



CAN PRIVATE EMPLOYERS REQUIRE EMPLOYEES TO GET VACCINATED FOR COVID-19?

By Jade Robinson



The first person in the United States received the COVID-19 vaccine on Dec. 14, 2020 and many frontline workers and members of the at-risk population will be receiving the COVID-19 vaccine during the coming months. The question on employers' and employees' minds alike is whether employers can require their employees to receive the vaccine.

Recent Equal Employment Opportunity Commission (EEOC) guidance says yes: Employers can require their employees to receive the COVID-19 vaccine but employers must make exceptions for employees' religious and disability accommodations in accordance with Title VII of the Civil Rights Act of 1964 (Title VII), the Americans with Disabilities Act (ADA) and the Ohio Civil Rights Act.

Title VII and ADA Accommodations

Employees with a sincerely held religious belief, practice or observance that equate to that of traditional religious views may request that an employer provide a reasonable accommodation for the employee's religious practice.¹ Employers must work with employees to consider all possible reasonable accommodations and only if all reasonable accommodations would cause the employer to expend more than a "de minimis cost" may employers deny the request.²

Employees who have established a disability, as defined by the ADA and the Ohio Civil Rights Act, can request a reasonable accommodation in order to avoid receiving the COVID-19 vaccine.³ Employers may request proof of this disability through a doctor's note, prescription or health insurance record.⁴ Once an employee requests an accommodation, employers must engage in the interactive process to determine if a reasonable accommodation is feasible that does not pose an undue hardship for the employer.⁵ Undue hardship considerations are the amount

of employees who have received the vaccine at the workplace, the amount of the unvaccinated employee's contact with others, the unvaccinated employee's position and the nature of the workforce.⁶

Examples of reasonable accommodations include providing masks, gloves and other personal protective equipment and the employee working remotely while other employees go back to the office. If remote work is not feasible, then the employee could be reassigned to a less populated worksite. Employers may also need to inform the unvaccinated employee that if the unvaccinated employee wishes to attend in-person work events such as holiday parties or social outings then the unvaccinated employee will have to continue wearing a mask, remain socially distanced, and may have to eat separately from their coworkers to minimize potential exposure.

Current EEOC guidance states that employers who implement a vaccine mandate may prohibit unvaccinated employees from entering the workplace if all reasonable accommodations would not reduce or eliminate the risk of unvaccinated employees exposing other employees to the virus. Employers should allow unvaccinated employees to work remotely when feasible to completely eliminate the risk of exposure. However, for unvaccinated employees who cannot be remote, the risk of spreading COVID-19 remains due to close contact with others, touching the same surfaces, and the possibility of improper mask wearing. Not only may these unvaccinated employees be prohibited from entering the workplace, but employers may terminate these unvaccinated employees after discussions with counsel to ensure employers would not be violating any possible equal employment opportunity laws at the federal, state or local levels.

Employers should consider creating or revisiting their standard accommodation

forms and overall process to prepare for potential employee accommodation requests. The accommodation policy could state that political beliefs regarding the vaccine are not a sufficient reason to request an accommodation in order to likely lower the amount of requests the employer receives. When an accommodation request is received, the request should be documented and included in the employee's personnel file. Employers should engage in the interactive process on a case-by-case basis to determine whether to grant an employee's accommodation request.

Designate an Employee or Committee to Implement the Vaccine Mandate

Employers should consider designating a committee or employee who will be responsible for receiving and reviewing the accommodation forms, following the policy and communicating with higher level employees regarding the implementation of the mandate and any problems that may arise. This committee or employee could also track when employees receive the vaccine.

With or without implementing a vaccine mandate, employers can ask employees to provide proof of their vaccination as long as the employer instructs the employee to remove any medical information from the vaccination proof before sending it to the employer.⁷ Any information collected regarding vaccinations should be treated as confidential and stored appropriately.

When tracking which employees have submitted vaccination proof and following up, employers should avoid asking why an employee did not or will not receive the vaccine unless the employer can prove that the questions are "job-related and consistent with business necessity."⁸ To meet this requirement, employers will have to show that the unvaccinated employees will be a direct threat to other employees at the workplace. If the employers



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are working in close quarters such as distribution or manufacturing sites, this may be easier to prove.

If Unionized, Consult the Collective Bargaining Agreement

Collective bargaining agreements might outright prevent mandatory vaccinations or may give rise to a duty to bargain. Employers should consider reviewing the collective bargaining agreement and begin necessary negotiations with the union sooner rather than later so that employers can expedite their implementation of a vaccine mandate.

If federal, state or local laws require vaccines in the near future, then employers will only have to bargain over *how* the vaccine is administered rather than *if* a vaccine mandate can be implemented as employers have no duty to bargain over nondiscretionary changes in terms and conditions of employment mandated by federal, state or local law.⁹

Consider Covering the Cost of Employees' Vaccinations

Covering the cost of the vaccine will likely encourage employees to be vaccinated. Employers could also offer incentives to encourage employees to receive the vaccine. Employers should avoid offering the vaccine onsite as pre-screening vaccine questionnaires could trigger the ADA and Genetic Information Nondiscrimination Act. Consider contracting with a third-party medical provider to administer the vaccine to employees.

Balancing employee relations and workplace culture should be strongly considered before implementing a mandate; that a vaccine mandate is legally permissible does not dictate whether it is the right choice for every employer. Applicable laws, regulations, and guidance are ever-changing regarding this issue so it is important to consult with counsel before implementing a COVID-19 vaccine mandate. 🏢



About the Author

Jade Robinson is an attorney with Faruki PLL in Cincinnati. Her practice focuses on employment law, business and complex commercial litigation matters and contractual disputes. She earned her undergraduate degree in criminal justice and police studies from Eastern Kentucky University and her law degree from the University of Cincinnati College of Law.

Endnotes

¹ 42 U.S.C. 2000(e)(j).

² 29 C.F.R. 1605.2(e).

³ 42 U.S.C. 12102(1); Ohio Adm. Code 4112-5-02(H); R.C. 4112.01(13).

⁴ *Tchankpa v. Ascena Retail Grp., Inc.*, 951 F.3d 805 (6th Cir.2020) (finding that employers may require documentation supporting an employee's disability for which the employee is requesting an accommodation) citing 29 C.F.R. 1630.14(c) (internal citation omitted).

⁵ 42 U.S.C. 12111(10).

⁶ EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, K.5 (December 16, 2020).

⁷ *Id.* at K.3.

⁸ *Id.* at K.2.

⁹ *Long Island Day Care Services*, 303 N.L.R.B. 112, 117 (1991).