

How Employers Can Enforce Compliant Vaccine Mandates

By **Susan Sholinsky, Joshua Stein and Nancy Popper** (September 7, 2021)

Many employers across various industries are choosing to protect employees — and, where applicable, customers — from ongoing COVID-19 risks and variants by mandating vaccination.

Implementing legally compliant policies and practices that make sense for each unique workplace is essential to successfully adjusting to a post-pandemic economy.

Considerations differ based on industry, geographic location, workspace design and whether customers or clients also frequent the workplace.

Employers must also consider ever-changing federal, state and local safety mandates and guidelines, such as masking requirements.

The following piece offers an overview of current federal and certain state laws affecting employers, in addition to practical considerations for helping these moving pieces interact.

Mask On, Mask Off?

Most employers are considering masking policies in conjunction with their vaccination policies.

However, a one-size-fits-all mask policy across all company workplaces may not be feasible due to varying state and local laws, unique workplace setups and the nature of work — e.g., front of the house with customer interaction versus back office.

Employers in the U.S. should monitor and remain aware of the Centers for Disease Control and Prevention's current guidelines for masking,[1] which the Occupational Safety and Health Administration guidance for general workplaces[2] mirrors, as well as state and local masking mandates, some of which have been recently reinstated.

Many employers that had previously relaxed masking rules are now requiring mask-wearing throughout their facilities — or at least in common areas and shared workspaces — thanks to the uptick in COVID-19 cases due to the delta variant.

Vaccine Mandates: Legal With Leeway

On May 28, the U.S. Equal Employment Opportunity Commission issued updated guidance[3] confirming that federal law permits vaccine mandates in the workplace as a condition of employment, so long as they comply with the requirements of both the Americans with Disabilities Act and Title VII of the Civil Rights Act.

These laws protect individuals who cannot receive the COVID-19 vaccine because of a disability or due to a sincerely held religious belief by requiring employers to provide reasonable accommodations.



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Additionally, employees who are pregnant may be entitled to accommodations under the Pregnancy Discrimination Act, the ADA (if there is a related medical condition caused by the pregnancy), or state and local law.

If an employee seeks an exemption from a vaccine mandate due to a disability or sincerely held religious belief, employers must engage in an interactive process to determine the nature of the request.

The employer then must assess what, if any, reasonable accommodations exist that could adequately neutralize the risk of COVID-19 without creating an undue hardship for the employer.

For disability-related requests for reasonable accommodation, employers may request substantiating documentation from the employee's doctor.

A sincerely held religious belief is protected under Title VII even if the religion is not traditional or organized, and even if it is not known or espoused by many, so long as the belief is sincerely held.

However, political opinions or philosophical objections are not religious beliefs, and do not entitle a worker to accommodation.

During the interactive process, employers can ask questions to assess the nature and sincerity of the employee's religious belief, such as when the belief was first embraced and examples of how the employee has adhered to the belief in the past.

Letters from a religious leader, as well as materials that describe the belief and explain how it conflicts with the employer's vaccination policy, can also support an accommodation request.

While some employers may wish to provide accommodations for other reasons, such as family planning concerns, if an employee who does not fall within the purview of the ADA or Title VII's protections refuses to follow a mandatory workplace vaccination policy, the employer need not accommodate the request, and may terminate their employment.

Once an employer confirms that an employee has a qualifying disability or sincerely held religious belief, the employer must engage in the interactive process to determine if a reasonable accommodation can be provided without creating an undue hardship or posing a direct threat to the health or safety of either the employee or others.

The standard for undue hardship under Title VII is different from that under the ADA;^[4] however, state and local laws may impose a stricter undue hardship standard for religious accommodations than under federal law.

Some examples of reasonable accommodations include masking in office, strict social distancing, periodic COVID-19 tests and teleworking.

Collecting and Storing Vaccination Status Documentation

The ADA restricts when and how much medical information an employer may obtain from job applicants or employees.

However, the EEOC's May guidance notes that simply asking a job applicant or employee if they've been vaccinated, or requesting proof of vaccination, is not a disability-related inquiry under the ADA. This is because it is not likely to elicit information about a disability, as there are a number of reasons why an employee may not be vaccinated.

Employers must be mindful of follow-up questions, which may run the risk of eliciting information about a disability.

Although employers may request proof of vaccination, they must take precautions when storing this information.

The ADA requires that all medical information about employees be stored separately from their personnel files, limiting access to this confidential information.

An employer may store medical information related to COVID-19 in existing medical files.

If electronic storage is used, files should be secure and separate, with limited access.

Employers can verify an employee's vaccination status by requesting copies of, or asking to see, vaccination cards or digital passports. They may also ask for signed affirmations or use the honor system, wherein employees need not provide proof.

Some state laws have restrictions on whether an employer may discipline an employee for failing to produce proof of vaccination.

Job Applicants and New Hires

Employers that require new hires to be vaccinated should be mindful of when during the hiring process they request vaccination-related information, and when they ask certain questions as part of the accommodation process, due to the ADA's prohibition on asking disability-related questions pre-offer.

