

# HR Insights

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## COVID-19 Vaccine Considerations for Employers

Since the onset of the COVID-19 pandemic, companies across the globe have been working to develop a COVID-19 vaccine. As the pandemic continues on and vaccine clinical trials progress, there may be a possibility of a COVID-19 vaccine being approved for use in the foreseeable future.

The prospect of a vaccine is exciting to most, but also presents challenges for employers. Employers may be considering whether vaccination will be encouraged or mandated.

Employers must navigate the inherent legal risks and logistics of mandating or encouraging employees to receive the COVID-19 vaccine. To do so, employers should seek legal counsel to discuss which course of action is best for their organization. This article provides a general informational overview of considerations for employers.

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### Governmental Guidance

The Equal Employment Opportunity Commission (EEOC) and OSHA have both issued guidance on vaccines in the employment context in the past, but make no specific mention of a COVID-19 vaccine.

#### **OSHA Guidance**

Per OSHA, employers can require employees to receive vaccinations for influenza, providing they properly inform employees of "the benefits of vaccinations." In addition, OSHA [states](#) that employees can refuse a vaccination due to a reasonable belief that they have an underlying medical condition that creates a real danger of serious illness or death, and that they "may be protected under Section 11(c) of the Occupational Health and Safety Act of 1970 pertaining to whistleblower rights."

#### **EEOC Guidance**

The EEOC, which enforces the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII), has also issued guidance regarding vaccines in the employment context. Specifically, in [March 2020](#), the EEOC addressed whether employers covered by the ADA and Title VII can compel employees to receive the influenza vaccine. In this guidance, it was noted that there was not a COVID-19 vaccine yet.

Additionally, the EEOC explained that an employee may be entitled to an exemption from a mandatory vaccine based on a disability that prevents the employee from taking the vaccine. This would be considered a reasonable accommodation, and the employer would be required to grant the accommodation, unless it creates an undue hardship for the employer. The ADA defines an undue hardship as an action requiring significant difficulty or expense when considered in light of factors such as an employer's size, financial resources, and the nature and structure of its operation.

The EEOC also states that, under Title VII, employees with sincerely held religious beliefs may be entitled to an exemption from a mandatory vaccination, which is considered a reasonable accommodation, unless it creates an undue hardship for the employer. Note that undue hardship under Title VII is defined as a "request that results in more than a *de minimis* cost to the operation of the employer's business." This is a much lower standard than under the ADA.

As such, these exemptions and the discrimination risk posed by mandating employees to receive any vaccine—including a COVID-19 vaccine when and if it becomes available—have led the EEOC to advise employers to simply encourage vaccination rather than mandating it.

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## Employer Considerations

There are a host of considerations employers need to review before coming to a decision on whether to encourage or require employees to receive a COVID-19 vaccination.

Employers should consider the following when reviewing their options:

- Evaluating undue safety burdens—Employers will face the challenge of determining whether an employee poses an undue safety burden on co-workers by choosing not to get vaccinated (if the employer is simply encouraging receiving the vaccine) or being exempt from a mandated vaccination. When evaluating this consideration, employers will need to decide whether there are other precautions that can be put into place to protect employees, which may include:
  - Social distancing protocols
  - Requiring employees to wear masks at work
  - Leveraging telecommuting arrangements
- Assessing and granting exemptions—If employers decide to require employees to get a COVID-19 vaccine, they will need to be prepared for the difficult task of determining whether an individual worker qualifies for a reasonable accommodation in the form of an exemption from receiving the vaccine under the ADA or Title VII. This assessment would need to be done on a case-by-case basis and could potentially leave an employer open to legal action should they wrongly deny an exemption request. In addition, the employer will also have to navigate protecting the rest of the workforce should an employee be exempt from being vaccinated.
- Evaluating legal risks of requiring vaccines—Employers need to consider the possibility that they may receive legal claims if they require employees to be vaccinated and an employee experiences an adverse reaction to the vaccine or develops subsequent health problems.
- Sorting out the logistics of requiring or recommending vaccination—Regardless of whether employers require or mandate COVID-19 vaccination, there are logistical elements to consider, including:
  - Will employers hold on-site vaccination clinics?
  - What vaccine, if more than one will be available on the market, will be used?
  - Who will pay for the vaccine?
  - Will the company require or cover the costs of vaccination for the employee's family?
  - How long after the vaccine becomes available must workers receive the vaccine, if vaccination is mandated?

In addition to the considerations explained above, employers should consult legal counsel to determine whether there are unique risks to consider for their specific organization.

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## For More Information

Employers should begin discussions on the topic of COVID-19 vaccinations at their organization today. Waiting until a COVID-19 vaccine is approved and readily available may leave employers open to overlooking important legal and logistic considerations.

For more information on the COVID-19 pandemic and keeping the workforce safe, contact McGohan Brabender today.

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