

COVID-19 vaccinations will pose new employer challenges



COVID-19 vaccinations hold the promise of a return to something resembling normal. That return, however, will be a process, not an event. Employers will have to decide whether to require vaccines or allow employees to make that choice. Some employees may not be able or willing to take the vaccine. How will employers handle those employees? Several federal laws impact employer actions and employers must develop a vaccine protocol that complies with all of them.

ADA vaccination considerations

Employer-required vaccines are considered medical examinations under the Americans With Disabilities Act (ADA). Employers must show the vaccine is “job-related and of business necessity” or prevents a “direct threat” to workplace safety. Employers have used this argument to justify vaccine requirements for employees who interact with infected or vulnerable co-workers and customers.

For COVID-19, it may be less clear whom employers may require to be vaccinated. No doubt, there will be lawsuits challenging mandatory vaccination orders based on medical or religious conditions. Under the ADA, an employee may request a reasonable accommodation if the vaccination poses a health risk. For example, some flu vaccines grow live or attenuated virus in eggs. People with egg allergies may experience a reaction.

The Centers for Disease Control (CDC) currently provides guidelines on flu vaccines and who is at risk for an

adverse reaction. Generally, the CDC advises all but those who have had [very severe reactions to flu shots](#) to avoid them. Of course, we do not yet know what form the COVID-19 vaccine(s) will take. In fact, competing versions are now being tested. The public may have multiple options from which to choose. Employees with egg allergies may be able to opt for a non-egg-based vaccine. Currently, several egg-free influenza vaccines are available and may serve as a template for similar COVID vaccines. You may also have employees who are immune-compromised because of a pre-existing medical condition that qualifies as a disability. Plus, those who currently take immune-compromising drugs for fairly common conditions ranging from eczema to rheumatoid arthritis may be unable to take vaccinations.

The vaccine's ingredients and the employee's health and vaccine history will be factors in finding a reasonable accommodation. Employers should be ready to explore vaccine options with the employee's healthcare provider. If the employee is unable to take any available vaccine, the employer should examine other options. For example, the employee could be placed with only vaccinated co-workers, a mini-herd immunity approach. Another option is telework.

Title VII issues

Title VII of the Civil Rights Act requires employers to explore reasonable accommodations based on the employee's religion. For example, Christian Scientists and the Dutch Reformed Church have blanket prohibitions on vaccines. Any vaccine using any pork product violates Islamic beliefs. Employees do not have to belong to any organized religion to assert a religious objection. The Supreme Court has ruled that any "sincerely held belief" constitutes a religion for Title VII purposes. As with the ADA, employers will have to explore all possible accommodations under Title VII.

Regardless of which law applies, employers should explore reasonable accommodations in good faith. Employers ultimately get to decide which accommodation the employee must accept. Further, employers may not retaliate against employees because they requested a reasonable accommodation.

The test is whether granting the request would create an undue hardship on your organization. If you run a nursing home, excusing some workers from a vaccination may create an undue hardship for patients. But you must consider each accommodation request individually. Be sure to document exactly why you rejected an accommodation. That is, show why it would be unreasonable to allow the employee an exemption. Employers may make the case, depending on the public health conditions present, that accommodating the objection endangers co-workers and is therefore an undue hardship. Again, telecommuting or temporary reassignment may be a better alternative.

CDC guidelines should inform employer requirements and accommodation requests. As public health officials learn more about the disease, accommodation options may change. Employers should monitor CDC guidance and adjust requirements and accommodations accordingly.

