

Expert Q&A: COVID-19 Vaccine and Employment

by Practical Law Labor & Employment

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An Expert Q&A with Richard Warren of Miller, Canfield, Paddock, and Stone, PLC on what employers need to know about the 2019 novel coronavirus (COVID-19) vaccine and the workplace. The Q&A includes a discussion of practical considerations, risks and rewards of a mandatory vaccination program, Equal Employment Opportunity Commission (EEOC) guidance, wage and hour issues, accommodation questions, and more.

December 2020 saw the beginning of the US distribution of vaccines that should start to turn the tide on the **2019 novel coronavirus** (COVID-19) pandemic. As of this writing, the US **Food and Drug Administration** (FDA) has granted Emergency Use Authorization for both the Pfizer/BioNTech and Moderna COVID-19 vaccine candidates, and additional vaccine approvals may be forthcoming. For more information on emergency use authorization, see the FDA's [Emergency Use Authorization for Vaccines Explained](#).

Although doses are limited and distribution will roll out slowly, employers are looking ahead to wider availability and assessing their legal obligations and rights. The key issues concern safety measures, implementation, and accommodation on the basis of disability or religion (see [Article, Expert Q&A: COVID-19 and Employee Return to Work Issues: What if an employee refuses to wear a face mask or comply with other safety measures implemented ...](#)). However, heightened concerns, politicization of the issue, and more vocal objections make these issues more pressing in the vaccine context. In addition, on December 16, 2020, the **Equal Employment Opportunity Commission** (EEOC) issued [EEOC Issues Updated Covid-19 Technical Assistance Publication](#), offering employers specific vaccine guidance.

To help employers understand these challenges, Practical Law reached out to Richard Warren of Miller, Canfield, Paddock, and Stone PLC for his thoughts on the COVID-19 vaccine and the US workplace. Richard is a Principal in the Employment and Labor Group and one of its Deputy Group Leaders. Richard represents management in labor relations and employment litigation, and in training, counseling and advising human resource departments and corporate management. He has been actively advising clients on COVID-19 employment-related issues and the vaccine during the recent outbreak.

Can employers lawfully mandate employees to get vaccinated?

Yes, but employers must recognize and comply with their duty to reasonably accommodate an employee's disability or sincerely held religious belief. Guidance from the EEOC suggests that a mandatory vaccination program is lawful. As is true in the context of other safety measures, such as required face masks, employees may have legitimate objections based on disability or religion (see [Even if a mandatory vaccine program is lawful, is it sensible? What are the risks?](#))

Although the case law on mandatory vaccinations comes largely from the healthcare field and from the public sphere, there is a US Supreme Court decision recognizing the power of states to place the good of the public over personal liberties in the context of vaccine mandates (*Jacobson v. Massachusetts*, 197 US 11 (1905)). Although the case dates back to 1905, a recent district court case noted that it “remains alive and well - including during the present pandemic.” (*Page v. Cuomo*, No. 1:20-CV-732, , at *8 (N.D.N.Y. Aug. 11, 2020) (internal citation omitted) (on appeal)). The private sector mandates will not be adjudicated against

the same standard, but it is helpful for context to note that mandatory vaccine programs have been enforced despite civil liberties challenges.

Finally, the **Occupational Safety and Health Act** (OSH Act) creates a **general duty clause**, under which employers must keep the workplace free of recognized hazards likely to cause death or serious physical harm to employees (29 U.S.C. § 654(a)(1)). Although there is no current safety standard specific to COVID-19 vaccination, the **Occupational Safety and Health Administration** (OSHA) recommends that employees get the seasonal flu vaccine to prevent the spread of disease in its [Worker Guidance Precautions for All Workers during Flu Season](#). OSHA will likely issue additional guidance on COVID-19 vaccination in the future.

Note that more stringent or different rules may apply to employers in the healthcare industry, and those are not contemplated in this assessment.

Even if a mandatory vaccine program is lawful, is it sensible? What are the risks?

Compulsory vaccine programs have both costs and benefits. Smart employers will consider both, and the risks identified below, before deciding whether to require employee vaccination.

Disability Accommodation

The **Americans with Disabilities Act** (ADA) requires employers to provide reasonable accommodations to qualified employees with a covered disability. Employers can avoid this obligation if they can demonstrate that the accommodation obligation creates an **undue hardship**. Particularly because the COVID-19 vaccines were developed on an expedited schedule and approved on an emergency basis, public concerns about their safety are likely to be heightened.

In general, once an employer has been made aware of a physical or mental limitation of a qualified individual, the employer should engage in the interactive process to determine whether a reasonable accommodation to overcome those limitations is possible (29 C.F.R. § 1630.2(o)(3)). For more information on disability accommodation, see [Practice Note, Disability Accommodation Under the ADA](#).

The COVID-19 era may present challenges without precedent, but there have been lawsuits over mandatory vaccination in the private sector before. Of primary concern to courts adjudicating these questions is what sorts of disabling conditions prompt an accommodation obligation? The Eighth Circuit rejected a claim that sensitivities to chemicals or allergies would suffice to trigger an accommodation obligation on a vaccine mandate (*Hustvet v. Allina Health Sys.*, 910 F.3d 399 (8th Cir. 2018)). On the other end of the spectrum, the Third Circuit reversed a lower court's dismissal of an accommodation claim citing severe anxiety and eosinophilic esophagitis as disabling conditions necessitating exemption from compulsory vaccination (*Ruggiero v. Mount Nittany Med. Ctr.*, 736 F. App'x 35, 36 (3d Cir. 2018)).

