

Vaccines, testing, screening: What can employers require of employees to get back to work?

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Over 27 million Americans have now received at least a first dose of what are proving to be effective COVID-19 vaccines. While this is extraordinarily welcome news, it raises complex questions about who will return to work, when, and how, including the tricky issue of whether employers can require employees to be vaccinated.

Should I require vaccines?

The answer isn't simple. Before getting into the legalities, it's important to note that from a management perspective, mandating vaccinations—i.e. firing people who refuse to be vaccinated—is probably not the best course of action. It's legally tricky, and it also can generate resentment from employees. It is far better to encourage and support optional vaccination than mandate it.

Techniques for doing this effectively range from education and information sessions, to senior management obtaining vaccines themselves as role models, to generous leave policies to make getting vaccinated as easy as possible. If, for some reason, the carrot needs to be replaced by some kind of stick, recent guidance provided by the Equal Employment Opportunity Commission (EEOC) and Occupational Safety and Health Administration (OSHA) shed some light on the legality of mandating vaccines for the workplace.

Agency guidance: What does the law say?

Employers have a legal obligation to keep workplaces safe for their employees, which includes not exposing them to a potentially deadly virus. OSHA, the agency responsible for enforcing this obligation, issued guidelines for maintaining a safe workplace on January 29 recommending that employers:

- encourage face coverings and provide them at no cost;
- make the COVID-19 vaccine available at no cost to all eligible employees;
- provide information and training on the benefits and safety of the vaccinations; and

- continue implementing protective measures, such as physical distancing and face coverings, as employees become vaccinated.

Employers should not treat workers who have received the vaccine differently from those who have not, nor are they allowed to communicate regarding a party's vaccination status to other employees. OSHA also provides detailed guidance for employers to implement a COVID-19 prevention program.

In addition to OSHA, the complex topic of the relationship between employers, employees, and healthcare is regulated by an interlocking, ever-changing matrix of state and federal statutes, including (but not limited to) the Americans with Disabilities Act (ADA); Title VII of the Civil Rights Act of 1964 (Title VII), the Age Discrimination in Employment Act (ADEA) and the Genetic Information Non-Discrimination Act (GINA).

Am I justified in mandating vaccination?

Possibly. If push absolutely comes to shove, employers probably can require employees to be vaccinated, and exclude from the workplace those that refuse, especially where there is a business necessity. However, there are numerous issues and potential loopholes that affect this. Always, always obtain legal counsel before embarking on the process of requiring COVID-19 immunizations.

Compulsory vaccination programs have existed in the past. Healthcare workers have been required to obtain flu vaccines, and hepatitis vaccination in the wastewater treatment industry has also been mandatory. However, these are extremely specific situations. If a workplace is unionized, for example, mandatory vaccination programs may require renegotiation of union contracts. What follows is a very basic overview of a complicated, ever-changing set of questions.

The first and most important legal framework that applies is the Americans with Disabilities Act. Under the ADA, an employer can require that an individual not be direct threat to the health or safety of individuals in the workplace. So far, so good. If you're not vaccinated, you could give your coworkers COVID.

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Exempt Employees: Those with a disability that puts them at risk

That being said, the qualification standard cannot disproportionately affect people with disabilities and reasonable accommodations may be required. Individual employees may opt out of a vaccination program if they have a disability which puts them at risk should they receive the vaccination. An important example of this latter category is employees with compromised immune systems—a disability that makes them susceptible to complications from vaccines. In either situation, to exclude them from the workplace the employer must then show that an unvaccinated employee is 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.”

Proving a “direct threat” requires assessing 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. If someone poses a direct threat at the worksite, the employer can’t take any action, including keeping them away, unless there is no way to provide a reasonable accommodation without “undue hardship” for the employer.

Courts have defined “undue hardship” under as having more than a de minimis (minimal) cost or burden on the employer. In the case of COVID, “reasonable accommodation” usually means setting employees up to work remotely or in another isolated scenario. Interestingly, this definition is shifting as well. Thanks to the pandemic, millions of people are now effectively working from home, with no disruption. Consequently, it’s become increasingly difficult for employers to claim that remote work isn’t feasible. Two years ago, courts tended to side with employers—that’s less and less the case.

Exempt Employees: Those with a sincerely held religious belief

Another situation in which a mandatory vaccination program can be a problem is if an employee has a sincerely held religious belief that prohibits inoculation under Title VII of the Civil Rights Act of 1964. Notably, an employee’s moral or ethical concerns regarding the efficacy of the vaccine do not constitute a sincerely held religious belief under this Act. If an employee does harbor a sincerely held religious belief that prevents them from getting vaccinated, again, the employer has to provide a reasonable accommodation under this Act’s “undue hardship” standard.

Final Answer: You can mandate vaccines, but try not to.

If an employee cannot be vaccinated for COVID-19 because of a disability or sincerely held religious belief, and there is no reasonable accommodation possible, then it would theoretically be lawful for the employer to exclude them from the workplace. Technically that employee is “at will,” there is no discriminatory intent present, and they can be terminated for being unable to perform what their job requires.

Again, however, doing this should be an absolute last resort. The employee may be eligible for leave, for example, under the Family and Medical Leave Act (FMLA), the Families First Coronavirus Response Act, or under the employer’s policies. While terminating an employee who refuses to be vaccinated may be technically possible, it should only be done with great care, and after consultation with counsel.

What about testing and screening?

As a final note, supplies of the vaccine are very low and it will likely take some time before most of the public has an opportunity to receive it. If your employees plan on returning to the workplace prior to receiving a vaccination, you should avoid requiring employees to present a negative test before returning to the workplace. This may rise to the level of an improper medical examination under the ADA.

As an alternative, under EEOC guidelines employers do have the right to ask basic pre-screening questions from their employees to determine if they have been exposed, and take their temperatures. If you choose to screen employees, it is recommended that you designate a third party vendor or a single

person within the human resources department to carry out these tasks and maintain all health information obtained confidentially.

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