation options that do not constitute an undue hardship to the employer, and may include the employer requesting and obtaining supporting documentation about the employee’s disability. Other factors may also impact the employer’s undue hardship consideration, for example the prevalence of Covid-19 vaccinated employees in the workplace and the amount of potential contact with other individuals for whom vaccination status is unknown.

Undue hardship might be hard to show if the employee can telework. But employers with frontline workers—doctors, nurses, first responders, and potentially even retail workers—likely will have an easier time proving that a request not to be vaccinated constitutes an undue hardship. Most of the existing case law on what constitutes an undue hardship comes in the context of patient care for health-care employers, where the risk of infecting vulnerable patients is significant. Courts may be more inclined to rule against mandatory vaccination policies in the office-space context.

Pre-pandemic ADA requirements are still applicable, and employers must remind managers and supervisors that it is unlawful to disclose that an employee is receiving an accommodation and that employers may not retaliate against an employee for requesting an accommodation.

What privacy and morale considerations accompany a vaccination requirement?

Employers should be aware of potential privacy and morale issues that could arise with a vaccine mandate. According to [studies conducted in late 2020](#), more than one-third of Americans said they would refuse a Covid-19 vaccine if offered one (but a recent [poll](#) suggests that the number of Americans willing to receive the vaccine is climbing). The reported hesitation may be due in part to the anti-vaccination movement, but may also include individuals who typically trust the safety of vaccines but have specific concerns based on their perception of the speed with which the Covid-19 vaccine is being developed. Employers need to be sensitive to such concerns and the problems that could arise if a material portion of their workforce feels unsafe receiving a vaccine shortly after it becomes available.

Relatedly, employers will be required to maintain the privacy of vaccine and accommodation records of their employees. But, some potential solutions for accommodating employees who cannot or do not want to receive the vaccine—such as continued mask wearing, or schedule or seating changes—might inevitably lead employees to guess or assume who received the vaccine and who did not. In turn, those who did receive the vaccine might raise concerns about working in close proximity to employees they presume have not been vaccinated. It will likely make sense for employers to draft appropriate policies and procedures to avoid such issues, or to address them if they arise.

If an employer requires employees to receive the Covid-19 vaccine, who should pay for it?

Employers who want to require their employees to receive the Covid-19 vaccine do not need to wrestle with the issue of who should pay the cost. The Centers for Medicare and Medicaid Services (CMS) [announced](#) a comprehensive plan to ensure that all Americans will have access to the Covid-19 vaccine at no cost when it becomes available. According to the report, CMS released an Interim Final Rule with Comment Period (IFC) establishing that any Covid-19 vaccine that receives Food and Drug Administration authorization will be covered under Medicare as a preventive vaccine at no cost to beneficiaries.

The IFC also implements provisions of the federal Coronavirus Aid, Relief, and Economic Security (CARES) Act that ensure swift coverage of a Covid-19 vaccine by most private health insurance plans without cost sharing from both in- and out-of-network providers during the course of the public health emergency.

Employers that mandate vaccination likely should provide paid time off for employees to be vaccinated, or at least allow employees to be vaccinated during their regularly scheduled shift.

What is the potential liability if an employer requires the vaccine, and the vaccine later causes health problems?

It is hard to predict the liability if an employer implements a mandatory vaccination policy, and the vaccine later demonstrates side effects, somehow causes other harm to an employee, or simply proves to be less effective than expected. Employees injured by a Covid-19 vaccine that was mandated by a work policy may attempt to bring lawsuits against employers for, among other things, workers' compensation, negligence, and Occupational Safety and Health Act (the Act) violations, if arguable links can be made between the vaccine injury and the employer's mandatory policy.

On the other hand, a vaccine cannot be distributed without first receiving FDA approval or emergency use authorization. At least as to negligence and claims under the Act, employers will be able to argue that they were simply following the government's safety assurance.

There will be obvious tension between an employer's desire to keep all employees safe at the workplace by mandating vaccination, and potential resultant harm to individual employees due to side effects. Certainly, employers will need to balance the advantages and risks before deciding how to proceed. To reduce risk, employers who are considering a mandate might consider limiting it to high-risk positions, departments, worksites, or locations.

In weighing the risks, employers should note that Pfizer, [reported](#) no serious safety concerns with its vaccine, while Moderna [reported](#) that some vaccinated individuals might expect minor, short-lived unpleasant side effects—including fatigue, sore arms, muscle or joint aches, and headache (and [the CDC and FDA continue to closely monitor Covid-19 vaccine safety](#)). So, while these side effects may cause some employees to miss work, they likely will not result in actionable harm. Employers more likely will have to be prepared to schedule around employees who take sick days after receiving

the vaccine, and to encourage and remind such employees to get the second dose of the vaccine even if they experience mild symptoms due to the first dose.

What position might OSHA take regarding employers and Covid-19 vaccinations?

