

Should Employers be Preparing to Mandate COVID-19 Vaccines?

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Employers are starting to examine whether they can or can't require their workers to use a COVID-19 vaccine when it becomes available to the public.

The short answer is yes.

And no.

Current guidance from the U.S. Equal Employment Opportunity Commission does include a pandemic preparedness response for vaccines. It does allow for employers to require employees to take the vaccine, subject to certain exemptions, including reasonable accommodations for religion and disability.

In addition to those exemptions - which all come with their own conditions - there is the possibility the EEOC could soon update its guidance. The current guidance for pandemic preparedness and vaccines comes from 2009 during the H1N1 swine flu pandemic. This current COVID-19 pandemic obviously has encompassed the globe hundreds of times more severely than swine flu, which could force the EEOC to update its guidance from 11 years ago.

With statistics trending definitively in the wrong direction for the COVID-19 pandemic, scientists have been working tirelessly to develop a vaccine that can adequately protect the majority of people and allow society to return to relatively "normal operations." On November 9, two key players in the pharmaceutical world announced that their collaboration has likely resulted in a vaccine that could have as high as a 90% effective rate (for comparison, the annual flu vaccine is between 40% and 60%, according to the Centers for Disease Control). Moderna has also announced preliminary results showing its vaccine is close to 95% effective.

The Food and Drug Administration (FDA) - the gatekeeper that all new vaccines must pass to get to market - has not approved any vaccine for the prevention of COVID-19. The FDA's normal vaccine approval process, which includes multiple stages of testing to ensure that a vaccine is safe and effective, can take many years. Even with the efforts to speed up this process, the FDA has indicated that it will not sacrifice safety to prematurely approve a vaccine. However, we may expect to see an Emergency Use Authorization (EUA) for COVID-19 vaccines before full approval. With an EUA, the FDA can make a determination that the known or potential benefits of the vaccine outweigh the known or potential risks. The FDA has followed this process to issue EUAs for a number of COVID-19 treatment measures to date, and Pfizer announced Friday [it will file for an EUA for its vaccine](#).

It is likely that initial vaccine supplies will be limited. The CDC already has released information as to how it intends to prioritize distribution of COVID-19 vaccines when they become available. Health care personnel

top the list, followed immediately by workers in essential and critical industries. What is considered an essential or critical industry may vary state-to-state based on its response to the pandemic, but in most cases, industries like agriculture, food production, logistics and manufacturing of critical products are considered critical or essential. It is possible that vaccines could be available on limited basis by the end of the year.

May employers require employees to get a COVID-19 vaccine?

While a vaccine seems to be on the horizon, the EEOC has yet to issue specific guidance in regards to mandatory COVID-19 vaccination. Despite the lack of COVID-19 specific guidance on this issue, the EEOC has stated that employers can and should rely on the EEOC guidance issued during the 2009 H1N1 swine flu epidemic.

In its 2009 guidance on pandemic preparedness, the EEOC suggested employers could compel employees to get the influenza vaccination as long as they provided reasonable accommodations for employees with disabilities - in accordance with the Americans with Disabilities Act (ADA). Employers must also provide for religious-based accommodations for employees with religious objections in accordance with Title VII of the Civil Rights Act of 1964 (Title VII).

The ADA requires employers to provide reasonable accommodations to qualified individuals with a disability that would prevent that individual from receiving a vaccination. In evaluating an employee's disability status, the employer should take into consideration CDC and U.S. Department of Health guidelines regarding conditions justifying (and not justifying) exemption from vaccine requirements. Employers are not required, however, to provide reasonable accommodations if doing so would cause an undue hardship or pose a direct threat to the health or safety of others. The EEOC has stated that an accommodation poses an undue hardship if it results in significant difficulty or expense for an employer, taking into the account the nature and cost of the accommodation, the resources available to the employer and the operation of the employer's business. Employers should note that these considerations do not mean that they can reject any accommodation that costs money. Rather, the considerations mean that an employer must weigh the cost of an accommodation against its current budget in light of the pandemic and state restrictions. The EEOC also has stated that assessments regarding whether an employee poses a direct threat must be based on "objective, factual information." The EEOC's regulations identify four factors to consider when determining whether an employee poses a direct threat:

- The duration of the risk
- The nature and severity of the potential harm
- The likelihood that potential harm will occur
- The imminence of potential harm

In the light of the current pandemic, the EEOC has confirmed that individuals with COVID-19 *will* pose a direct threat to the health of others.

Even if a direct threat to health and safety is present, an employer must consider possible reasonable

accommodations to mitigate or eliminate such threat. Possible accommodations may include telework, modified work schedules, unpaid or paid leave, or special masks or other personal protective equipment (PPE).

Additionally, Title VII requires that employers provide reasonable accommodations to employees who hold sincere religious beliefs, practices or objections preventing them from receiving an employer-mandated vaccination. Similar to the ADA, employers are not required to provide a reasonable accommodation if that accommodation would pose an undue hardship to the employer. Employers should note that Title VII's "undue hardship" standard is much lower than the standard set forth under the ADA as it only requires "more than a *de minimis* cost" - a trivial or minor cost - to the operation of the employer's business. Employees granted a religious exemption may be required to take additional safety precautions to mitigate safety risks, including wearing specialized masks or other appropriate PPE or transfer to another work area.

While employers are expected to adhere to the current guidance, it is more than a decade old. Because of the differences between the H1N1 swine flu that prompted the current guidance, it is possible the EEOC's COVID-19 vaccination guidance could be significantly different.

If you have any questions about how you could be preparing for the release of a COVID-19 vaccine, please contact [Martin R. Siegel](#), [Jennifer Craighead Carey](#), [EmmaRose Boyle](#), [Kareemah Mayer](#), [David Freedman](#), or anyone on the Barley Snyder [COVID-19 Response Team](#) for assistance. Additionally, to learn more about the legal issues related to mandatory COVID-19 vaccination, tune in to [the latest episode of the Barley Snyder Legal Update Podcast](#).

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