



The COVID-19 Vaccine Is Here - Can Employers Mandate Immunization?

By: Edward S. Schenk III & Rebecca E. Ivey

12.21.2020

COVID-19 vaccines are finally here. The rollout has begun in healthcare settings across the nation. However, despite broad support for the vaccines and their near-universal endorsement by the medical community, many individuals have concerns about being vaccinated for a variety of personal, medical or religious reasons. If employers mandate vaccination, there may be significant numbers of workers across the country who will object. What is an employer to do?

On December 16, 2020, the Equal Employment Opportunity Commission (EEOC) issued much-anticipated updated **COVID-19 Technical Assistance** (See Section K.), which provides guidance specific to COVID-19 mandatory vaccination programs. The good news for employers? The updated guidance is consistent with the EEOC's past advice, as well as the guidance of other regulatory agencies, including the Centers for Disease Control and Prevention (CDC), and countless health care advocacy groups and professional associations, which strongly endorse vaccination. What makes the current issue distinguishable from all other mandatory vaccination programs (which have been approved by courts across the country) is that this appears to be the first time in our nation's history where an employer-mandated immunization would implicate a vaccine that was approved under the FDA's "emergency use authorization" (EUA), rather than full-fledged FDA approval. While there is no indication that mandatory immunization using EUA vaccines will be viewed differently by courts than traditionally approved FDA vaccines, the issue appears to be one of first impression. If (or when) any of the vaccines receives full FDA approval, then the novelty of EUA vaccines will disappear, and employers can rely on the well-settled body of court cases that have upheld use of mandatory vaccination programs.

Background on Employer-Mandated Vaccination Programs

The primary federal employment laws that are implicated when considering mandatory vaccination programs are (1) Title VII of the Civil Rights Act of 1964 (Title VII) (i.e., vaccination abstention based on religious grounds), (2) the Americans with Disabilities Act (i.e., vaccination abstention based on disability-related reasonable accommodation requests) and (3) OSHA.

For several years, various highly regarded medical organizations have advocated for mandatory annual influenza immunizations for health care workers. They include the CDC, the American Academy of Family Physicians, the American Hospital Association, the Society for Healthcare Epidemiology of America, the Infectious Diseases Society of America, the Pediatric Infectious Diseases Society, the Association for Professionals in Infection Control and Epidemiology Inc. and the American Public Health Association.

The EEOC and OSHA previously interpreted mandatory flu vaccinations as a permissible mandate by employers with certain conditions. In response to the 2009 H1N1 "swine flu" pandemic, the EEOC's Pandemic Preparedness for the Workplace guidance advised that, absent a state or local law to the contrary (which should be assessed in every state in which an employer operates), employers may require employees to get vaccinated from the flu. That said, the EEOC emphasized that "even during a pandemic" employers are obligated to consider accommodation requests from employees whose disabilities or religious beliefs prevent them from getting a vaccination. The OSHA guidance similarly allows employers to mandate such vaccinations for employees, but it provides an exception based on OSHA's whistleblower provisions for any employee who refuses a flu vaccine 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).

Long prior to the adoption of many federal employment laws, in 1905, the Supreme Court of the United States upheld Massachusetts' decision to mandate the vaccination of all citizens in response to the smallpox epidemic. See *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905). In the years since, several courts—state and federal—have upheld mandatory influenza vaccine programs in the health care setting and in the context of assisted living facilities, even when the employee objected to the vaccination under state or federal employment law.

Mandating the COVID-19 Vaccine

While the EEOC and the CDC have not specifically stated that employers may mandate vaccination, there are indicators that such a mandate would be legally permissible. Most importantly, the EEOC has confirmed that COVID-19 meets the "direct threat" definition under the ADA in many cases. Therefore, if the employer can show that, based on the unique circumstances of the work environment, a failure to be vaccinated would pose a "direct threat" to the health or safety of other co-workers or third parties with whom they interact, there would appear to be support for upholding mandatory vaccination programs.

The EEOC has now confirmed, in its guidance specific to COVID-19 vaccination, that the ADA allows an employer to have a qualification standard that includes "a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace," such as a vaccination

requirement. However, if this requirement screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat due to 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. The EEOC continues to require employers to conduct an individualized assessment to determine whether a direct threat exists, and has identified the following four factors to consider: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.

Importantly, the EEOC has also clarified that a direct threat **would include a determination that an unvaccinated individual will expose others to the virus at the worksite**

This is not the end of the analysis, however. If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer must then determine whether it can provide a reasonable accommodation (an accommodation that does not cause undue hardship to the employer) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat. The employer cannot exclude the employee from the workplace or take any other action unless the interactive process of finding a reasonable accommodation that eliminates the direct threat fails. The EEOC lists accommodations that may eliminate the direct threat, including remote work or leave under the Families First Coronavirus Response Act (FFCRA), the Family and Medical Leave Act (FMLA), or their employer's paid time off policies, among others. As of today, the FFCRA will still sunset on December 31, 2020, though Congress could act to extend or augment its protections.

Otherwise, below are examples of common questions and issues that employers are facing when addressing mandatory vaccination programs.

Frequently Asked Questions

If an employer is an essential business? can it require that all employees be vaccinated?

