

THOUGHT LEADERSHIP

Service

Labor & Employment

Professionals

ERIK K. EISENMANN

MILWAUKEE:

414.978.5371

ERIK.EISENMANN@

HUSCHBLACKWELL.COM

BARBARA A. GRANDJEAN

DENVER:

303.892.4458

BARBARA.GRANDJEAN@

HUSCHBLACKWELL.COM

LEGAL UPDATES

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Frequently Asked Questions Regarding Employer Vaccine Requirements

Now that the federal Food and Drug Administration (FDA) has issued its formal approval of the Pfizer-BioNTech COVID-19 vaccine, many employers are beginning to implement vaccine requirements for employees. This article provides answers to a number of frequently asked questions regarding employer rights and responsibilities in this area.

While the commentary below is based on federal law and will apply in most jurisdictions, employers should consult applicable state and local laws. At least one state (Montana) has prohibited private employers from mandating COVID-19 vaccination and recognizes vaccination status as a protected category, prohibiting employment discrimination based on vaccination status.

Job Applicants, New Hires, and Proof of Vaccination

Q.1: Can an employer ask job applicants if they are vaccinated?

While the U.S. Equal Employment Opportunity Commission (EEOC) has stated that asking **current** employees whether they have received the COVID-19 vaccine is not a disability-related inquiry under the Americans with Disabilities Act (ADA), an employer should refrain from asking **prospective** employees about their vaccination status until after they have received a job offer. Any follow-up questions, such as why a job applicant has not been vaccinated, will likely violate the ADA's prohibition on asking job applicants to answer medical questions or to identify a disability before making a job offer.

Notwithstanding the foregoing, employers should make any vaccination requirements known to all prospective applicants, including via the job posting and even possibly a statement on the employment application itself.

Q.2: Can an employer mandate vaccination for new hires but not for current employees?

Yes. In addition, until the new hire shows proof of full vaccination (or provides a valid religious or disability-related basis for refusing vaccination), the employer can require the new hire to wear a mask, social distance, work remotely if possible, and undergo regular COVID-19 testing.

Note that if COVID-19 testing is done onsite for non-exempt/hourly employees, employers should be aware of potential wage-and-hour concerns. Time spent undergoing onsite COVID-19 testing should be compensated at the employee's regular hourly rate and included for purposes of calculating non-discretionary bonuses and overtime.

Employers should also consider the potential impact on employee morale from requiring new employees to get vaccinated but not current employees. Such a policy may also cause current employees to doubt the sincerity of the employer's belief in the importance of maintaining a vaccinated workforce if the employer does not require all employees to get vaccinated.

Q.3: Can an employer require employees to provide proof of vaccination?

Yes. The EEOC has stated that requiring proof of vaccination is not a prohibited disability-related inquiry under the ADA and is permitted under federal law. However, employers are required to keep all information about their employees' vaccination status confidential. Additionally, all employee vaccination records must be kept separate from employee personnel records.

Hard Mandates, Soft Mandates, and Vaccination Incentives**Q.4: Can an employer have different vaccination requirements for different parts of its workforce?**

Yes. An employer may impose a "hard" vaccination mandate for health and safety reasons, such as requiring those employees who interact with the public or work closely with other employees to be vaccinated, while imposing a "soft" vaccination mandate, or providing incentives to get vaccinated, for the rest of its workforce.

On August 17, 2021, the soap manufacturer, Dr. Bronner's, announced their policy of **requiring** employees who interact with the public to be vaccinated and offering \$1,000 bonus incentives to the remaining employees to **encourage** them to get vaccinated.

Q.5: Can an employer offer incentives to employees who show proof of vaccination?

Yes. EEOC guidance is clear that offering an incentive to an employee "to voluntarily provide documentation or other confirmation of a vaccination received in the community" is not a disability-

related inquiry and is permitted under federal law. Employers may utilize vaccination surveys and can require employees to upload photos of their vaccination cards or other proof of vaccination. Employers may collect proof of vaccination from employees but must keep this information confidential and separate from employee's personnel files.

However, the EEOC has issued specific guidance for employers who offer incentives to get vaccinated when the employer or its agent is the party administering the vaccine. If an employer or its agent administers the COVID-19 vaccine for employees, the employer may only offer incentives, which includes rewards and penalties, that are "not so substantial as to be coercive." This restriction only applies when the employer or its agent administers the vaccine (as opposed to when employees are vaccinated from third parties in the community, such as pharmacies or health care facilities) because vaccinations require employees to answer pre-vaccination disability-related screening questions and a substantial incentive could make employees feel pressured to disclose protected medical information to their employer.

Reasonable Accommodations for Employees Who Will Not or Cannot Get Vaccinated

Q.6: What should an employer with a mandatory COVID-19 vaccine policy do if an employee refuses to get vaccinated based on a disability?

If an employee certifies that he or she cannot get vaccinated due to a disability, the employer must provide a reasonable accommodation such as mask wearing, enhanced cleaning, social distancing, remote work, frequent testing, and even job reassignment, so long as these accommodations do not cause an undue hardship (require significant difficulty or expense), and the unvaccinated employee does not pose a "direct threat." An employee's disability creates a direct threat if, even with an accommodation, the disability creates a significant risk of substantial harm to the health or safety of the employee or others that cannot be eliminated or reduced by reasonable accommodation.

To determine if an employee who is unable to be vaccinated due to a disability poses a direct threat, the employer must perform an individualized assessment and engage in an interactive process with the employee to determine whether any reasonable accommodations are available that will mitigate the threat. If, after going through the interactive process to determine whether a reasonable accommodation exists, the employer determines it cannot eliminate the "direct threat" from having the unvaccinated employee in the workplace, the employer may terminate the employment relationship.

