



## Client Alert

# Mandatory or Voluntary COVID-19 Vaccination Policies: What Should Employers Do?

Now that the distribution of the COVID-19 vaccine has begun, many employers are asking themselves if this vaccine can be required in the workplace. The Equal Employment Opportunity Commission (EEOC) recently updated its guidance on this topic.

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The full text of the guidance titled “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” can be located [here](#). In sum, the answer is yes, employers can implement mandatory vaccine policies, with significant exceptions regarding accommodations for disability, pregnancy or religious objections.

### **Employers Can Require Vaccine Subject to Obligation to Accommodate**

Section K of the new guidance explains that if an employee indicates to the employer that he/she cannot receive the COVID-19 vaccine due to a disability, an employer needs to conduct an individualized assessment and determine if an unvaccinated individual will expose others to the virus at the worksite. In compliance with the American with Disabilities Act (ADA), employers can legally require its employees to get a COVID-19 vaccine as long as they are able to show that the unvaccinated employee would pose a direct threat due to a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” When making this evaluation, the employer must consider ways to provide reasonable accommodation to the individual that could eliminate or reduce the risk. EEOC cautions employers to be mindful that certain pregnancy-related medical conditions can constitute disabilities under the ADA. Reasonable accommodation should also be provided under Title VII if an employee is prevented from receiving the vaccine due to a “sincerely held religious belief, practice, or observance.” Importantly, social, political and economic beliefs, and a general “anti-vaccine” viewpoint, are not protected classes under Title VII.

The employer must remember to engage in the interactive process with all employees who refuse the vaccine due to disability or religious reasons with the goal of finding options that can work for both

the employee and the employer, absent undue hardship. These employees cannot be automatically terminated; without considering reasonable accommodation options, including, for example, working remotely or protected leave under federal, state or employer policies.

### **Pre-Vaccination Questions Are Restricted Under Mandatory Policy**

Under a mandatory policy, if an employer requires employees to receive the vaccine from the employer, or through a third party with whom the employer contracts, then any pre-vaccination questions asked of an employee are likely not permitted unless the questions are “job-related and consistent with business necessity.” This restriction on pre-screening questions does not apply if the employer’s vaccination policy is voluntary or if employees obtain their vaccinations independently. Employers are able to ask for proof of vaccination, as long as they are careful to not inquire into the reasons for the employee’s decisions, nor ask or receive any medical information accompanying the proof of vaccination, because such requests may constitute ADA violations. Employers who ask for such information may also violate Title II of Genetic Information Nondiscrimination Act (GINA) involving the disclosure of “genetic information.”

### **Should An Employer Implement A Mandatory Vaccination Policy?**

An employer contemplating a mandatory vaccine policy should consider that while many employees will opt for a vaccination, a significant percentage of employees may be hesitant to receive the vaccine. In addition, employers will need to be prepared to process the inevitable accommodation requests. Employers may also want to contact their workers’ compensation insurers regarding the insurer’s view on coverage if an employee has an adverse reaction to a mandatory vaccine. As a result of these considerations, many employers may decide to issue a voluntary vaccination policy and provide information sessions for employees regarding the vaccine, including up to date information from authorities.

We will continue to monitor federal and state guidance regarding COVID-19 and provide updates as they become available.

## **Downs Rachlin Martin Labor & Employment Law Group**

This article is intended to provide general information on the status of the US labor laws. If employers have further questions or would like to discuss, please contact a member of our [Labor & Employment Law](#) team: [Beth Rattigan](#), [Tim Copeland](#), [David Harlow](#), [John Maitland](#), [Amy Braun](#), [Benjamin Traverse](#), [Andrea Wright](#) and [April Tuck](#).

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