



## Labor & Employment ADVISORY ■

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### COVID-19 Vaccines: Seven Questions for Employers

As particular COVID-19 vaccines have been authorized by the Food and Drug Administration (FDA) for emergency use and are starting to become more available, employers continue to grapple with how they should (or shouldn't) address the vaccination status of their employees. While there are no clear or easy answers about how any particular employer should handle the issue of COVID-19 vaccines in the workplace, there are emerging legal and practical issues that all employers should consider as they make decisions about how to address this important matter.

#### **1. Can employers require employees to get a COVID-19 vaccine as a condition of new or continued employment?**

Generally speaking, employers are permitted to require employees to receive vaccines, subject to some very important exceptions. Under Title VII of the Civil Rights Act of 1964, employers are required to provide reasonable accommodations to employees whose sincerely held religious beliefs prevent them from getting a vaccine. Similarly, the Americans with Disabilities Act (ADA) requires employers to provide reasonable accommodations to employees who have an underlying disability that prevents them from being vaccinated.

Fact sheets for the [Pfizer/BioNTech](#) and [Moderna](#) COVID-19 vaccines list medical conditions that a potential vaccine recipient should discuss with the vaccination provider or his or her health care provider as part of deciding whether to take the vaccine. These fact sheets provide examples of some of the underlying medical conditions that might form the basis for a request under the ADA. Given the current lack of clinical trial data of associated risks for women who are pregnant or breastfeeding, employers should also provide reasonable accommodations if requested by such employees.

Additionally, if an employer has unionized workers, the company will need to consult its collective bargaining agreement and may need to bargain with the union before imposing a vaccine mandate on such employees.

Notwithstanding the general notion that employers can require employees to receive vaccinations subject to certain limitations, the fact that COVID-19 vaccines are being authorized by the FDA through an emergency use authorization (EUA), rather than the longer, traditional approval process, introduces additional uncertainty and potential risk in requiring employees to obtain a COVID-19 vaccine as a condition of employment. When the FDA authorizes a drug through an EUA, federal law requires that the drug must be accompanied by information on the right of individuals to

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refuse the drug and the consequences of such refusal. It is possible that employees who are terminated for refusing to receive a vaccine authorized by the FDA under an EUA could try to pursue claims for wrongful termination in violation of public policy. The viability of such claims will depend on applicable state law regarding a potential public policy exception to at-will employment and how courts (state and federal) construe the EUA wording. This unique set of facts is just one example of the unclear and as-yet-untested legal and regulatory framework within which COVID-19 vaccines currently reside.

## **2. What factors should employers consider when deciding whether to require employees to get a COVID-19 vaccine as a condition of new or continued employment?**

This issue will largely be driven by the nature of the employer's business and operations and potentially the nature of a particular employee's job duties for the employer. Employers in the health care industry and related industries (such as senior care) have a significantly heightened basis for requiring or strongly encouraging employees to get vaccinated now. This position would also be consistent with many states' plans for certain priority groups to receive the COVID-19 vaccine. Outside those industries, employers should consider factors such as how closely together employees work as part of their job duties (such as in a manufacturing facility); how much exposure employees have to customers or other members of the public; and whether employees have exposure to food products or other consumables, whether in a manufacturing setting or restaurant or retail setting. Employers may also wish to consider whether they constitute an "essential business" in the states they operate.

Employers considering mandating vaccines for their workforce should give very serious consideration to the practical employee relations and business operations issues that could arise from such a requirement. Many employees may be reluctant to get a COVID-19 vaccine out of concern that the vaccine development process may have been politicized or rushed, concern about adverse reactions, or general anti-vaccine sentiment. If an employer purports to mandate that all employees get a COVID-19 vaccine, and a material portion of the workforce refuses to comply, the employer will be put in the very difficult position of either adhering to the mandate and terminating all these employees (and possibly harming the company's business or leading to staffing difficulties or other business disruptions) or deviating from the mandate, at least for certain employees, which would likely lead to additional employee relations problems, as well as the potential for discrimination claims.

## **3. In what ways might employers incentivize employees to receive COVID-19 vaccinations rather than requiring them to do so?**

Rather than implementing mandates that could lead to such difficult decisions, employers may wish to focus on steps they can take to strongly encourage and incentivize employees to get vaccinated, such as the following:

### **Vaccination education campaigns**

Some employers have had success in increasing participation in annual employer-sponsored flu shot drives through carefully constructed employee communications and education efforts, and the same approach might yield positive results with COVID-19 vaccines. Such efforts should avoid politicizing this public health initiative and may be more successful when framed as the company's and the employees' best option for a return to normalcy, rather than a negative focus on those employees who are reluctant to get vaccinated.

