

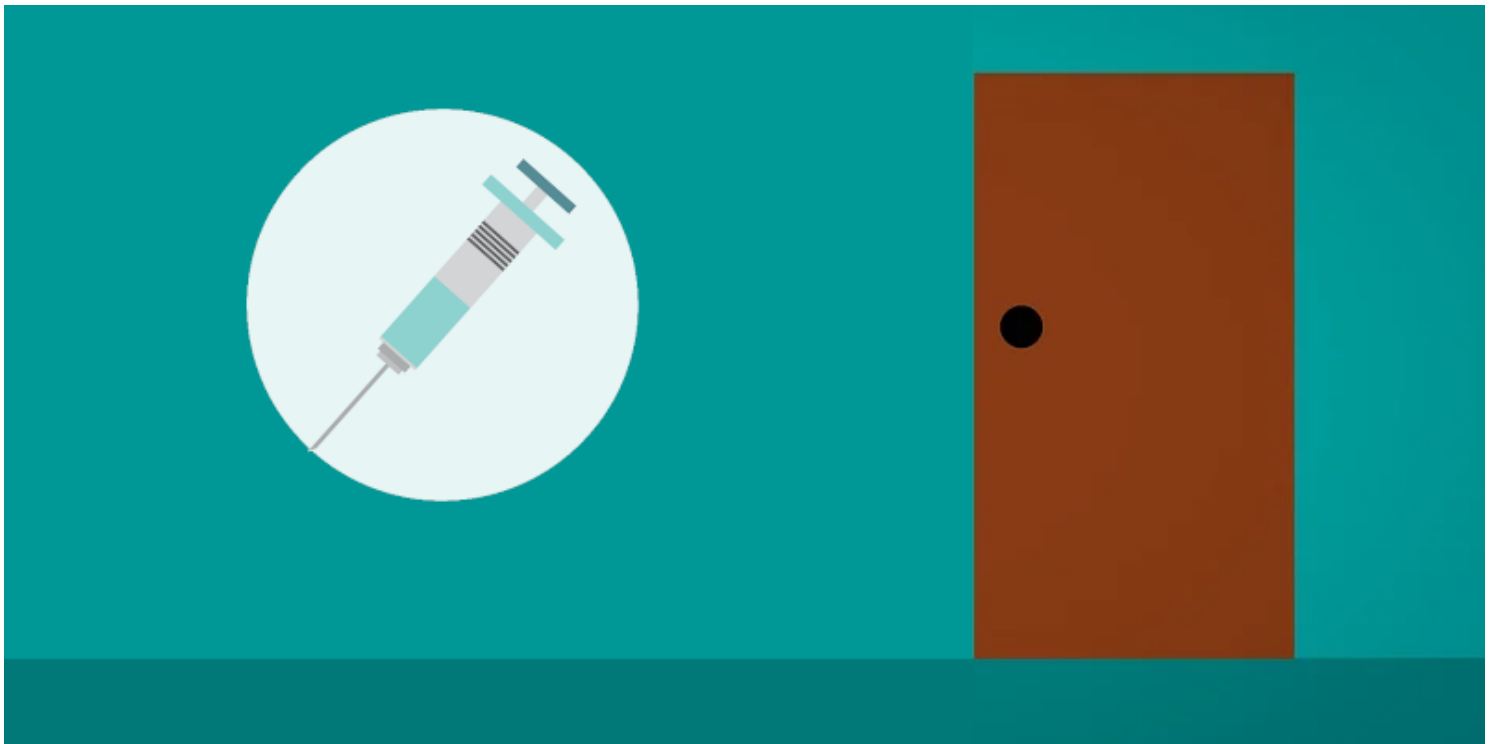
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Safety Law Matters

A blog focused on OSHA and MSHA compliance in the workplace

Can you require your employees to get vaccinated when a COVID-19 vaccine becomes available?



By Avi Meyerstein on August 20, 2020

by Sydney Buckley

With scientists worldwide racing to develop a COVID-19 vaccine, many employers are asking if they can require employees to be vaccinated. As with everything COVID-19, there are

many open questions, but here are some of the major legal issues in considering mandatory vaccination policies.

Past (and future) EEOC guidance may be key

The EEOC has not yet weighed in on this question specifically for COVID-19, but in 2009 the agency released a **technical-assistance publication** asserting that under the Americans with Disabilities Act (ADA) and Title VII, employers cannot impose mandatory vaccination requirements on employees who qualify for certain exemptions, such as employees with certain medical conditions or religious beliefs, even in the midst of a pandemic.

Although the EEOC guide was updated in March 2020 for COVID-19, the vaccination guidance remains the same (as of August 20, 2020). Of course, the actual emergence of a COVID-19 vaccine could change that. Employers should check this guidance for further updates once a COVID-19 vaccine emerges.

