

Blog Post

Mandatory Versus Voluntary Vaccinations: An Employer Guide

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With COVID-19 vaccines now available to every adult in the United States, employers are starting to see a light at the end of the tunnel after a year of uncertainty. But for employers whose workforces spent a year away from the office, a safe return to normalcy presents new legal, practical, and ethical questions.

Considerations for Instituting a Vaccine Mandate

Vaccine Mandates in General

Despite the predictably hyperbolic rhetoric surrounding mandatory vaccinations for COVID-19, vaccine mandates in general are nothing new. For example, the [National Conference of State Legislatures](#) reports that all fifty states have legislation requiring certain vaccines for students, subject to various religious, medical, or other exemptions. Courts have rejected challenges to vaccine mandates, typically deferring to states' use of police power to require vaccinations for the benefit of public health. In such cases, mandated vaccines were typically licensed under a biological license application (BLA), which is the standard regulatory framework through which vaccines are licensed by the federal Food and Drug Administration for use in interstate commerce.

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COVID-19 Vaccine Mandates

In considering whether to implement a COVID-19 vaccination mandate, employers must walk a tightrope, balancing their duty to maintain a safe workplace against the concerns of workers who are reluctant to be vaccinated.

The Equal Employment Opportunity Commission (EEOC) has issued Guidance noting that there are circumstances under which employers can require employees to get a COVID-19 vaccine, so long as they make reasonable accommodations for those with disabilities or sincerely held religious beliefs. Proponents of mandatory COVID-19 vaccines in the workplace point to this Guidance to support their position.

By contrast, opponents of mandatory COVID-19 vaccinations have focused primarily on the fact that COVID-19 vaccines have not yet been licensed under a BLA, but rather, under the Emergency Use Authorization (EUA) provision of the Federal Food, Drug, and Cosmetic Act (FD&C Act), which allows patient access to unlicensed vaccines for emergency use under certain conditions. Opponents of mandatory vaccines argue that private employers cannot legally mandate COVID-19 vaccines that have only been approved through the EUA process because an individual has the right under the FD&C Act to refuse administration of an EUA authorized product. Already, there is at least one early test case on this issue, in which a New Mexico detention center employee filed a federal lawsuit claiming he has the right to refuse an EUA approved COVID-19 vaccination as a condition of employment.

The EUA provision of the FD&C Act provides that individuals to whom such vaccines are administered must be informed of “the significant known and potential benefits and risks of such use, and of the extent to which such benefits and risks are unknown; and of the option to accept or refuse administration of the product.” Notably, it goes on to

say that such individuals must also be informed “of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.” 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III). Thus, while opponents of mandatory COVID-19 vaccines are correct that an individual may refuse a vaccine, this provision of the FD&C Act has been construed by proponents of mandatory COVID-19 vaccines as allowing an employer to impose consequences on the individual for such refusal, so long as the employer has shared those consequences in advance. Another issue which remains up for debate is whether the EUA provision of the FD&C Act extends to an employer when the employer is not administering the vaccine.

The New Mexico case opposing mandatory vaccine programs will no doubt provide further insights for employers as the case progresses.

Can Employers Require Documentation?

The EEOC’s vaccine Guidance states that requiring an employee to show proof of receipt of a COVID-19 vaccination is not a disability-related inquiry. However, it cautions that subsequent questioning, such as asking why an individual did not receive a vaccination, “may elicit information about a disability” and would be subject to the Americans with Disabilities Act’s (ADA) standard that the inquiry be “job-related and consistent with business necessity,” or may result in the disclosure of information protected under the Genetic Information Nondiscrimination Act (GINA). Accordingly, to the extent that employers seek documentation of vaccination, it is advisable for such employers to explicitly state that they are not asking for any medical information.

