

Tips for Fine-Tuning Workplace Vaccination Policies During Pandemic

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With colder weather beginning to creep in, many employers are, for good reason, looking at their influenza vaccination policies with fresh eyes. COVID-19 and the seasonal flu share common symptoms, which can complicate an employer's efforts to prevent the spread, especially of COVID-19 infection, in the workplace. And now, more than ever, a potential flu outbreak could cause panic among workers and significantly impact business operations, as well as burden the nation's health care system, which already has been stretched due to the COVID-19 pandemic.

Bearing these considerations in mind, employers are asking: Can I *require* employees to get the flu shot? What about if and when a coronavirus vaccine is available? May I require staff to be inoculated? The short answer is a *qualified* yes. However, that right is not absolute. For example, federal EEO laws categorically bar employers from applying a blanket rule requiring all employees to be vaccinated regardless of disability status or religious belief. In other words, while an employer may require that its employees get the flu shot (and a COVID-19 vaccination, if and when one is available to the public), it may have to adjust the policy or excuse its application to certain employees on disability or religious accommodation grounds.

Both are discussed in more detail below.

Available Exemptions

Employers should be mindful of violating federal and state discrimination laws when putting their vaccination policies into practice. The two federal discrimination laws with which an employer's policy needs to comply are the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII). In 2009, during the H1N1 pandemic, the EEOC issued enforcement guidance specifying that employers may not categorically require all employees to get flu shots, but rather

may be required to excuse the requirement for certain employees as a disability accommodation under the ADA, or a religious accommodation under Title VII.

Turning first to the medical exemption, under the ADA an employee may be entitled to an exemption from a mandatory vaccination requirement if the employee has an ADA disability that prevents her from taking the vaccine. Exempting the employee from the mandatory vaccine policy may be a reasonable accommodation, depending on the particular circumstances, as discussed below. In the context of the flu shot, this issue has come up when an employee is allergic to eggs, which are used to make some influenza vaccines.

Similarly, it is a violation of Title VII to fail to reasonably accommodate an individual whose religious observance or beliefs conflict with a work rule - like a vaccination mandate. While the employee's objection must be rooted in a "sincerely held" religious belief, the EEOC has made clear that protected religions are not limited to major, well-recognized faiths. Employers should be aware of the breadth of this exemption. Indeed, "an employee's belief or practice can be 'religious' under Title VII even if "no religious group espouses such beliefs or . . . the religious group to which the individual professes to belong [does] not accept such belief."

If an employee requests a reasonable accommodation on disability or religious grounds, the employer has an obligation to provide one unless and until doing so would impose an undue hardship. "Undue hardship" does not mean the same thing as applied under the ADA and Title VII. Under the ADA, undue hardship means "significant difficulty or expense" when considered in light of the accommodation's net cost, the employer's overall financial resources, the employer's type of operation, and the impact of the accommodation upon the employer's operation. Under Title VII, however, undue hardship has been interpreted by the Supreme Court as meaning anything more than a *de minimis* burden. In either case, the employer should engage in an interactive process with the employee to determine the nature of the disability or religious conflict, its impact on the individual's ability to perform the essential functions of the job or to meet the work requirement, and whether a reasonable accommodation exists that would not impose an undue hardship.

Outside of the ADA and Title VII, there may be state or local laws that limit an employer's right to mandate vaccination. The Centers for Disease Control collects many of these state and local laws [here](#). Employers should consult with local counsel before implementing any new policies.

Takeaways

Even though it is legally permissible in many instances to effect a mandatory vaccination policy, there are legal hurdles that must be cleared. Indeed, the most recent guidance from the [EEOC recommends](#) that "ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it." However, even in light of this

recommendation, it is incumbent upon employers to conduct their own internal risk assessments and consider what makes sense for their organization, not only in the context of the flu vaccine but also in the event that a COVID-19 vaccine becomes available. It is possible that since the EEOC has labeled COVID-19 as a "direct threat," their existing guidance may be updated when a vaccine is available.

In the meantime, employers should revisit their existing policies and consider whether simply encouraging employees to get vaccinated-either through education or by offering in-office vaccination-is an acceptable risk for their business.

Carlton Fields routinely counsels employers on the gamut of employment policy issues. If you have questions about your vaccination policy, please contact us.

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