



“CAN I MANDATE THAT MY EMPLOYEES GET VACCINATED?” AND OTHER COVID-19 WORKPLACE ISSUES

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On May 28, 2021, the U.S. Equal Employment Opportunity Commission (“EEOC”) updated its guidance on employee vaccine requirements. Meanwhile, on June 10, 2021, the U.S. Occupational Safety and Health Administration (“OSHA”) updated its guidance on what employers need to do to protect workers who are unvaccinated or otherwise at-risk.

This FAQ will highlight the key provisions of these EEOC and OSHA documents; it is not a comprehensive review of the laws impacting the workplace, including but not limited to the Americans with Disabilities Act (“ADA”), Title VII of the Civil Rights Act, the Genetic Information Nondiscrimination Act (“GINA”), or the Occupational Safety and Health Act (the “OSH Act”). Most important, however, this memo does not address any restrictions that states might impose that could be more restrictive or different from the federal law discussed in this document. DTA members should discuss these issues with legal counsel, human resource personnel or other similar experts. Furthermore, this document reflects the status of the law as of August 25, 2021, which is subject to change.

Q1. Can an employer mandate its employees get a COVID-19 vaccine as a condition of an employee entering the workplace?

A1. The EEOC document makes clear that under **federal law** an employer can require that its employees be vaccinated, subject to offering reasonable accommodations to employees who decline the vaccine due to a disability, a sincerely held religious belief, practice or observance, or pregnancy under certain circumstances. Employees who chose not to vaccinate because of a disability or religious reason must let the employer know that he or she needs a reasonable accommodation.

As with any employment policy, DTA members considering vaccine mandates must be mindful

of the disparate impact that such a policy may have on its employees based on race, color, religion, sex, national origin, or age, as some of these groups may face greater barriers to receiving a vaccine. Imposition of a vaccine policy could result in allegations that certain employees are more likely to be negatively impacted or disproportionately excluded by a vaccine requirement, which could result in a violation of federal law.

Q2. Can the individual states restrict an employer's ability to mandate vaccines?

A2. Yes. The EEOC enforces federal law only, and the **states can pass more restrictive laws** if they choose to and opt to deviate from the EEOC position. DTA members need to be mindful of this as they contemplate mandating vaccinations for their employees.

Q3. Must employers protect employees from COVID-19 exposure?

A3. Under the OSH Act, employers must provide their workers with a safe and healthful workplace, free from recognized hazards that are causing or likely to cause death or serious physical harm. The OSHA document, however, notes that most employers no longer need to take steps to protect their workers when **all the employees** in the workplace or in a well-defined portion of the workplace are vaccinated against COVID-19, and where the employer can provide reasonable accommodations to protect those who are unvaccinated but who otherwise are legally entitled to reasonable accommodations against being vaccinated.

Q4. What are examples of reasonable accommodations?

A4. For those individuals who cannot comply with an employer's vaccine mandate for the reasons set out above at A1, reasonable accommodations would include masking (or other personal protective equipment), social distancing, modified work schedules, periodic COVID-19 testing, teleworking or reassignment. This list is not exhaustive.

The requirement to provide reasonable accommodation extends only to the employee. Thus, an employer is not required to accommodate an employee based on the disability or religious needs of a family member or other associated persons.

It is unlawful for an employer to disclose that an employee is receiving a reasonable accommodation or to retaliate against the employee for seeking reasonable accommodation.

Q5. May an employer require an employee to be vaccinated even if that employee claims a handicap or religious exception?

A5. Yes, if the employee who cannot be vaccinated for a reason set out above in A1 poses a “direct threat” to others in the workplace which cannot be remedied by accommodations, then the employer can require the employee to be vaccinated. No bright line exists for determining what constitutes direct threat other than it be “a significant risk of substantial harm” that cannot be eliminated or reduced via reasonable accommodations. As such, employers need to review all the options for accommodation before concluding that the employee constitutes a direct threat to other workers.

Q6. May a fully vaccinated person request accommodation?

A6. Yes, if they face a heightened risk of severe illness from COVID-19. For example, an employee who is immunocompromised might request additional accommodations, notwithstanding being fully vaccinated. If requested, then the employer should analyze whether such accommodation is warranted.