These challenges sought the specific accommodation of exemption from a vaccine requirement in the healthcare setting, but reasonable accommodation does not mean that the employee must get precisely what they want. The accommodation does not have to be that an employee can come back to work with unfettered access to the workplace or indefinite remote work. Instead, employers can explore creative solutions involving enhanced personal protective equipment or work spaces away from others.

Religious Accommodation

Title VII of the Civil Rights Act of 1964 (Title VII) creates another obligation for employers in setting the standard for vaccination requirements. Title VII requires the reasonable accommodation of an employee or applicant's sincerely held religious belief absent undue hardship. Although the term "undue hardship" is the same under the ADA and Title VII, the standards are different. Under Title VII, an undue hardship is one that poses more than a de minimis cost on business operations. For more information on religious accommodation, see [Practice Note, Religious Discrimination and Accommodation Under Title VII](#).

Although the standard for undue hardship is less rigorous for employers to meet under Title VII than under the ADA, the standard for "sincerely held religious belief" is a trickier territory. Simple preferences fall short of creating legal protections, but courts come to very different conclusions about what constitutes a sufficient religious belief to meet the standard. For example, the Third Circuit ruled against the employee in a case involving a vaccination objection. The court found that the plaintiffs held a sincere stance against vaccination, but not the requisite religious belief underpinning it (*Brown v. Children's Hosp. of Philadelphia*, 794 F. App'x 226, 227 (3d Cir. 2020), citing *Fallon v. Mercy Catholic Med. Ctr. of SE Penn.*, 877 F.3d 487, 492 (3d Cir. 2017)). Conversely, at least one court found it "plausible" that veganism created the foundation of a legitimate sincerely held religious belief and basis for accommodation (*Chenzira v. Cincinnati Children's Hosp. Med. Ctr.*, No. 1:11-CV-00917, , at *4 (S.D. Ohio Dec. 27, 2012)). Given that veganism passed muster in at least one instance, it is difficult to say for certain what other religious beliefs may suffice to create an accommodation obligation.

Vaccinations and Their Relationship to Medical Examinations under the ADA

Although the ADA prohibits disability-related inquiries during certain phases of the employment relationship, the EEOC's vaccination guidance confirms that requiring an employee to take a vaccination is not a medical exam because it does not seek information about an employee's impairments or current health status. However, an employer's use of pre-screening questions that ask an employee to disclose whether the employee has been vaccinated might cause an employee to reveal information about a disability. Given this, the employer should be prepared to demonstrate that the questions are job-related and consistent with business necessity. The EEOC, in this context, defines business-related as a basis to believe that if the employee does not receive the vaccine, the employee will pose a direct threat to the safety of other employees or him or herself.

GINA Questions

The **Genetic Information Nondiscrimination Act** (GINA) prohibits discrimination on the basis of genetic information. Although [EEOC guidance](#) makes clear that vaccination alone does not violate GINA, the sorts of questions employers may ask in support of a vaccination program might implicate protections under GINA. To avoid running afoul of GINA, employers should strongly consider outsourcing any questions regarding family history or other genetic indicators to a third party medical provider. For more information about GINA, see [Practice Note, Discrimination Under GINA: Basics](#).

Wage & Hour Considerations

Employers who require employees to become vaccinated must also correctly identify whether the time spent receiving the vaccination is compensable work time. Under [29 CFR 785.43](#), time spent by an employee waiting for or receiving medical attention on the premises or at the direction of the employer during the employee's regular work hours on days when the employee is normally working is compensable work time. Given this, time spent by an employee waiting for and receiving a vaccine, during regular work hours, is compensable work time. For more information on the wage and hour implications of COVID-19, see [Article, COVID-19 Wage and Hour FAQs](#)

Traditional Labor Considerations

Unionized employers should also be mindful that **collective bargaining agreements** (CBAs) may create additional obligations to pay for lost work time under some circumstances. For more information about the interplay between COVID-19 and a unionized workforce, see [Article, Employer Responses to COVID-19 and the NLRA](#).

Workers' Compensation Considerations

Employers that decide to bring in a third party medical provider to administer vaccinations to employees in the workplace, or employers who administer the vaccinations in the workplace themselves, should take care to first consult with their workers compensation insurance carrier to determine whether alleged injuries resulting from the vaccination will trigger workers compensation insurance coverage.

Can employers ban employees from entering the workplace if they refuse to take the vaccine?

Yes. The [EEOC guidance](#) directly addresses this question, stating that if an employer cannot reasonably accommodate an employee who refuses a vaccine due to a sincerely held religious belief or a disability, then excluding the employee from the workplace is permissible. However, the EEOC guidance cautions employers that immediate termination may not be permissible.

Do employers still need to require safety measures, such as social distancing and face masks, once the on-site workforce has been fully inoculated?

Yes. Employers that require mandatory vaccinations are not automatically excluded from complying with state laws issued by safety and health agencies, departments of health and each state's legislature. For more information on these requirements, see [Practice Note, COVID-19: Employment Law and Development Tracker](#).

Practical Implementation Considerations

Employers that implement mandatory vaccination programs must be prepared to address employee concerns about the effectiveness and safety of the vaccine. Some employees may oppose the vaccine on principal, while others may simply request additional information. Employers should address those concerns by drafting policies that address the requirement of the vaccine, explain why it is required, and provide employees with an avenue and forum to address those concerns. Further, some customers and vendors may express a business preference for mandatory vaccination, if the employer's workers are anticipated to come into contact with employees of those customers and vendors. Finally, third parties who come onto the employer's worksite may attempt to allege and prove negligence claims if the employer does not require vaccines and that third party is injured as a result.