

## STICKING POINT: SHOULD EMPLOYERS REQUIRE THEIR EMPLOYEES TO BE VACCINATED?

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The first doses of the Coronavirus vaccines have been shipped across the country and Employers will soon have to decide whether they will require their employees to be vaccinated. Employers choosing to require vaccinations will also have to enact and enforce quality policies and procedures to prevent opposition and avoid potential litigation. However, as with all COVID-19 issues, there are many open questions, few concrete answers, and significant legal concerns when considering mandatory employee vaccinations.

Employers have a difficult task - they must balance their responsibility to maintain a safe and danger-free workplace with the individual rights of employees. This article will provide an outline of the legal framework currently addressing mandatory employee vaccines, what issues employers must consider, and some recommended best practices and guidance employers can rely on to navigate these unprecedented times.

### The Legal Framework

The first question any employer must ask themselves is whether to make the vaccine mandatory for its employees or to strongly encourage its workers to receive the vaccine on their own. Still another option is for employers to evaluate their workforce and adopt a hybrid method where certain employees, such as those that are customer-facing, travel-based, or unable to implement other preventive measures such as masks or distancing, are required to get the vaccine while the rest of the workforce is just encouraged to get it. While the impact of the virus may make mandatory vaccines appealing, employers need to be prepared to address and, with the help of counsel, minimize the legal pitfalls that come with a mandatory vaccination policy. Those pitfalls begin with the current state of federal law and federal guidance regarding mandatory employee vaccines.

### Federal Law & Guidance

Due to the novel nature of the Coronavirus, the current state of federal and state law and guidance is premised on the flu vaccines. While COVID-19 may be the more prevalent vaccine on employers' minds, the CDC has indicated the critical importance of flu shots this year, making the below analysis applicable to both vaccines.

Employers must keep in mind three distinct federal laws when considering a vaccine policy: OSHA, ADA and Title VII.

### OSHA

The U.S. Occupational Safety and Health Administration ("OSHA") has taken the position that employers can mandate flu vaccines for their employees as well as other vaccinations. However, OSHA's position also emphasizes that employers must "properly inform" their employees of the benefits of vaccinations. OSHA also provides for certain exceptions to a vaccine mandate where an employee refused to be vaccinated

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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 a serious reaction to the vaccine)...”

## ADA

The Americans with Disabilities Act (“ADA”) provides a basis for individuals with medical disabilities that would be triggered by a vaccine policy to request a reasonable accommodation.

The Equal Employment Opportunity Commission (“EEOC”) released vaccine-related guidance in March 2020 addressing whether employers covered by the ADA can require its employees to receive flu vaccines. The guidance explains that the ADA can provide employees with an exemption to the vaccination requirement based on a disability that would prevent the employee from taking the vaccine. For example, some flu vaccines have contained egg products that would prevent someone allergic to eggs from taking that variety of flu vaccine. Where such a disability exists, the employee would be entitled to a reasonable accommodation that includes not receiving the vaccine. That is, unless that accommodation would present an undue hardship to the employer.

The ADA defines “undue hardship” as “significant difficulty or expense” incurred by the employer in providing an accommodation. Critically, the guidance notes both that the undue influence standard is higher under the ADA than it is under Title VII, and that prior EEOC guidance has identified COVID-19 as meeting the ADA’s “direct threat standard.” This means that an employee with COVID-19 poses a “significant risk of substantial harm” in the workplace allowing employers to conduct certain tests the ADA would usually forbid, such as temperature checks. This could also mean that the disability exemption may not apply to a mandatory vaccination policy and program.

## TITLE VII

Under Title VII, an employee also has a right to an accommodation of not taking a vaccine if the employee has a sincerely held religious belief that would be violated by receiving the vaccine. If providing such an accommodation represents more than a “de minimis” cost, i.e. imposes more than a minimal cost, the employer can enforce its mandatory vaccination policy and program. The costs incurred by the employer of providing the accommodation can be both economic and non-economic costs and would include the increased safety and legal risks presented by a non-vaccinated employee. Given the state of the virus and the compounding effect of flu season, it is possible and even likely that an employee refusing vaccination on religious grounds would present a more than minimal cost to the employer based on increased risk to employees, customers, and business operations. The level of risk brought to bear on an employer by a vaccine-refusing employee may be based on the specific job duties of that employee such as direct customer interaction, regular travel or an inability to use other public health measures to perform their job.

## Interactive Dialogue Required

Regardless of whether an employee objects based on health or religious grounds, employers must engage with the objecting employee(s) to determine whether a reasonable accommodation would allow the employee(s) to perform the essential functions of their job without compromising the health and safety of the workplace. Employers should document the interactive process in writing, including the proposing of accommodations such as use of masks or other personal protective equipment, relocating the employee’s

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workstation, working from home, or even a leave of absence. Only those accommodations that do not present an undue hardship are required to be considered by the employer.

## Don't Forget About State Law - A Look at New Jersey, Pennsylvania & the Third Circuit

State law and the case law of the Third Circuit will also play a critical role in any mandatory vaccine policy and program. As of January 2020, New Jersey law requires that each "health care facility" establish and implement annual flu vaccination programs including mandatory annual vaccinations. New Jersey law also provides that some employer-required medical examinations, which may include vaccinations, must be paid for by the employer either directly or through reimbursement.

Pennsylvania on the other hand currently does not have a vaccination requirement law. Neither state prohibits private employers from enacting mandatory vaccine policies and programs, and the New Jersey law may provide the State with a means of requiring employees beyond the health care industry to get vaccinated.