That being said, for employees who request an accommodation due to disability, the EEOC’s Guidance qualifies that the interactive process between employer and employee “should include

determining whether it is necessary to obtain supporting documentation about the employee's disability[.]” The Guidance also provides that if an employee requests an accommodation, an employer may ask questions or request medical documentation about why an accommodation is needed. Possible questions for the employee may include: (1) how the disability creates a limitation; (2) how the requested accommodation will effectively address the limitation; (3) whether another form of accommodation could effectively address the issue; and (4) how a proposed accommodation will enable the employee to continue performing the “essential functions” – i.e., the fundamental job duties – of his or her position. As with any medical inquiry, the questions should be posed by Human Resources personnel who understand the obligation to maintain the confidentiality of the information.

Returning To The Office Without A Mandatory Vaccine Policy

In determining whether to institute a mandatory COVID-19 vaccination policy, employers should understand that vaccine hesitancy remains common. Based on a poll from Gallup released last month, more than a quarter of adults do not plan to be vaccinated, and those who are least willing to get vaccinated are also least likely to take steps to contain the virus.

How do employers balance the reticence of those who will not or cannot be vaccinated with the risk of harm to the rest of the workforce that the unvaccinated workers present? In addition, in some industries – such as nursing – where there is already a shortage of qualified workers, if employers mandate a vaccine, how will they meet staffing needs?

Balancing Vaccine Preferences With Risk Of Harm To The Workforce

In some industries where physical presence is not required, some employers are turning to hybrid workplaces as an answer, allowing some workers to return to the site and others to remain remote.

Where possible, wise employers will try to balance their operational necessity with their employees' preference. In some office settings, certain employees may *need* to be physically present at least some of the time (such as those who deal with sensitive information only kept in the office, those who are in charge of daily mail and check processing, and those who need to meet with clients in an office setting). In addition, physical presence may be essential for the professional development of newer employees, or employees who were just promoted into new positions or those who need more hands-on supervision.

Keep in mind that a hybrid workplace can result in other issues. Employers must pay attention not just to federal wage and hour laws, but also the laws of the states where employees work remotely. Tracking the hours of remote workers can be a challenge, but is critical for non-exempt workers.

Some workplaces do not have the option of remote work, and they have tougher challenges. Some may choose to bring workers back to the worksite, but stagger their staffing to minimize the number of workers exposed. Employers should continue to follow the latest CDC guidance, which at present provides that fully vaccinated people can be in the same space with other fully vaccinated people indoors without wearing masks or physical distancing, and even be indoors without wearing masks or physical distancing with unvaccinated people from a single household who are at low risk for severe COVID-19. However, the CDC cautions that fully vaccinated people should continue to take precautions like wearing a well-fitted mask and maintaining social distancing when in the presence of unvaccinated people from multiple households. Given that guidance, employers must be cautious

mixing vaccinated and unvaccinated people from multiple households in the workplace.

Should Employers Offer Incentives Encouraging Vaccination?

According to a survey from last month by the Kaiser Family Foundation, about four out of ten employed adults who would rather “wait and see” before deciding on vaccination stated that they would be more likely to get the vaccine if their employer arranged for on-site vaccination or offered them a \$200 cash incentive to get vaccinated. Nevertheless, as we have previously written in greater detail, employers who offer incentives should be mindful that they need to comply with federal and state laws, such as ERISA, HIPAA, the ADA and GINA.

For example, incentives to encourage vaccination could result in a violation of the ADA’s prohibition against coercing employees to participate in wellness activities. Employers should thus ensure that any incentive programs are clearly designated as purely voluntary, and should refrain from making major incentive offers that employees “can’t refuse.” Employers should also take care to ensure that incentive programs do not discriminate against employees with disabilities or sincerely held religious beliefs preventing them from following the mandatory vaccination policy.

Takeaway for Employers

With more employees getting vaccinated, employers are understandably eager for a return to pre-COVID normalcy. Before employers institute a mandatory vaccine policy, they should evaluate their worksite and workforce and carefully assess the risks. In the interim, employers should educate workers on the efficacy of vaccines and encourage them to do their part to stop the spread of COVID-19.

For assistance with these and other COVID workplace issues, contact your Akerman attorney.

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