



## Compulsory COVID-19 Vaccination Policies in the Employment Context

Once our population has been inoculated against COVID-19, experts predict we will soon recover from the devastating social and economic effects of the pandemic and employers will be permitted to operate at full capacity. They caution, however, that the efficacy of vaccines currently available will require the majority of us to be inoculated before we see the rates of infection diminish. This condition also applies to an employer's workforce. Surprisingly, quite a few people eligible for the vaccine are opting not to receive it. For this reason, many public and private employers, including school districts, colleges and universities are asking counsel whether they can require their employees to be vaccinated.

While COVID-19 may be novel, mandatory inoculations are not. In a case dating back to 1905, the United States Supreme Court addressed mandatory vaccinations in regard to a smallpox outbreak in Massachusetts. In *Jacobson v Massachusetts*, 197 US 11, 88 (1905), Jacobson objected to a regulation requiring compulsory vaccinations, arguing it was in "derogation of the rights secured to the defendant by the 14th Amendment of the Constitution of the United States . . . providing that no state shall make or enforce any law abridging the privileges or immunities of citizens of the United States, nor deprive any person of life, liberty, or property without due process of law . . . ." Rejecting this argument, the Court ruled that a State law requiring compulsory vaccination of citizens to eradicate disease was a proper exercise of the legislative prerogative to protect the public health, finding "the police power of a state must be held to embrace, at least, such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety." Drawing on the logic from then existing school immunization mandates, the Court held that such regulations do not violate the 14th Amendment right to liberty because they fall within the type of restraints to which every person necessarily is subjected for the common good, and that real liberty for all could not exist if each individual is allowed to act without regard to the injury that his or her actions might cause others. The holding in *Jacobson* has been a staple of public health law and compulsory vaccinations remain a valid exercise of State power.

State-mandated vaccination laws have been on the books for the past century and although we generally think of them applying to children attending day care facilities and schools, many states have enacted laws requiring immunization of certain groups of people such as healthcare workers, patients, and residents of long-term care facilities.

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Generally, employers also may lawfully require employees to be inoculated with a vaccine approved or authorized by the Food and Drug Administration (FDA). The Equal Employment Opportunity Commission (EEOC) cautions, however, that employers contemplating inhouse vaccination programs must be aware that prescreening questions for the vaccine may illicit information regarding the individual's disability or genetic information which would violate employee-protections under the ADA and the Genetic Information Nondiscrimination Act (GINA). Accordingly, it is better practice to recommend employers require their employees to receive the vaccination from a third party that does not have a contract with the employer, since the ADA "job-related and consistent with business necessity" restrictions on vaccination screening questions would not apply.

Employers may request documentation from employees verifying they have been inoculated by a third-party since the EEOC advises that requesting proof of COVID-19 vaccination, in and of itself, is not a disability or medical related inquiry. If an employer requires employees to provide documentation verifying that they have received a COVID-19 vaccination from a pharmacy or their own health care provider, the employer should advise the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA or GINA. As long as this warning is provided, any genetic information the employer receives in response to its request for proof of inoculation will be considered inadvertent and therefore not unlawful under EEO laws.

## **Navigating Potential Accommodations in the Employment Context**

According to the National Conference of State Legislators (NCSL), all states allow exemptions for medical reasons, 45 states and the District of Columbia have a religious exemption law, and 17 of those states have philosophical exemption laws allowing individuals and/or parents to claim an exemption based on their personal, moral or other beliefs.

Perhaps the most controversial exemptions to compulsory vaccination laws are those for religious and philosophical reasons. Title VII of the 1964 Civil Rights Act prohibits religious discrimination in the workplace, however, employers are not required to accommodate the religious beliefs and practices held by employees if doing so involves more than a *de minimis* cost. Now, in the greatest public health and financial crisis in our lifetimes, a strong argument can be made that an employer permitting any part of its workforce to go unimmunized would pose more than a *de minimis* cost. Add to that rubric the fact that Congress has yet to pass any legislation limiting legal liability for employers over COVID-19 infections that occur in

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the workplace. This lack of action provides further justification for employers to take every conceivable precaution to keep potential COVID-19 transmission out of their workforce and facilities.