One way to approach this could be to ask applicants if they are vaccinated pre-offer, and if they say no, the employer can ask whether the reason is medical, religious or something else.

If it is confirmed that the reason is not medical or religious, the employer need not continue with the hire.

If the reason is a religious belief, the employer can ask additional questions to ascertain if the job can be performed by the applicant with an accommodation that requires no more than a de minimis cost.

If the reason is disability-related, however, employers may make disability-related inquiries so long as they do so for all entering employees in the same job category, and do so only after the applicant receives a conditional offer.

It is during this post-offer, preemployment phase that employers should engage in the interactive process. They may ask the prospective employee for evidence supporting the need for accommodation, such as a doctor's note.

If an employer implements a mandatory vaccination policy, this condition of employment should be clearly stated in the job advertisement and offer letter.

Special Considerations Based on Your Workforce

Organizations will need to consider interesting challenges in connection with vaccine mandates due to diverse workspaces and exposure to the public.

Corporate Versus Public-Facing Employees

Many employers are considering a bifurcated approach to their vaccine policies based on whether the employees are public-facing or not.

Even if an employer implements a mandatory vaccine policy for all its employees, reasonable accommodations may look different for corporate versus public-facing employees due to varying risk levels.

While corporate employees tend to work in private office spaces, public-facing retail employees, for example, interact with the public and generally work in open spaces.

Accommodations for public-facing employees who are unable to be vaccinated due to disability or religious reasons are less likely to be reasonable.

This is because practical accommodations, like teleworking or working from a private office space, are often not possible for those roles.

Employers may also decide that regular testing as an accommodation may pose a direct threat to the public and to other employees due to the high risk of transmission in between tests.

It is important to keep in mind that even where a reasonable accommodation might not exist to allow an employee to continue working at this immediate time, leave may be an accommodation as a temporary measure.

Employee Policy Versus Policies for the Public

Employers that are also places of public accommodation are also grappling with whether to and how to implement vaccination requirements for customers. Some states, including Florida and Texas have banned so-called vaccine passports, or have prohibited private companies from requesting proof of vaccination from customers.

These vaccine passport bans do not apply to private employers with respect to their employees, and several of the bans are currently being challenged in court.

Generally, businesses are precluded from adopting eligibility or screening criteria that have a tendency to exclude someone that has a disability.

However, businesses are allowed to do so in the rare instance when such rules are necessary for the business to operate safely in providing its goods and services.

To be legitimate, the safety concerns must be based on actual risks, grounded in science — such as those stated by the CDC or the World Health Organization — and not based on stereotypes or speculation about those with disabilities.

Accommodations for customers that cannot receive a vaccine due to disability or sincerely

held religious beliefs might include curbside pickup, free shipping, or white-glove service, where the customer comes into the store after hours or an employee shops for them virtually.

Additionally, any requests for proof of vaccination should be done in a manner that respects the privacy of such information, and that is accessible to individuals with disabilities

Based on analogies to existing areas of accessibility law, we do not advise businesses ask customers for any underlying medical information or proof about the reasons why they cannot receive a vaccination.

Note that some cities, including New York and San Francisco, issued orders that require certain entities to mandate vaccination and impose a duty on businesses to confirm that employees and patrons are vaccinated.

Contractors, Consultants and Vendors

Employers must exercise caution when inquiring about the vaccination status of contractors, consultants and vendors.

Although it may seem counterintuitive to allow potentially unvaccinated individuals into a vaccine-only workplace, exercising too much control over these individuals could trigger joint employer issues, especially in jurisdictions that have wage and hour laws that strictly enforce employee misclassification protections.

If a business requires all contractors, consultants and vendors to receive a vaccine, and a worker is fired by their direct employer for refusing, the employer requiring the vaccination could be liable.

Note also that jurisdictions such as New York state and New York City protect contractors and vendors from workplace discrimination. This could be interpreted to include a requirement to accommodate.

Thus, employers should be mindful that contractors, consultants and vendors may require workplace accommodation.

Next Steps

After considering the relevant implications — depending on factors such as industry, location, workforce and workplace conditions in general — employers seeking to protect employees and others through a mandatory vaccination policy should establish a written policy, including a process for seeking exemption and accommodation.

Any applicable contracts or collective bargaining agreements should also be considered.

Consequences for failure or refusal to comply should be included.

The policy should be communicated and applied consistently.

Those tasked with managing a vaccination mandate should be trained in how to navigate the ever-changing waters churned by the ongoing COVID-19 storm.

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[1] <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/about-face-coverings.html>.

The CDC and OSHA recommend mask usage in "public indoor settings" even for fully vaccinated individuals in areas of high or substantial transmission, and anywhere if one has come into contact with anyone that has tested positive for COVID-19.

[2] <https://www.osha.gov/coronavirus/safework>.

[3] <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

[4] Under Title VII, the standard is more than a de minimis cost on business operations. The ADA requires a significant showing of difficulty or expense, taking into consideration factors such as the nature of the accommodation, its impact on operations, and the resources of the business (all the way up to the parent company), including the number and location of facilities.