No, not automatically across the board. While an employer can establish a vaccination requirement, that mandate must allow for exemptions consistent with the requirements of federal law. Regardless of whether an individual employee is characterized as a critical infrastructure worker or an essential critical worker by the CDC, the Americans with Disabilities Act, the Rehabilitation Act (which applies to government contractors and provides the same requirements as the ADA), OSHA and Title VII still apply to the employer. In other words, being an essential business does not excuse the employer's obligations to comply with state and federal employment laws when considering mandatory vaccine programs.

For example, even if there is an employer mandate, as an individual employee may have a disability (as defined by the ADA) that makes the vaccine dangerous to him or her, under the ADA employers may have to reasonably accommodate such employees who cannot take the vaccine. If so, and if an employee provides documentation of the need for a reasonable accommodation, the employer will have to enter into the interactive reasonable accommodation process with that employee to ascertain if the requested accommodation is reasonable or the accommodation cannot occur because the employee

poses a direct threat to himself or herself or others. The same interactive discussion should occur with any employee who objects to the vaccine for religious reasons.

Also, as the population increasingly becomes vaccinated and herd immunity is achieved, it is possible that an employer's ability to successfully argue unvaccinated workers pose a direct threat will be diminished, because it is anticipated that a large majority of Americans will take the vaccination.

But what about healthcare providers? How can we ensure our patients' safety without mandating that our employees get vaccinated?

The nuances of different employment environments, including the nature and frequency of employees' interactions with patients, vendors, suppliers, customers and other third parties, are key factors in determining what constitutes a direct threat, but the ADA, OSHA, and Title VII will still apply. There are strong arguments that unvaccinated staff in most healthcare environments will pose a direct threat, particularly to patients who are later in the vaccination rollout but are still within vulnerable populations, but employers should undergo the four-factor assessment described above and consult legal counsel as necessary to promote compliance with the law.

What about encouraging vaccine use as part of a wellness program?

This is a popular option under discussion with many employers. For those that have wellness incentive programs in place, adding the vaccine to the wellness program may be a simple means of incentivizing use. The EEOC's previous attacks on wellness programs have largely been rolled back, but all employers should consider consulting with legal counsel before including the COVID-19 vaccine in their wellness incentive programs.

If exemptions have to be allowed, what are they?

As set forth above, even if you are permitted to mandate vaccination, you will still have the obligation to determine whether reasonable accommodations must be made to individuals with a qualified disability under the ADA or the Rehabilitation Act, who under Title VII have sincerely-held religious beliefs against vaccination. If employers are allowed to mandate and an individual does not have a disability that would keep him or her from taking the vaccine, then a person who is simply an anti-vaxxer without a sincerely-held religious belief will likely have to take the vaccine as a condition of employment.

What documentation can be required for any exemption?

Absent a change in the ADA's standards as to medical disabilities, as with most disability-related accommodation requests, employers should be able to require documentation from a qualified health care provider that specifies the medical, disability-related reasons why an employee cannot take the vaccine. In the case of a religious accommodation, there should also be an interactive process with the employee. Ordinarily, for religious accommodation requests, employers may ask the employee to identify (1) the sincerely held religious belief upon which he or she relies to object to the vaccine; and (2) why or how that religious belief is negatively impacted by the vaccine.

If an exemption is invoked and the employee contracts COVID, must an employer hold the employee's position until they are fully recovered?

The Family Medical Leave Act (FMLA), which applies to all employers who have more than 50 employees, will mandate that any eligible employees who have a "serious medical condition" (temporary or permanent) be provided with unpaid, job-protected leave for up to 12 weeks and that he or she be returned to the same or an equivalent job position once he or she has been released to return to work at the end of the FMLA leave. Job protection rights are also currently available under the Families First Coronavirus Response Act (FFCRA), but this law is set to expire on December 31, 2020. Commentators are waiting to see if Congress or the President by executive order extends the FFCRA into the new year for an additional period of time. In addition, absent FMLA coverage, unpaid, job-protected leave can be a reasonable accommodation under the ADA if the COVID-related illness constitutes a "disability." The EEOC has yet to state whether contracting COVID-19 in and of itself constitutes a "disability" (even if only temporarily). The answer to that question will likely be a fact-specific inquiry based on how an individual's unique symptom presentation impacted his or her ability to perform daily life activities and the essential functions of the job.

What about unionized workforces?

No matter what actions regulators, legislators, governors or the President take, any employer with an organized workforce should consult its collective bargaining agreements and consult with legal counsel prior to mandating a COVID-19 vaccination.

Conclusion

Pending additional action by regulators, state or federal legislatures, governors or the President, employers should be able to require employees to receive vaccinations when available, subject to the regulations and guidance identified by the EEOC and OSHA (i.e., by following the same rules for health care employer mandatory influenza vaccination programs, augmented by COVID-specific advice). Given the important nuances of these issues and the complexity of potentially overlapping state and federal employment laws, employers are encouraged to consult with their legal counsel prior to instituting a mandatory or incentivized vaccination program.

Related People

- Rebecca E. Ivey ? 804.420.6334 ? rivey@williamsmullen.com
- Edward S. Schenk III ? 919.981.4303 ? eschenk@williamsmullen.com

Related Services

- Labor, Employment & Immigration
- Health Care