Q7. Can an employer request proof of vaccination from an employee?

A7. Yes, an employer can require that the employee provide written proof of vaccination received from a third-party. It is also not a violation of the Health Insurance Portability and Accountability Act (“HIPAA”) for an employer to request proof of vaccination.

Q8. Can an employer administer COVID-19 vaccines directly or through a third-party?

A8. An employer can administer the COVID-19 vaccine directly or can direct its employees to a third party for the vaccine. It can do this on a mandatory or a voluntary basis, but such action has a direct impact on the questions it can ask during the vaccination process. Where an employer requires its employees to get vaccinated, any pre-vaccination screening questions asked prior to the administration of the vaccine, whether by the employer or its third-party agent, must comply with the ADA. This means that any pre-vaccination screening questions, which may elicit information about a disability, must be “job related and consistent with business necessity.” The standard is different when the vaccination program is voluntary, in which case pre-vaccination screening questions need not be job related.

Q9. May an employer provide incentives to its employees to get vaccinated?

A9. Incentive programs and rewards are allowed under federal law to entice employees to get vaccinated. The level of incentive, however, must be measured so as not to appear coercive. The EEOC document gives no benchmark for what constitutes an excessive incentive.

Q10. What steps must an employer take to safeguard personal medical information?

A10. Under the ADA, information regarding one's vaccine status is considered medical information that the employer must keep confidential. Thus, this information must be safeguarded in an employee's confidential medical file. This is different than the employee's personnel file, which by law cannot store confidential medical information.

Q11. May an employer provide vaccine information or other support to its employees?

A11. Employers may provide its employees and their families information about COVID-19 vaccines as a means of trying to encourage employees to vaccinate. Employers may facilitate employee vaccination by providing transportation to vaccine sites or assisting the scheduling of appointments.

Q12. How should an employer handle a sick employee?

A12. During a pandemic, such as COVID-19, employers subject to the ADA can ask employees calling in sick if they are experiencing symptoms of the pandemic virus. This information must be retained in the employee's confidential medical record.

Furthermore, an employer can ask all employees who will be entering the workplace if they have COVID-19 or its associated symptoms. Employers may exclude people from the workplace if they have COVID-19 or its symptoms.

Employers may measure an employee's body temperature, but such information must be retained in the confidential medical record. If the employee refuses to have their temperature taken or answer questions about whether they have COVID-19, then the employer can bar the employee from the workplace.

Managers or other employees can report to the employer if they believe an employee has or is showing symptoms of COVID-19; however, every effort should be made to limit the number

of people who learn the name of that employee. In turn, the employer may disclose the name of the employee to a public health agency when it learns that the employee has COVID-19.

Under OSHA rules, employers are responsible for recording work-related cases of COVID-19 if the following are met: 1) the case is a confirmed COVID-19 case; 2) the case is work related; 3) the case involves one or more relevant recording criteria, such as medical treatment or days away from work. COVID-19 related deaths and hospitalizations must be reported to OSHA

Q13. Can an employer ask a potential employee if he or she has been vaccinated?

A13. Under the ADA, an employer cannot inquire as to a potential employee's health or disability status, or require a medical exam, **prior** to making a conditional job offer to that applicant. This has not changed because of COVID-19. Such inquiry, however, is permitted between the time of the offer and when the applicant begins work, provided that fellow employees in the same job category are subject to the same requirement(s).

Thus, the employer can screen a job applicant who has received a conditional job offer for symptoms of COVID-19, so long as the applicant is treated the same as others in that same job category. Any medical exams are permitted after an employer has made a conditional offer of employment, including taking one's temperature. Under current CDC guidelines, if the job requires the applicant to start immediately, yet the applicant cannot safely enter the workplace because it has COVID-19 or symptoms thereof, the employer may withdraw the job offer.

Q14. Can an employer require a potential employee be vaccinated as a condition of employment?

A14. Employers may require that new hires be vaccinated by the first day of work, provided they accommodate those who cannot receive the vaccine for disability or religious-based reasons as discussed above in this document. If being vaccinated is a requirement of employment, then it is recommended that the job description or similar job advertising be transparent on this point.