Most mandatory vaccination programs are implemented in the healthcare industry. However, given COVID-19's highly contagious nature and community transmission, other types of employers—especially those with significant workplace risks of transmission—may also be successful in implementing vaccination programs, provided that adequate exemptions under federal law are in place. That said, the unique challenges of COVID-19 may test the limits of these exemptions.

Even employees with medical conditions may not be exempt if they would present a direct threat at work

The ADA prohibits discrimination on the basis of disability, and prevents employers from excluding disabled individuals from the workplace for health or safety reasons unless they pose a “direct threat” (*i.e.*, significant risk of substantial harm even with reasonable accommodation). Employers must offer accommodations to disabled individuals unless the accommodation would impose undue hardship, or a significant difficulty or expense, on the employer.

One of the March 2020 updates to the EEOC's guide states that the COVID-19 pandemic meets the ADA's “direct threat standard,” meaning that an employee with COVID-19 poses a “significant risk of substantial harm” in the workplace. This allows employers to conduct certain tests the ADA would usually forbid, such as the now common practice of monitoring

temperatures. It could also mean that the exemption may not apply to a vaccination program.

Religious exemptions also may not apply if accommodating them will require more than de minimis cost

Under Title VII, an employer must seek an accommodation for an objecting employee with a sincerely held religious belief. If the cost to the employer of providing an accommodation is more than “de minimis” (*i.e.*, imposes more than a minimal cost), the employer can enforce the vaccination mandate. The costs to the employer can be economic or non-economic, and include problems like increased safety or legal liability risks.

Considering the severity of the COVID-19 pandemic, it is possible that an employee’s refusal to receive a COVID-19 vaccine would impose more than a minimal cost on the employer. In particular, at least **one court has found** previously that hospitals are not required to accommodate religious objections from employees that have frequent patient contact because this would impose more than a minimal cost. Under similar reasoning, in the COVID-19 context courts might not require employers to provide religious exemptions in some situations, such as for hospital employees with direct patient contact.

Other exemptions may be tested by the pandemic, too

Aside from medical and religious exemptions, in the past employees have tried—with less success—other grounds for avoiding mandatory vaccination programs. For example, those with ethical objections (apart from religious beliefs) have only sometimes been found to be exempt. Such claims may be even less likely to succeed with COVID-19 because of the clear need to protect workplace health.

Likewise, fear has never been a recognized objection in the past. Of course, some may claim that a rapidly-developed COVID-19 vaccine presents a different and more dangerous situation, depending on the vaccine’s demonstrated safety and efficacy and the severity of its potential side effects.

Other complicating factors to consider with a vaccination policy

- Unionized workplaces: Many unions have taken a position on implementing mandatory vaccination policies, and some collective bargaining agreements may not allow such

policies without union consent.

- Age Discrimination in Employment Act (ADEA): Advanced age itself cannot be the basis for excluding an employee from the workplace. The EEOC's June 2020 **technical-assistance guide** maintains that the ADEA would prohibit an "employer from involuntarily excluding an individual from the workplace based on his or her being 65 or older, even if the employer acted for benevolent reasons such as protecting the employee due to higher risk of severe illness from COVID-19."
- Potential liability for not mandating vaccination: Before the pandemic, there were no cases of a patient or employee successfully suing after contracting the flu from an unvaccinated employee. However, when a COVID-19 vaccine becomes available, employers may face liability if they fail to implement legally adequate precautions to prevent other employees or visitors from becoming infected.
- Workers' compensation claims: Employees suffering allergic reactions or other adverse side effects to mandatory vaccinations could lead to workers' compensation claims.
- Employee refusal to Work: Under federal law, employees can refuse to work in good faith under certain circumstances involving a reasonable belief of real danger of death or serious injury and the employer has refused to mitigate the danger.

Possible alternatives to vaccination

If mandatory vaccination is not feasible at your worksite for some or all of your employees, there are still other important strategies to keep people healthy as part of your COVID-19 response protocols, including:

- Mandatory mask use: Wearing a mask in lieu of vaccination has long been an accommodation for objecting employees.
- Reassignment: Employers have flexibility to reassign unvaccinated employees. But, employers should avoid changing employment conditions in a way that would seem like a punishment or demotion.
- Antibody testing: Currently, the **EEOC does not allow antibody testing** before returning to work because **CDC and other experts** still do not know the extent to which antibodies indicate future immunity. Of course, scientific knowledge and guidance may change in the future.
- Expanding teleworking programs: Working from home will likely continue to be a leading alternative for employees whose jobs do not require their physical presence.

More questions?

Have more questions about your COVID-19 policies and keeping employees healthy? Please contact your Husch Blackwell attorney, **Julianne Story**, or **Avi Meyerstein**.

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