

Employer's Mandatory Vaccination Policy Update

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The Equal Employment Opportunity Commission (“EEOC”) guidance has confirmed employers may require a COVID-19 vaccination as a condition of employment and/or to return to the workplace. Employers who choose to do so need to be careful about how they implement mandatory vaccine requirements.

Who Will Administer the Vaccine?

The EEOC guidance provides that administering the COVID-19 vaccine or asking whether an employee has been vaccinated are not, alone, a medical examination or a disability related inquiry under the ADA. However, the CDC requires health care providers ask certain pre-screening questions before administering the vaccine to ensure there is no medical reason that would prevent an individual from being vaccinated. These pre-screening questions may violate the ADA by eliciting an employee's disability-related information.

Employers can avoid this ADA restriction by leaving it to employees to obtain their vaccination from a public or private entity and simply asking employees to provide proof of vaccination. Employers should obtain no more than certification of vaccination from employees. Do not ask for or accept any other medical information.

If an employer chooses to administer a mandatory vaccine at its own facilities, the employer will be responsible for showing pre-screening questions are “job-related and consistent with business necessity.”

Where the vaccine is offered in-house on a voluntary basis, an employer or its contractor may ask pre-screening questions without having to show business necessity if the employee's decision to answer pre-screening, disability-related questions is voluntary. If an employee chooses not to answer these questions, the employer may decline to administer the vaccine but must not retaliate against, intimidate, or threaten the employee for refusing to answer any questions.

What if Employees Refuse to be Vaccinated?

In general, employers may terminate at-will employees who refuse to comply with a mandatory vaccine requirement. However, employers should clearly communicate to employees their mandatory vaccine policy, how to request an exemption, the deadline to request an exemption, the date by which they must receive the vaccine, and any ramifications for failure to vaccinate. Additionally, unionized employers may be required to bargain over the implementation of such a policy depending on the terms of their labor contract.

On the other hand, under the ADA and Title VII, employers must grant employees who cannot receive the vaccine due to a disability, pregnancy, or a sincerely held religious belief an exemption to any mandatory vaccine policy. Employers must engage in a flexible, interactive process with exempt employees to identify whether the employer can provide the employee a reasonable accommodation without causing an “undue hardship.” Under the ADA, to prove an undue hardship an employer must show it will suffer significant difficulty or expense to accommodate the employee; differently, under Title VII, an employer only must show a minor cost to avoid the accommodation requirement. Regardless, employers who operated remotely or implemented social distancing, mask, and enhanced cleaning protocols during the pandemic will be hard-pressed to show those same alternatives are no longer feasible accommodations for exempt employees.

What Happens if Employees Suffer Serious Side Effects from the Vaccine?

Employees whose employers mandate vaccination may have a workers’ compensation claim if they suffer a severe reaction from the vaccine. Additionally, under the American Rescue Plan (“ARP”), employers with less than 500 employees that *voluntarily* provide employees with paid leave will be eligible to receive a refundable tax credit. The ARP added obtaining the vaccine and recovering from vaccine side effects to the reasons an employer can provide paid leave to employees through either emergency paid sick leave or emergency family medical leave. Alternatively, employers can encourage, rather than mandate, vaccination through incentives, such as a bonus. Any incentives should be clearly defined in the employer’s vaccine policy.

How Should Employers Manage the Workplace Once Employees are Vaccinated?

Until information exists on how vaccines will reduce transmission of COVID-19 and how long protection lasts, and the MIOSHA Emergency Rules expire or are modified, employers must continue to adhere to social distancing, mask, and quarantining protocols. For additional information, employers should read Bodman’s previous E-Alert, [COVID-19 Safeguards Still Apply to Vaccinated Employees](#).

Bodman’s Workplace Law Group is available to assist should you have specific questions related to implementing vaccine policies and/or the duty to accommodate. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.

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