**Facilitating vaccine access**

As vaccines remain in very short supply, employers may be able to encourage employees to get vaccinated if they are able to educate their employees on how their state has described priority groups who are able to receive the vaccine in earlier phases. For example, an employee may be eligible to receive a vaccine in a priority group under a particular state's vaccine prioritization plan based on the employee choosing to self-identify to the vaccine administration site/vaccine provider as an eligible recipient based on age or underlying conditions. Employers could provide employees with information on where state vaccine plans can be accessed online and encourage individuals to contact their health care provider or the state public health authority for information on obtaining the COVID-19 vaccine and whether vaccinations are available by appointment, at drive-thru sites, or in other locations. State plans should be checked periodically because some states are updating and expanding who can receive the vaccine and in what priority. In the meantime, employers could contact third-party vaccination providers to assess whether on-site vaccination will be feasible (consistent with applicable state plans) or to confirm whether vouchers or some type of appointment process will be available for employees to receive the COVID-19 vaccine. For example, vaccination providers in a state might include national pharmacy chains that are publicly advertising COVID-19 vaccines, primary care doctors, and possibly other health care providers. Check with the state public health authority to confirm which providers have been enrolled as authorized COVID-19 vaccination providers. Some state public health authorities' websites also list the names of specific facilities (such as hospitals, pharmacies, physicians, and county public health departments) and the number of Pfizer/BioNTech and Moderna vaccine doses requested and received by them thus far.

**Ensure that employees covered by employer group health plans know that they can get vaccines without cost to them**

Employers that sponsor group health plans may be able to take steps to ensure that their covered employees have access to vaccines—when they are available—at no cost. Affordable Care Act (ACA) covered group health plans are generally required to cover COVID-19 vaccinations and other qualifying COVID-19 preventive testing services without participant cost-sharing. The rules for coverage of COVID-19 preventive services are stricter than the rules that apply to other preventive services. For example, COVID-19 vaccinations must be covered by the plan without cost-sharing within 15 business days after recommendation by the Centers for Disease Control and Prevention (CDC) and regardless of whether the vaccine is administered by an out-of-network provider. For employees who are not eligible for coverage under the ACA covered arrangement, the employer may be able to extend COVID-19 vaccination coverage through an employee assistance program (EAP) arrangement. The compliance costs associated with such an arrangement should be carefully considered before extending such coverage.

**Provide paid time off for vaccination and recovery from side effects**

Some state and local paid sick leave laws may require covered employers to provide paid time off (PTO) for employees to get vaccinated and recover from any adverse effects. Even for employers not subject to such laws, they should consider providing PTO to encourage employees to get vaccinated. For employees who have exhausted their PTO or paid sick leave, employers may wish to consider providing additional PTO for this reason, but they will have to balance this potential incentive against the potential for abuse by employees who get a COVID-19 vaccine and then use that as a reason to take paid leave even if they are not suffering side effects.

**Providing incentives to employees who get vaccinated**

Employers may also get creative in offering cash or non-cash incentives to employees who get vaccinated, being mindful of the appropriate tax treatment of such incentives. Such arrangements would likely be ERISA-covered health

plans, and appropriate steps should be taken to ensure compliance with the applicable plan document, reporting, HIPAA privacy, and ACA requirements for such arrangements.

#### **4. How should employers that mandate employee vaccinations handle requests by employees to be excused from the vaccination requirement because of a medical condition or sincerely held religious belief?**

The Equal Employment Opportunity Commission (EEOC) has recently issued [guidance](#) specifically addressing this issue. When an employee indicates that he or she cannot receive an employer-required vaccine because of a disability or a sincerely held religious belief, the employer should engage in the following steps to determine if the employee may lawfully be excluded from the workplace:

- First, the employer must determine if 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 a reasonable accommodation. The employer should conduct an individualized assessment focusing on the following factors: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. According to the EEOC, a determination that an unvaccinated individual will expose others to the virus at the worksite would justify a conclusion that the employee poses a direct threat.
- Second, if the employer determines that an individual who cannot be vaccinated due to disability or a sincerely held religious belief poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent undue hardship<sup>1</sup>) that would eliminate or reduce this risk so that the unvaccinated employee does not pose a direct threat. In assessing what reasonable accommodations may be available, employers should engage in the same interactive process they would use when considering any other accommodation request, and as part of that process they should consider the various health and safety measures that have already been implemented during the pandemic—such as masks, social distancing, health screenings, education on enhanced handwashing and cough/sneeze etiquette, and elevated cleaning protocols. This process should include determining whether it is necessary to obtain supporting documentation about the employee’s disability, as well as considering the possible options for accommodation given the nature of the workforce and the employee’s position and job duties. According to the EEOC, employers may rely on CDC recommendations when deciding whether an effective accommodation that would not pose an undue hardship is available, and employers should also consult applicable Occupational Safety and Health Administration standards and guidance.
- Third, if the employer determines that there is no reasonable accommodation that would reduce the direct threat to an acceptable level, the employer may exclude the employee from physically entering the workplace. However, rather than automatically terminating the employee in this instance, the employer must then consider whether there are other reasonable accommodations available that would allow the employee to perform the