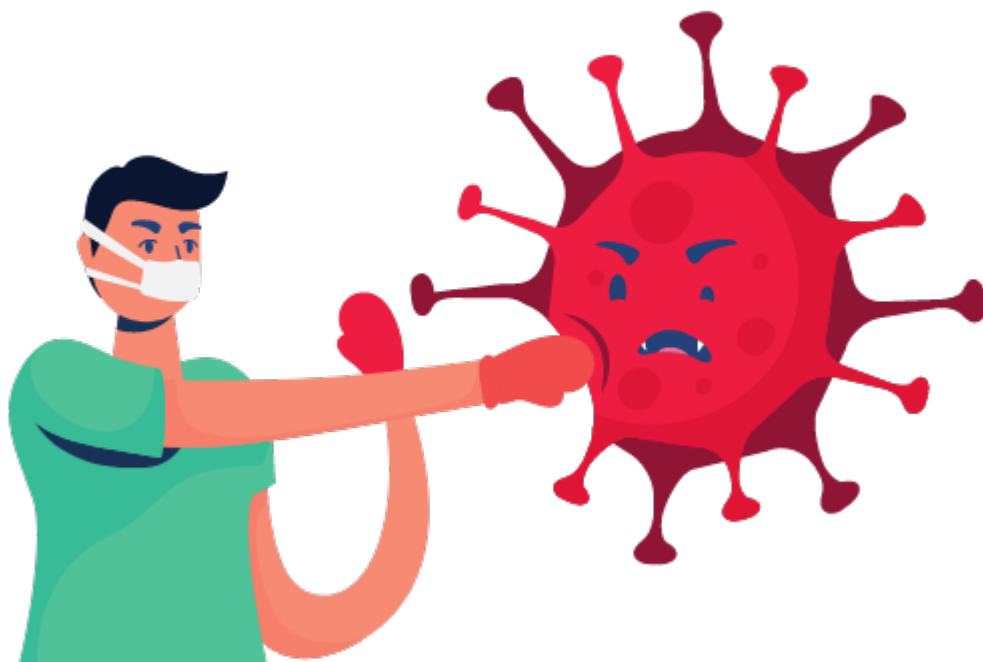
Vaccines are not political

Unfortunately, masks and other personal protective equipment have become political issues. Any politicization of vaccines will probably antagonize a large portion of the workforce. Instead, employers should focus on employee and customer safety and well-being. Arguments for vaccination should be science-based and show how vaccination will help the business. Management should take the lead by getting the vaccine and encouraging employees to do the same.

Workers Compensations & FMLA considerations

Employers who do not adopt vaccine requirements could face workers compensation claims from employees who get sick at work. Whether these claims succeed will depend on what duty courts may decide the employer

owes employees. For employers who require vaccines, employees who have a reaction could potentially file workers compensation claims.



High-risk COVID employees may have rights under the Family and Medical Leave Act (FMLA). The FMLA covers chronic conditions. An employee with a chronic condition may be unable to safely take a vaccine. Under certain circumstances, this employee may be able to take FMLA leave until it is safe to return to work.

OSHA claims

The Occupational Safety and Health Act's (OSHA) general duty clause requires employers to provide a safe workplace. The vaccination double-edged sword comes down here as well. The agency that enforces the Act, the Occupational Safety and Health Administration (also OSHA), has held that employers are not required to mandate vaccines. OSHA has also ruled that employers may do so. Employees who believe being vaccinated will cause a severe injury or death may allege an OSHA whistleblower complaint. If an employer does not require vaccinations, employees could file charges under the Act's general duty clause.

NLRA issues

An employer's actions concerning any COVID-19 vaccination could encourage union organizing activity. For an employer who implements a mandatory vaccine regime, unions may pander to the employee's desire to maintain individual rights. For employers who do not insist on vaccinations, unions could argue the employer does not care about employee safety.

Again, the best approach is to make an employee safety-based argument. The employer could opt to only require some employees to be vaccinated. For example, the employer could choose to vaccinate only those whose jobs place them at-risk or who work with at-risk populations. Depending on the workplace, this could be all workers or only a small number.

For unionized employers, the collective bargaining agreement (CBA) will determine how to proceed. If the CBA is silent on the issue, then the employer should attempt to get union buy-in on the vaccination program.

Consulting with union leadership before presenting the plan to the rank and file most likely ensures a better reception.

State-mandated vaccinations?

Will states require vaccinations? That is unclear, and most likely will vary from state to state. The orders may be Executive Orders from Governors or legislative edicts. Any such orders would have similar exceptions for those who may fear an adverse reaction or who object on religious grounds. No doubt litigation will abound. How the courts will come down on this is unclear.

State mandates would take the heat off employers. Multi-state employers would have to comply with several different laws.

What you can do to prepare now for COVID-19 vaccinations

As we wait for a vaccine, employers should prepare a vaccine policy. Determine which positions or employees need the vaccine first. Prepare documentation to make your case to employees. If you have a union, discuss vaccinations with them now if your CBA does not address the issue. Employers who have the outline of a plan will be able to move more quickly once the vaccine(s) is/are available.