



# The Pros and Cons of Mandatory COVID-19 Vaccinations in the Workplace: Practical Considerations for Employers

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# May an Employer Require COVID-19 Vaccinations?

- Yes, an employer may require all employees to be vaccinated as a condition of employment
- Two important exceptions
  - Disability
  - *Sincerely* held religious belief or practice
- Duty to accommodate subject to undue hardship
- Proof of vaccination is permitted, but the inquiry must be limited
- Emergency Use Authorization status likely does not affect the permissibility of mandatory vaccination policies
  - EEOC vs. FDA
  - *Bridges v. Houston Methodist Hospital*, 21-CV-1774 (S.D. Tx. Jun. 12, 2021) (dismissing unlawful termination claims by employee who refused vaccination)



# Crafting a Mandatory COVID-19 Vaccination Policy

- Elements of the Policy:
  - Explain the purpose of the policy, *i.e.*, an additional health and safety measure
  - Identify employees required to comply
  - Specify the date by which employees must be *fully* vaccinated
  - Identify the point of contact to whom employees should provide proof of vaccination
    - Copy of the vaccination card
    - Do **not** maintain proof of vaccination in the personnel file
  - Explain that accommodations may be made due to a sincerely held religious belief or due to disability
    - Identify the point of contact responsible for receiving accommodation requests
  - Provide for paid time off:
    - To receive the vaccine – required for non-exempt employees (or under state law)
    - Consider providing PTO to recuperate from after-effects of vaccination

# Implementing the Mandatory Vaccination Policy

- Employee Accommodations
  - All accommodation requests should be assessed on an **individualized** basis
  - No requirement to accommodate a personal objection
  - Consider dusting off your existing accommodations policy, and training managers
- Disability:
  - Request medical documentation
  - Does the presence of an unvaccinated employee pose a direct threat?
  - Provide reasonable accommodations that would not pose an **undue hardship**
    - Here, meaning significant difficulty or expense
- Religion:
  - Definition is broad, but belief must be sincerely held (is there an objective basis for questioning the sincerity)
  - Provide reasonable accommodations that would not pose an **undue hardship**
    - Here, meaning having more than minimal cost or burden on the employer

# Implementing the Mandatory Vaccination Policy (cont.)

- Assess Any Potential for Disparate Treatment or Impact
  - Avoid implementing a mandatory vaccination policy that treats employees differently on the basis of any protected category:
    - Federal: disability, race, color, religion, sex (including pregnancy, sexual orientation and gender identity), national origin, age, or genetic information
    - Consider additional categories protected by state law
  - Unless there is a legitimate non-discriminatory reason
  - Consider whether there are affected employees who may have greater difficulty receiving the vaccine, and would be more likely to be negatively impacted by the policy
- Employees Who Refuse to Comply
  - Absent an accommodation that has been granted, employees should be expected to fully comply
  - May need to part ways with employees who refuse to comply, absent an accommodation

# Considerations for Employers That Are Not Opting for a Mandatory Vaccination Policy

- **Applicable Guidance**

- Federal Guidance

- CDC has relaxed certain requirements for vaccinated individuals
    - Fully vaccinated individuals are exempt from wearing masks and social distancing **EXCEPT** where required by federal, state or local laws, rules, and regulations
    - Fully vaccinated individuals who have been around someone who has COVID-19, do not need to stay away from others or get tested unless symptoms appear
    - Fully vaccinated individuals do not need to get tested before or after domestic travel or self-quarantine after domestic travel. Requirements are still in place for international travel, but are more relaxed than those previously implemented
    - Fully vaccinated means two weeks have passed since the last dose in the vaccine series depending on the vaccine
    - Individuals who are not fully vaccinated are still required to wear masks, social distance, and adhere to more stringent guidance previously in effect

# Considerations for Employers That Are Not Opting for a Mandatory Vaccination Policy (cont.)

- **Applicable Guidance**

- State and Local Guidance

- Employers should follow state and local guidance to the extent it is more stringent than federal guidance
    - Some states and localities have **NOT** lifted masking and social distancing requirements
    - Some state and localities generally have lifted masking and social distancing requirements, but still have guidelines and requirements in place applicable to businesses generally as well as specific industries
    - Some state and localities generally have lifted masking requirements, but not social distancing requirements
    - Some state and localities have guidance addressing environments where there is a mix of vaccinated and unvaccinated individuals

# Considerations for Employers That Are Not Opting for a Mandatory Vaccination Policy (cont.)

## ▪ Creating COVID-19 Policies

- COVID-19 policies, at a minimum, should comply with all applicable guidance
- If state and local guidance have not lifted masking and social distancing for your business, follow the guidance
- If state and local guidance have lifted masking and social distancing for your business, what are your options?
  - Implement COVID-19 policies that are *more* stringent than applicable guidance
    - CDC Fully Vaccinated: “You will still need to follow guidance at your workplace...”
  - Treat vaccinated and unvaccinated individuals differently in accordance with guidance



# Considerations for Employers That Are Not Opting for a Mandatory Vaccination Policy (cont.)

- **Creating COVID-19 Policies**

- **Hypothetical:** State A exempts vaccinated individuals from mask wearing requirements and there are no other requirements in place for the employer's business. The employer wants to create a policy that allows vaccinated employees not to have to wear a mask in the workplace.
  - Should an employer allow vaccinated employees to use the honor system with regard to mask wearing?
  - Why is the honor system insufficient?
  - What are some alternatives to the honor system alternatives?
- What type of policy is right for my workforce?
- Regardless of the policy implemented, employers should take steps to make sure the policy is enforced

# Encouraging Voluntary Vaccination

- Employers can offer an **incentive** to employees to voluntarily receive the vaccine
  - Can collect documentation demonstrating that the employee received the vaccine
  - Remember, keep this information **confidential**
- Parameters of the incentive
  - Meaning of “voluntary” is a bit in flux, as January 2021 proposed rules have been withdrawn
    - Current guidance: cannot exceed 30% cost of health care coverage (May 2016 Final Rule)
  - A permissible incentive cannot be so **substantial** as to be considered **coercive**, but may be more than “**de minimis**” to be considered voluntary
- Permissive Incentives: water bottle, t-shirt, gift card of modest value
- Impermissible Incentives: \$50 monthly penalty, paying for a gym membership, paying for airline tickets
- Accommodation Requirement: must make accommodations to allow employees with disabilities to participate and receive the incentive (for example, attending a health and safety training)

# Mandatory Vaccination Required by Customer or Client

- **Hypothetical:** Employer A provides on-site services to Customers X, Y and Z pursuant to certain contracts. Employer A does not have a mandatory vaccination policy. Customer X has informed Employer A that all of Employer A's employees who provide services on-site must be vaccinated. Customer Y has asked Employer A how many of its employees who provide on-site services are vaccinated. Customer Z has not raised the vaccination issue at all with Employer A.
  - **Customer X**
    - Can Employer A require employees who service Customer X to be vaccinated, but not require employees who service Customers Y and Z to be vaccinated?
      - Form of request
      - Addressing an employee's refusal to be vaccinated
  - **Customer Y**
    - Can Employer A provide the number of vaccinated employees?
      - What does Customer Y intend to do with the information?
      - How should Employer A obtain the information from employees?

# What if an Employee Refuses to Come Back to the Worksite?

- Questions to consider:
  - Does the employee have a disability that prevents return to the worksite?
  - Does the employee have a sincerely held religious belief or practice that prevents vaccination?
  - May the employee's primary job duties be performed remotely?
  - Has the organization made exceptions for other employees?
- The affect of at-will employment
- The importance of written remote work agreements

# Questions?



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