Q.7: What should an employer with a mandatory COVID-19 vaccine policy do if an employee refuses to get vaccinated based on a sincerely held religious belief?

Employees may refuse to get vaccinated based on a sincerely held religious belief. “Religious belief” is defined broadly under federal law and includes beliefs of established religions as well as beliefs held by a small number of people who may not be part of any organized religion. Employers are required to accommodate an employee’s sincerely held religious beliefs, unless doing so would create an undue hardship. Under federal law, an undue hardship when accommodating a religious belief is anything that would impose more than a **de minimis** burden on the employer.

Under EEOC guidance, if an employee refuses to get vaccinated based on a sincerely held religious belief and the employer is aware of facts that provide an objective basis for questioning the religious nature or sincerity of the belief, the employer may ask the employee to provide additional supporting documentation.

Under Title VII, an employer should consider all possible reasonable accommodations that would not impose more than a **de minimis** burden on the employer if an employee refuses to get vaccinated based on a sincerely held religious belief. This “de minimis” standard is a lower threshold and is therefore easier for an employer to establish than the undue hardship standard applicable to disability-related accommodations under the ADA.

Q.8: Can an employer refuse to hire a job applicant if the employer suspects the applicant will refuse to get vaccinated and will request a reasonable accommodation or exemption from the employer’s mandatory COVID-19 vaccine policy?

No. Under federal anti-discrimination laws, an employer is prohibited from refusing to hire a job applicant based on the belief that the applicant will request a reasonable accommodation or exemption from an employer’s mandatory vaccine policy.

Q.9: Must an employer offer a reasonable accommodation to an employee who refuses to get vaccinated until the FDA issues full approval of a particular COVID-19 vaccine?

Reportedly, 30% of unvaccinated Americans are waiting for full FDA approval of COVID-19 vaccines before they will get vaccinated.

As noted above, on August 23, 2021, the FDA issued formal approval of the Pfizer-BioNTech COVID-19 vaccine. The other two COVID-19 vaccines available in the United States, produced by Moderna and Johnson & Johnson, were approved by the FDA under an Emergency Use Authorization (EUA) and are awaiting full FDA approval.

Regardless of approval status, the EEOC and the Department of Justice **have** stated that employers can mandate vaccines authorized under an EUA. Therefore, employers can mandate that their employees receive the COVID-19 vaccine before any of the vaccines receive full FDA approval. However, if an employee refuses to get vaccinated on the basis of a disability or sincerely held

religious belief until the FDA issues full approval (claiming safety or other concerns), an employer should offer a reasonable accommodation to the employee until the employee can get vaccinated.

Q.10: Can an employer require its employees to receive a booster shot?

The federal government is now recommending that fully vaccinated individuals – particularly those with compromised immune systems – receive a “booster shot” of the COVID-19 vaccine if at least 8 months have passed since the individual was fully vaccinated. Booster shots are expected to be available in September 2021.

Employers should be aware that inquiring about an employee’s health to determine if that employee would benefit from a booster shot is prohibited under federal law. The EEOC is likely to issue guidance on whether employers can require booster shots but has not done so yet. At this point, employers should refrain from mandating booster shots or including booster shots in their vaccine policies. However, barring future guidance to the contrary, employers will likely be able to offer eligible employees incentives to receive booster shots to increase their immunity to COVID-19, thereby increasing the safety and health of the workforce.

Disparate Impact Concerns from Mandatory Vaccine Policies**Q.11: Should employers be concerned about whether their mandatory vaccination policy has a disparate impact on workers in protected categories, such as workers in a protected category who have less access to the vaccine than other workers?**

Yes. Employers who implement mandatory vaccine policies should be prepared to respond to allegations that their vaccine requirement has a disparate impact on employees based on membership in a protected category such as race, color, religion, gender, age, or national origin. If an employer is aware that certain members of its workforce are likely to have restricted access to the vaccine, such as a lack of transportation, employers should consider implementing strategies, such as reimbursing employee’s travel costs to and from vaccine sites, providing employees with information on where to get vaccinated, and providing paid time off work to get vaccinated, to address these barriers.

Potential Concerns when Implementing a Mandatory Vaccine Policy**Q.12: Are there any state or local prohibitions on mandating vaccines that employers should be aware of?**

Yes. At least one state (Montana) has prohibited conditioning employment or otherwise discriminating on the basis of vaccination status, and others are considering similar legislation. As state and local laws regarding vaccination are rapidly changing, employers should consult local

employment counsel to determine if there are any state or local laws that prohibit them from mandating vaccination.

Q.13: Must employers implement a written vaccine policy or is it sufficient to tell employees they must get vaccinated?

Any mandatory vaccine policy 1) should be in writing; 2) must include an exemption if an employee provides a valid disability-related or religious reason for not getting vaccinated; and 3) should have a protocol in place for handling reasonable accommodation requests.

Q.14: Are there any concerns with implementing a mandatory vaccination policy that are unique to unionized workforces?

Yes. If a workforce is unionized, employers should be aware that mandatory vaccine policies may be the subject of collective bargaining. If a workforce is unionized and mandatory vaccine policies are the subject of collective bargaining, an employer should consider implementing a voluntary vaccine program coupled with incentives.

Contact us

If you have questions about these frequently asked questions, contact Erik Eisenmann, Brittany Falkowski, Barbara Grandjean, Jessica Brown or your Husch Blackwell attorney.

Your comprehensive COVID-19 legal resource

Since the pandemic's onset, Husch Blackwell has continually monitored state-by-state orders regarding capacity, masking, vaccines, and more. We regularly address your FAQs and provide you with easy-to-use COVID-19 tools about returning to work and navigating federal programs. Contact our industry-specific legal teams or your Husch Blackwell attorney to plan through and beyond the pandemic.