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<sup>1</sup> Note that “undue hardship” is defined differently under the ADA and Title VII. Under the ADA, undue hardship is defined as significant expense or difficulty. Under Title VII, on the other hand, the term is defined as having more than a de minimis cost or burden on the employer. As a result, it is easier for employers to establish an undue hardship defense in the context of a religious accommodation request under Title VII than in the context of a disability accommodation under the ADA. In either instance, according to the EEOC, the prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration.

essential functions of his or her job (for example, working remotely) and whether the employee has other rights under federal, state, or local laws.

As employers engage in assessments of direct harm and reasonable accommodation, they should be mindful of the guidance and practices that have been an important part of return-to-work efforts throughout the pandemic. Employers should also be aware of CDC guidance about available COVID-19 vaccines and in particular whether health risks of not being vaccinated (including risk of transmission at the workplace) may be reduced (1) when others in the workplace have received a COVID-19 vaccine; or (2) as a result of the same COVID-19-mitigation efforts and related accommodations that many business have successfully used during the pandemic.

## **5. What risks does an employer run if it decides not to require employees to get vaccinated before returning to the workplace?**

At the moment, the risks to employers of *not* requiring employees to be vaccinated remain, at best, high level and somewhat amorphous. Some companies have expressed concern that they could be subject to litigation from customers or other third parties who allegedly contract COVID-19 from one of the company's employees. In addition, some employers may be concerned that employees might try to use a company's failure to require vaccines as a basis for avoiding the exclusive remedy provisions of state workers' compensation laws. A defense to such claims would likely be to show compliance with CDC vaccine guidance and state and local guidance and regulation, which at present do not recommend that employers require vaccinations. There also may be state law protections that provide immunity to certain businesses if they post specific signage to customers about the risk of COVID-19. Moreover, the fact sheets that accompany the available COVID-19 vaccines may also provide additional defense to such claims by potential employees or customers. Both the Pfizer/BioNTech and Moderna fact sheets (which are provided to vaccine recipients) currently state that the COVID-19 vaccine "may not protect everyone," the COVID-19 vaccine "may prevent COVID-19," "the duration of protection against COVID-19 is currently unknown," and the vaccine is "still being studied in clinical trials."

## **6. What employee privacy and confidentiality concerns should employers bear in mind when deciding how to handle employee vaccinations?**

### **Vaccination status**

Before an employer asks an employee questions that amount to a "disability-related inquiry" (one or more questions that are likely to elicit information about a disability) or engages in a "medical examination" (a procedure or test that seeks information about an employee's physical or mental impairments or health), the employer must ensure that the inquiry or examination is job related and consistent with business necessity. In its recent guidance, the EEOC has explained that receiving a vaccination itself is not a medical examination under the ADA, and merely asking an employee for proof of vaccination is not a disability-related inquiry. Thus, neither is required to be job related and consistent with business necessity. However, the EEOC has also explained that follow-up questions about an employee's vaccine status (such as *why* the employee has not been vaccinated) may be disability-related inquiries that are subject to the ADA's requirement that such questions be job related and consistent with business necessity. Moreover, the EEOC also indicated that administering a vaccine or requiring proof of vaccination does not implicate the Genetic Information Nondiscrimination Act (GINA) because such actions do not involve the use of genetic information to make employment decisions or the acquisition or disclosure of "genetic information."

### **Pre-screening questions**

The CDC encourages health care providers to ask pre-screening questions before administering a COVID-19 vaccination. Such questions likely seek to identify persons who should not take the COVID-19 vaccine or who should discuss the matter further with their health care provider. Because those questions are likely to elicit information about an employee's disability, they may constitute disability-related inquiries, which means the employer must show the screening questions are job related and consistent with business necessity. Further, the fact sheets for the vaccines specifically instruct individuals to inform the vaccination provider "about all of your medical conditions" before receiving the vaccine. In addition, GINA prohibits employers (and those acting on their behalf) from asking questions about genetic information (including family medical history), so any pre-screening questions asked by an employer or its agent about an employee's genetic information (including family medical history) would violate GINA. If, however, an employee receives the vaccination from a third party that does not have a contract with the employer (such as a pharmacy or doctor's office), even if vaccination is required by the employer, the ADA and GINA should not apply to such questions. As a result, employers that want to ensure their employees have been vaccinated may want to request proof of vaccination rather than administering the vaccines themselves or paying a third party to do so.

