

A COVID-19 Vaccine Is on the Way—Considerations for Employers and Their Workforces

A COVID-19 vaccine authorized by the U.S. Food and Drug Administration (FDA) for emergency use has arrived in the United States and is being widely distributed to select groups as we issue this update. It is more than likely there will be vaccines approved for nonemergency use around Q2 of 2021. Consequently, many employers are evaluating whether they can and should issue a mandatory vaccine policy, and, if they decide to do so, how it should be implemented. As companies navigate this fast-moving development in the COVID-19 pandemic and its impact on the workplace, they should consider key issues concerning the legal parameters of mandating a vaccine, as well as strategies for implementing such a plan.

Can an employer require its employees to get the vaccine once the FDA approves one for nonemergency use?

Yes, though this is subject to limitations under the Americans with Disabilities Act (ADA), Title VII of the Civil Right Act of 1964, state law prohibitions on employer-mandated vaccines, and collective bargaining obligations for companies with represented employees.

On December 16, 2020, the Equal Employment Opportunity Commission (EEOC) updated its guidance [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#) and addressed the question whether an employer can require employees to receive the COVID-19 vaccine. The ADA allows employers to have a qualification standard that includes a "requirement that an individual shall not pose a direct threat to the health and safety of individuals in the workplace." If a safety-based qualification standard, such as a vaccination, would screen out an individual with a disability, the employer must show that an 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." Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists that an unvaccinated person will expose others to the virus at the worksite: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; (4) and the imminence of the potential harm. If there is a direct threat, then an employer must consider whether reasonable accommodations (e.g., telecommuting) exist without imposing an undue hardship.

Under Title VII, if an employee holds a sincere religious belief, practice, or observance that prevents them from taking a vaccine, the employer must offer a reasonable accommodation unless it would pose an undue hardship as defined by Title VII ("more than *de minimis* cost" to the operation of the employer's business, which is a lower standard than under the ADA).

In addition to the limitations provided in the ADA and Title VII, some state laws may limit an employer's right to mandate a vaccine. For example, in Oregon, healthcare providers cannot mandate vaccines. Employers should watch for state or local guidance and/or regulations relating to mandating COVID-19 vaccinations.

How should an employer implement and execute a plan if it does require employees to get the vaccine?

Create a phased communication plan. Seek input. Build buy-in.

There is a lot we do not yet know about the anticipated FDA-authorized vaccine. Implementation and execution of a vaccine policy will depend on myriad factors, such as industry, availability of a vaccine, potential impacts on business operations, and the willingness of the workforce. Whether an employer makes the vaccine optional or mandatory, the likely success of the company-adopted plan will depend on factors including communications to socialize the possible plan and educational information for employees on medical and scientific information (including potential risks of the vaccine).

A phased communication plan will allow an employer time to hear and address concerns from its employees and build buy-in. Of course, there is not yet a nonemergency approved vaccine so companies are cautioned not to definitively say that they will or will not mandate that employees get the vaccine. If an employer leans toward requiring vaccination, then early communications that convey the company's efforts to carefully monitor availability of a safe and effective vaccine along with the importance of the vaccine to business needs will be an important step in creating confidence and ensuring compliance.

The CDC has a COVID-19 Vaccination Communication Toolkit for medical centers, clinics, and clinicians to help build confidence about the COVID-19 vaccine among healthcare teams, staff, and patients. These communication materials may be a useful reference as employers develop their communication plan.

Develop a COVID-19 vaccination policy and plan to process exemption requests and train staff how to appropriately address such requests.

Employers should determine whether the employer or a third-party vendor will administer the vaccine, or whether the employer will rely on employees to obtain the vaccine on their own (such as from the employee's own healthcare provider). If the employer chooses to administer the vaccine (or engage a third-party vendor to do so), there are additional legal considerations that the employer should consider. For example, any pre-vaccination medical screening questions may implicate the ADA and the Genetic Information Nondiscrimination Act (GINA), and PREP Act immunity may apply. Additionally, employers will need to consider how to conduct the vaccinations in a confidential manner and in a way that does not increase exposure risk. Employers should consult with counsel to determine the best course of action for their business.

Additionally, employers will want to be prepared for how to respond to employees who request either: (1) an accommodation due a disability or (2) an exemption due to a sincerely held religious belief. Once the employer has decided whether to make the vaccine mandatory, the employer should create a policy summarizing the plan and the process for employee exemption requests. It is anticipated that employers may see an increase in exemption requests and staff should be adequately trained to appropriately handle these requests in accordance with federal, state, and local law.

Defray vaccination costs.

News reports indicate that there will be no individual costs to obtain a COVID-19 vaccine. If this is true, employers can still adopt policies that will make it easier for their employees to get vaccinated, such as providing paid time off to obtain the vaccination, offering vaccination clinics (if available), and providing paid

time off for employees who experience side effects from the vaccine (such as fatigue).

Continue to follow applicable CDC and state and local guidance on preventing the spread of COVID-19.

Even if employees are vaccinated, the CDC currently recommends that individuals continue to use all tools available to prevent the spread of COVID-19, including wearing a mask, washing hands often, staying at least six feet away from others, and continuing to clean and disinfect frequently touched surfaces daily. Employers should continue to ensure that their employees understand that the COVID-19 protocols will remain in place until appropriate guidance changes.

This document was last updated on December 16, 2020. While Perkins Coie routinely provides updates based on any new applicable guidance, this area is rapidly changing. If you have any questions, would like additional information regarding these issues, or want to discuss best vaccination policy strategies, please contact any attorney from Perkins Coie's Labor & Employment practice group.

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