OSHA has not promulgated a rule regarding airborne diseases like Covid-19, but President Biden has issued an [Executive Order](#) requiring OSHA to issue revised guidance to employers on workplace safety during the pandemic to consider whether any emergency temporary standards on Covid-19 are necessary. Given the above-described Title VII and ADA issues, it seems unlikely that OSHA would affirmatively require employers to offer or mandate a Covid-19 vaccine. Indeed, the Executive Order does not mention vaccines. The states that have implemented mandatory Covid-19 standards—e.g., [California](#), [Michigan](#), [Oregon](#), [Virginia](#)—which OSHA could look to for guidance, do not require vaccination. OSHA, however, potentially could rely on the Act's [general duty clause](#)—which requires employers to furnish “a place of employment ... free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees”—to cite an employer that fails to make the vaccine available to its employees.

OSHA has previously taken the [position](#) that employers can require employees to receive the flu vaccine, provided they properly inform employees of the benefits of the vaccinations. Additionally, OSHA has explained that an employee who refuses a flu vaccination because of a reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death—such as serious reaction to the vaccine—may be protected under Section 11(c) of the Act, which pertains to whistleblower rights. This is yet another consideration for employers considering whether to implement a Covid-19 vaccination mandate.

What alternatives do employers have to mandating Covid-19 vaccination?

Rather than mandating vaccination, employers may consider promoting non-mandatory tools and policies, such as educating and reminding employees about the importance and benefits of vaccination, providing free and convenient access to the vaccine. In the context of influenza vaccination, the [CDC](#) recommends that employers encourage vaccination through a variety of means. Employers should consider these suggestions in the context of a Covid-19 vaccine.

Employers' efforts to promote vaccination could include, allowing employees time off of work to be vaccinated, posting and publishing promotional materials about the importance of vaccination, and, potentially, hosting a vaccination clinic at the office. Employers could also consider giving small incentives or rewards to employees who get the vaccine (taking care to ensure any such incentives do not run afoul of the ADA or Title VII or laws regarding health-contingent wellness programs). Moreover, as rapid Covid-19 tests, which return results in approximately 15 minutes, become more widely available and less expensive, employers initially may wish to rely on mandatory rapid testing rather than vaccination. The EEOC has [expressly approved](#) of the use of mandatory Covid-19 tests in the workplace.

When should employers start discussing how to address any eventual Covid-19 vaccine workplace issues?

There is no time like the present. Many of the challenges employers have faced during the pandemic have felt like a fire drill. The Covid-19 pandemic hit the country quickly, and since that time, circumstances and laws have continued to change, sometimes with little or no notice. Employers would be wise to monitor the vaccine-related legal landscape, while developing plans for how they intend to address the vaccine with their workforce.

Even as Covid-19 vaccines roll out, public health experts continue to evaluate their effect on public health and whether they prevent transmission of the virus from person to person. Therefore, many of the current requirements and best practices that employers have implemented, such as teleworking, mask wearing, and physical distancing, likely will be part of the workplace for some time to come.

Additionally, employers should monitor whether state or local governments implement vaccination regulations. A [long-existing Oregon law](#) prohibits health care employers from requiring vaccinations as a condition of employment “unless such immunization is otherwise required by federal or state law, rule or regulation.” At least eleven states – [Florida](#), [Kentucky](#), [Louisiana](#), [Minnesota](#), [Missouri](#), [New Jersey](#), [New York](#), [South Carolina](#), [Tennessee](#), [Virginia](#), [Washington](#)—have introduced new or amended legislation that would ban or limit vaccine mandates to some or all of the population. On the other hand, while the New York State Assembly debates a bill that would prohibit mandatory vaccination policies, the New

York State Senate is considering a bill that would require vaccination under certain circumstances. Additionally, the [New York State Bar Association recommended](#) that New York consider mandating a Covid-19 vaccine once a scientific consensus emerges that it is safe, effective, and necessary, but only after conducting a public awareness campaign to encourage voluntary vaccination.

In the meantime, employers considering a mandatory Covid-19 vaccination program should:

- In represented workforces, determine whether such a program is permissible under any governing CBAs, and if the issue is not addressed, consider discussing it now with the union or unions to reach a MOU.
 - If proceeding with such a program, keep vaccination records separate from personnel files, and be prepared to engage in the interactive process and provide reasonable accommodations as appropriate to employees who object to vaccination due to a disability or sincerely held religious belief.
 - For those employees who object to vaccination on disability or religious grounds:
- Ensure that an employee's refusal to be vaccinated originates from a covered disability or sincerely held religious belief, understanding that employers' challenges to claims of sincerely held religious beliefs have been heavily scrutinized by the courts.
 - Consider the nature of the employee's position, as courts are more likely to require an alternative accommodation for employees who do not frequently interact with the public, and accommodations may take the form of telework, wearing of face coverings or face shields, or the transfer to a non-frontline position.
 - Develop policies and practices to help avoid or mitigate, as much as possible, the morale and privacy issues that might be created by having some employees receive accommodations or permission to opt out of the program.
 - Be aware of the possibility that employees who suffer side effects from the vaccination may seek to hold employers liable.

Conclusion

There are a wide scope of concerns facing employers as they consider Covid-19 vaccination programs, but with proper preparation and in-depth research, employers can move forward into a new era of work with a concrete plan ensuring the maximum level of safety and concern for their workforce.