

So There's a Vaccine... Now What?

*Considerations for employers pondering employee
Coronavirus vaccinations*

News of the imminent Coronavirus vaccine roll-out is flooding the news prompting employers to ponder employee vaccination programs. As organizations continue complicated decision making around the pandemic, there are two big questions to consider for vaccination policies:

1. Can you require employees to be vaccinated?

Healthcare providers have long required other vaccinations, including annual flu shots and childhood vaccinations, but mandatory vaccination policies are less common outside the healthcare industry. The big difference with the Coronavirus vaccine is that it will first be available under an “emergency use authorization” rather than a full FDA licensure. The issue of whether an employer can require a vaccine that is released under emergency use authorization has not arose before, and to date, the U.S. Equal Employment Opportunity Commission and the CDC have not released specific guidance for corporate policies.

Once a Coronavirus vaccine receives formal government approval, similar to other vaccinations, an organization’s legal counsel may be more likely to approve a mandatory vaccination program with specific policies and procedures.

2. Will employees willingly take the vaccine?

While Moderna has announced a 94.5% effective rate for its vaccine and Pfizer an over 90% effective rate, safety concerns about the short development timeframe worry many in the general public. Polling shows a drop in the number of Americans who say they are likely to get the vaccine when its available. According to a STAT-Harris Poll, 58% of the U.S. public in October said they would get vaccinated as soon as a vaccine was available, down considerably from 69% who said the same thing in mid-August.



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DEVELOPING A PLAN

As organizations develop a potential vaccination plan and policies, here are additional considerations to be addressed by executive teams and legal, risk and HR advisors:

- » When do you make decisions? Do you wait and see what federal and state agencies recommend or require, or do you start planning now?
- » Will you mandate the vaccination or will it be voluntary?
 - Do you mandate it for all employees or only those for those who are most at risk due to social distancing limitations and other factors?
 - Do you make exceptions for “religious, philosophical or personal reasons?”

Keep in mind: According to Julianne Story, a partner with Husch Blackwell LLP co-leading the firm's Labor & Employment and Employment Litigation Defense practices and associate Sydney Buckley, the ADA prohibits discrimination on the basis of disability and prevents employers from excluding disabled individuals from the workplace for health or safety reasons unless they pose “a direct threat.” Updates made to the EEOC's guide in March 2020 state that the COVID-19 pandemic meets the ADA's “direct threat” exemption, meaning that an employee with COVID-19 poses a “significant risk of substantial harm” in the workplace. This allows employers to conduct certain tests that the ADA would usually forbid but are now allowed, including temperature monitoring. Whether the exemption will apply to the vaccination program is yet to be determined.

Under Title VII, an employer must seek an accommodation for an employee who objects because of a sincerely held religious belief. However, if the cost to the employer providing an accommodation is more than “de minimis,” imposes more than a minimal cost, the employer can enforce a vaccination mandate. The costs to the employer can be considered economic or non-economic and include issues such as safety and liability risks.

- » Will you offer employee incentives?

Keep in mind: Offering incentives with already established wellness program rewards, such as gift cards or discounts on health insurance premiums, could likely prompt more employees to get the vaccine. A global survey co-authored by Lawrence Gostin, faculty director of the O'Neill Institute of National and Global Health Law at Georgetown Law School, found that 61% of employees said they would likely get a Coronavirus vaccine if their employer recommended it.
- » What will you do if employees resist?
- » As new data and guidelines are released, what is your plan to update your policies and communicate updates with employees?
- » Does a vaccination mandate open your organization up to potential claims?
- » Will you limit where non-vaccinated staff can go within your facilities?



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- » How will you monitor adherence?
- » If you have a union-represented workforce, how will you work with representatives? Does your collective bargaining agreement stipulate that union consent is needed to implement a mandatory vaccination policy?
***Keep in mind:** To the extent that an employee or group of employees mobilize co-workers to challenge mandatory vaccines being imposed by an employer, this could be viewed as "protected concerted activity" under Section 7 of the National Labor Relations Act (NLRA), even in the absence of a union, resulting in potential unfair labor practices being filed against the employer.*
- » Do you allow unvaccinated employees and visitors to enter the premises?
- » For voluntary programs, what alternatives will you implement?
 - Will you continue a mandatory mask use policy?
 - Will you continue work-from-home opportunities for employees, particularly unvaccinated employees?
 - Will you consider reassigning roles for unvaccinated employees?

BEST PRACTICES FOR VACCINATION POLICIES

Some policies will make it intrinsically easier for employees to opt-in to a vaccination program and reduce the organization's liability:

- » If your policy mandates the vaccination, make it free.
- » Make it easy for employees to receive the vaccine.
- » Be transparent and consistent in communications. Regular communication is paramount.
- » If you create a policy that mandates a vaccination, make sure accommodations are consistent across classes, such as current employees and new hires. Clearly indicate any potential consequences for vaccination refusal.
 - View additional information here: <https://www.natlawreview.com/article/healthcare-employers-exercise-caution-when-enforcing-mandatory-vaccination-policies>
 - If your policy is voluntary and an employee chooses not to vaccinate and needs to be reassigned, avoid changing employment conditions in a way that would seem like a punishment or demotion.