The Third Circuit has addressed the issue of a religious objection to a mandatory vaccine program. In December 2017, the Third Circuit was faced with a hospital worker who was terminated for refusing to get a flu shot in contradiction to his employer's policy, on the basis of his religious beliefs. Fallon, the employee in *Fallon v. Mercy Catholic Med. Ctr. Of S. Pa.*, 877 F.3d 487 (3d Cir. 2017), had previously had his religious exemption granted by the hospital, but in 2014 the employer's standards had changed and that Fallon's basis for his religious beliefs against vaccination were, the hospital said, no longer valid. Specifically, the hospital required a new level of proof to support claimed religious beliefs. The Third Circuit upheld the lower court's dismissal of the employee's lawsuit. The Court analyzed whether the employee's beliefs were in fact religious and were in fact sincerely held. The Court analyzed: (1) whether Fallon's beliefs were, in the context of Fallon's life, religious; (2) whether Fallon's beliefs occupied a place in Fallon's life parallel to that filled by God in a traditionally religious person; (3) whether Fallon's beliefs addressed "fundamental and ultimate questions having to do with deep and imponderable matters"; (4) whether Fallon's beliefs were a "belief-system"; and (5) whether there were any formal and external signs of Fallon's beliefs. The Court ultimately decided that Fallon's beliefs, while sincerely held, were not religious and instead found that Fallon was worried about the health effects of the flu vaccine, disbelieved the science behind vaccines and wanted to avoid the vaccine.

This case illustrates the employee-specific nature of exemption requests and that employers should analyze each employee's situation independently. However, a deep dive into whether beliefs are truly religious should be reserved for the Courts. Rather, employers should mainly focus on whether the request for accommodation imposes an undue hardship on the employer. It also indicates that employers can require employees claiming religious beliefs to support those beliefs.

Based on the above, there is no law preventing employers from requiring its employees to receive a flu vaccine or potentially a COVID-19 vaccine through establishment and enactment of a mandatory vaccine policy and program. For employers seeking to enact such a policy and program they should start that process now and be mindful of the following concerns and best practices.

## Practical Concerns and Best Practices

### Areas of Concern

In addition to the individual assessments described above, employers will also need to resolve questions including: is the vaccine effective? If multiple vaccines are brought to market which one should be mandated? Who should pay for the vaccinations? How widely available will the vaccination be? How long is it effective for?

Further, other complicating factors related to mandatory vaccines include:

**Unionized workforces.** Applicable collective bargaining agreements may directly address mandatory vaccines or other health screenings, and nearly all agreements would dictate that implementation of such a policy either requires union consent or must be bargained for.

**Age Discrimination.** Given that older individuals are more susceptible to both COVID-19 and the flu, employers may think it best to exclude or treat these employees differently. However, even when done for altruistic reasons, such differing treatment is a violation of the ADEA and exposes employers to significant liability and costly litigation.

**Workers Compensation and Employer Liability.** There is the potential for liability where an employer mandates a vaccine and an employee has an adverse reaction to the vaccine including workers' compensation claims if not lawsuits. While the federal government provides for such relief, the implementation of a mandatory vaccine policy may shift liability to the employer. Conversely, if an employer does not mandate vaccinations and infection arises there could also be attendant liability for the employer. This potential further solidifies that employers must carefully draft its policy and program and do so with the assistance of counsel.

**Refusal to work.** Federal law provides that employees who hold a reasonable belief of danger or death, and where such belief is based on fact, can refuse to attend work if the employer refuses to mitigate the danger. If an employer does not mandate a vaccine, its workforce may have grounds to refuse to work.

### Best Practices

**Start now.** Employers should enact vaccination policies now regardless of whether the policy will mandate or simply encourage employees to take the vaccine. If vaccines are to be mandated, employers should also engage in the interactive process for any religion-based objections now to avoid this time-consuming process occurring when the vaccine is ready.

**Cast a wide net.** Employers should consider all aspects of a mandatory vaccine policy including which employees it will apply to, how to assess the effectiveness and safety of a COVID-19 vaccine, what to do if there is limited availability of COVID-19 vaccine, and what accommodations the employer is willing, and not willing to provide.

**Be specific.** Employers should ensure that their policies designate which protocols apply to which vaccines, flu, COVID-19, and others. Further, parameters for how vaccinations will occur, establishing proof of

vaccination, the objection process, and alternative measures should be specifically spelled out to avoid ambiguity.

**Open communication.** Prior to any vaccine policy being rolled out, employers should review the policy and procedures with employees and answer as many questions as possible to avoid confusion and apprehension on the part of employees and management-level employees responsible for administering the policy.

**Consider alternative measures.** Some alternatives to vaccines, which can also be used as accommodations, include: masks or other PPE, moving non-vaccinated employees to either different workspaces, different locations or departments without altering terms and conditions of employment, and expanding remote work while ensuring teleworking policies are in good condition.

**Stick to the law.** Employers must remember that currently only religious and medical reasons provide employees with an exception to mandatory vaccines. Ethical obligations, fear, or similar anti-vaccination beliefs have rarely been accepted as valid reasons for refusing to comply with an employer's mandatory vaccination policy. Employers should only consider and evaluate objections based on religious and medical reasons, and avoid considering exemptions based on generalized fear or non-religious beliefs.

By acting now, employers will be ready when a new vaccine is announced, and will be able to navigate this new terrain by minimizing the impact on both employees and business continuity.

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