### **HIPAA concerns**

Whether HIPAA applies to vaccine-related information will depend on, among other things, who is administering the COVID-19 vaccine and whether the vaccine is administered in connection with a health plan. Not all health care providers are covered by HIPAA. Some employers may decide to offer the COVID-19 vaccine as a work safety public health measure, while others may offer the vaccine as part of a benefit under a HIPAA covered health plan. Additionally, as states move to distribute the COVID-19 vaccine to other priority groups, employees could seek to obtain the COVID-19 vaccine on their own and not as a voluntary or mandatory measure in connection with their employment. Employees who choose to receive the COVID-19 vaccine at a third-party site unrelated to their employment can self-disclose the fact of the first dose of a COVID-19 vaccine to their employer or could sign an authorization permitting the vaccination provider to disclose the date, type, and fact of the COVID-19 vaccine to the employer. If a COVID-19 vaccine is provided as part of a HIPAA covered health plan or wellness program, then the employee should be asked to sign a HIPAA authorization permitting the health plan to notify the employer of the date, type, and fact of the vaccine's administration. However, if the COVID-19 vaccine is offered by an employer to employees not as part of a health plan, but instead as a work safety public health measure for all employees (whether they participate in the health plan or not), then HIPAA should not apply to the employer that is acting solely in the capacity as an employer. Even if HIPAA does not apply to an employer's COVID-19 vaccine program, HIPAA may apply to the vaccination provider itself, thus necessitating a HIPAA authorization for disclosure to the employer. Additionally, state laws may still apply to the employer; thus, information about an employee's COVID-19 vaccination status should continue to be treated as private information and not further shared with others in the company unless on a need-to-know basis as part of their job duties and functions.

## **7. What other considerations should employers bear in mind when deciding how to handle employee vaccinations?**

### **Keep using health and safety measures in the workplace to help slow the spread of COVID-19**

As information about the availability and distribution of COVID-19 vaccines continues to develop, companies should not abandon current COVID-19 workplace safety practices, including good hygiene, enhanced cleaning, social distancing (as feasible), and wearing masks. In reality, a COVID-19 vaccine still may be several months away

for many individuals (especially those who are not in health care or critical infrastructure or do not meet certain age or health criteria). Even when a COVID-19 vaccine becomes available to a company's employees in a particular state, some individuals may have personal, medical, or religious objections and plan to decline receiving the vaccine. Plus, according to the CDC as recently as late December 2020, measures to stop the possible spread of COVID-19, such as masks and social distancing, will still be needed after vaccination. For both the Pfizer/BioNTech and Moderna vaccines, a second dose is necessary, and there is likely more to be learned about the period of time before a vaccine recipient is considered fully vaccinated, whether that period is the same for different groups of people, and how long that protection will last. As noted by the CDC, "experts need to understand more about the protection that COVID-19 vaccines provide before deciding to change recommendations on steps everyone should take to slow the spread of the virus that causes COVID-19. Other factors, including how many people get vaccinated and how the virus is spreading in communities, will also affect this decision."

### **Consider a point of contact and process for employee questions and accommodation requests**

Establish a central point of contact at your company to receive questions and issue updates to employees. Once that person is identified, inform employees who they should reach out to with questions and concerns about the COVID-19 vaccine. Also consider what person should receive and process requests and objections by employees who do not wish to receive the COVID-19 vaccine.

### **Be prepared for potential confusion between vaccine side effects and COVID-19 symptoms**

There are some reported similarities between general side effects of the COVID-19 vaccine and actual symptoms of COVID-19. Employers (particularly in the health care industry) should consider whether to have employees undergo COVID-19 testing if they have had general side effects lasting *more than one day* after receiving the COVID-19 vaccine, to confirm they do not test positive for COVID-19. As noted by the FDA, a COVID-19 vaccine does not necessarily guarantee the lack of COVID-19 infection. According to the FDA, "It typically takes a few weeks for the body to build immunity after vaccination. That means it's possible a person could be infected with the virus that causes COVID-19 just before or just after vaccination and get sick. This is because the vaccine has not had enough time to provide protection."

### **Be careful about communications with employees, customers, and the public**

Employers that seek to have employees receive the COVID-19 vaccine (whether voluntarily or by requirement) may wish to market that their employees (especially in a public-facing business) are "immune" or "protected from COVID-19," or that customers who enter their stores are now "at less risk" of contracting COVID-19. Companies should carefully consider the legal ramifications of representations to employees and to the public, especially since vaccine-related information, data, and guidance are rapidly evolving and still in process. In addition to such representations, companies could consider whether vaccination status data at a particular location or store, even if aggregated, would inappropriately disclose individuals' private information. In the meantime, companies should continue to keep any signs posted on their business premises, based on applicable state law, regarding COVID-19 protective measures and visitors' assumption of risk.

Alston & Bird has formed a multidisciplinary [response and relief team](#) to advise clients on the business and legal implications of the coronavirus (COVID-19). You can [view all our work](#) on the coronavirus across industries and [subscribe](#) to our future webinars and advisories.

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