Notably, there has seen a sea-change in public attitude toward vaccination exemptions following the catastrophic effects of COVID-19, which may result in the federal or state governments preemptively taking up the gauntlet for employers. By way of example, on May 13, 2020, the New York State Bar Association's Health Law Section Task Force on COVID-19 issued an 83-page report and recommendations on dealing with various aspects of the pandemic. The report states that although "some Americans may push back on the COVID-19 vaccination for religious, philosophical or personal reasons," "for the sake of public health, mandatory vaccinations for COVID-19 should be required in the United States as soon as it is available." In support of its position, the Bar notes "Constitutional challenges ... have failed, when the individual interests are not strong enough to outweigh the public benefit," and concludes that the "gravity of COVID-19 presents compelling justification for State legislatures and Congress to mandate a COVID-19 vaccination."

With this backdrop, it is conceivable that compulsory vaccinations may be on the horizon at the state or even federal level. At a minimum, we would expect to see legislation regarding certain sectors with high risk populations such as healthcare workers, employees and residents of elder-care facilities, school districts, universities, and perhaps even employees in the retail and food service sectors. State lawmakers are already proposing to introduce legislation to include COVID-19 vaccination to the immunization list required to enroll children in the public schools systems.

While a fully inoculated workforce is ideal, absent federal or state laws mandating inoculation, whether for all citizens or specific sectors and employee groups, employers only can go so far in implementing compulsory vaccination policies. Employers need to be mindful of existing federal and state laws that may be implicated when implementing mandatory employment policies. The Equal Employment Opportunity Commission (EEOC) issued guidance regarding the flu vaccine on March 21, 2020, in which the agency stated that employers covered by the Americans With Disabilities Act (ADA) and Title VII may require employees to be inoculated for the influenza virus. The agency cautioned, however, that employees may be entitled to an exemption from the employer's mandatory vaccination policy under the ADA, based on a disability, or under Title VII, for the employee's sincerely held religious beliefs.



Accordingly, employers may not terminate an employee who cannot be vaccinated due to a medical contradiction related to his or her disability or a sincerely held religious belief, unless the employer can show that there are no reasonable accommodations available (such as remote work) and the unvaccinated employee would pose a “direct threat” to the health or safety of individuals in the workplace. Employers are required to conduct an individualized assessment of the following four factors in determining whether a direct threat exists: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. Only then – upon a determination that an unvaccinated individual will expose others to the virus in the workplace – may the employer exclude an employee from the workplace.

While the U.S. Occupational Safety and Health Administration (OSHA) does not mandate employee vaccinations, it encourages employers to make COVID-19 vaccines available at no cost to eligible employees. In 2009 the agency took a position during the H1N1 pandemic that employers may require employees to submit to influenza vaccines, providing that employees are informed properly of the benefits of vaccinations. OSHA cautioned, however, that “an employee who refuses vaccination 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) may be protected under Section 11(c) of the Occupational Safety and Health Act of 1970 pertaining to whistleblower rights.”

**Take Away On Client Counseling:** While it is important to check your state laws on the issue, generally an employer may implement a policy mandating its workforce be inoculated with one of the FDA approved vaccines currently available. Although the policy should be applied uniformly, the employer will need to consider exceptions to the mandate, on a case-by-case basis, for an employee’s medical condition or his or her sincerely held religious beliefs.

The employers’ front-line supervisors and managers should be trained to recognize when an employee is making an accommodation request due to his or her disability or sincerely held religious belief and know to whom that request should be communicated for consideration. All supervisors and managers need to be reminded that it is unlawful to retaliate against an employee for requesting an accommodation from a mandatory vaccination policy or to disclose that an employee has been granted such an accommodation.

Employers also should revisit their anti-discrimination training on EEO laws for supervisors and employees and consider an updated training module for pandemic-specific types of discrimination. For example, derogatory remarks about



“China Flu,” or individuals with national origins from various global locations where variants of COVID-19 are reportedly originating (South America, South Africa, United Kingdom), and individuals belonging to populations currently eligible to receive COVID-19 vaccinations such as the elderly and disabled are all members of protected classes under EEO laws. Discrimination based upon an employee or coworker’s membership in a protected class can lead to hostile work environment, and discrimination claims. ➤

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