

Labor & Employment Law Client Alert: Mandatory Vaccination Policies

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Can a U.S. employer legally *require* its workers to get the COVID-19 vaccination? And if a worker refuses, can the employer *bar* that employee from the workplace, and even fire him/her?

Yes, yes, and yes. However, there are a number of crucial qualifications the employer should bear in mind—and those qualifications are significant enough that many employers may prefer to *encourage* the vaccination, instead of requiring it.

On December 17, 2020, the U.S. EEOC (Equal Employment Opportunity Commission) confirmed that employers may make COVID-19 vaccinations mandatory.¹ This does not violate the ADA (Americans with Disabilities Act) because vaccinations are not considered “medical examinations” or “inquiries” under that Act.

That said, if an employer makes its policy mandatory, it must train its staff to process two major exemptions:

1. **Medical Exemption.** An employee is exempt from a mandatory vaccination policy if the employee can show that he/she has a disability covered by the ADA that prevents him/her from taking the vaccine. If an employee claims this exemption, he/she should provide supporting evidence, such as a letter from a medical doctor.

Once the disability is substantiated, the employer must excuse the employee from vaccination if the employer can adopt “reasonable accommodations” without any “undue hardship” on that employer. An undue hardship would exist if an unvaccinated employee posed a “direct threat” due to a “significant risk of substantial harm to the health or safety of the individual or others that cannot be reduced by reasonable accommodation.” This inquiry must be individualized to each claimant.

Typically, the employer and employee would engage in an “interactive” dialogue to determine what reasonable accommodations would enable the employee to continue performing his/her essential job functions without compromising the safety of others. Potential accommodations might include additional PPE (i.e., personal protective equipment, such as masks and face shields), moving the employee’s workstation, a temporary reassignment, teleworking, or a leave of absence. Note that if the employee worked directly with highly vulnerable populations (e.g., unvaccinated, sick, or elderly

¹ See https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=.

people), the employer would have a much stronger case for not allowing any accommodations.

The EEOC has recommended that employers consult CDC and OSHA guidelines in considering what types of accommodations to adopt, as well as how many other employees are vaccinated.

2. Religious Exemption. Similarly, an employee would be exempt from mandatory vaccination if he/she could demonstrate that taking the vaccine would violate his/her “sincerely held” religious beliefs, practices, or observances. (This is known as the religious accommodation provision of Title VII of the Civil Rights Act of 1964. Note that non-religious beliefs—even if sincerely held—do not trigger that Act’s protections; therefore, political opposition would not apply. This is important given the number of Americans that are still expressing generalized concerns about the vaccine.)

Here, too, the employee would have to substantiate his/her claim, and the employer would need an “objective” basis to dispute it. After the claim is substantiated, the conversation would again turn to what “reasonable accommodations” could be provided to the employee without posing an “undue hardship” on the employer.

Unfortunately, it is no easy feat for an employer to successfully process and handle exemption claims. This can be a huge trap for the unwary—the stakes of which, if the employer gets it wrong, can be extremely expensive. As if the above weren’t complicated enough, important sub-issues the employer must consider include:

- Liability, HIPAA, ADA, and other reasons for instructing employees to be vaccinated by independent, third-party providers and not the employer;
- Information and advice for employees regarding third-party vaccinators’ pre-shot health screenings (any information regarding genetics, disabilities, or any other protected information is not collected);
- Ensuring similarly situated employee exemption claims are treated the same for Constitutional and ADA reasons; and
- What special vaccination issues to consider when employees are unionized.

As the above suggests, it would be far safer for most, if not all employers, to strongly “encourage” their employees to get vaccinated, instead of requiring it—and wait until large-scale employers (e.g., the Walmarts, Amazons, and Googles) have defended their policies in court.

For employers who disagree or do not have that luxury—such as certain health care providers—*Howard & Howard is ready and available to assist you in this process*. It is vital that we work with and train your staff to: (i) properly identify exemption claims; (ii) funnel them to appropriate human resources staff; (iii) troubleshoot specific accommodation requests; and (iv) know when to bring our firm in for more difficult and potentially litigious situations. The laws and regulations regarding COVID-19 are constantly in flux, with momentous local, state, and federal rules sometimes changing by the day or week. In Nevada, for example, an August 2020 law (SB4) insulates many businesses, nonprofits, and other organizations from COVID-19 related liabilities

—if the entity in question acted “in substantial compliance with controlling health standards.” We at Howard & Howard are here to help you navigate these waters as our local governments continue to roll out vaccination campaigns to the general public.

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