
Employer-Mandated COVID-19 Vaccines: Important Considerations

As COVID-19 vaccines become increasingly available, employers may consider requiring that employees be vaccinated prior to resuming or continuing in-person work. Guidance from the Equal Employment Opportunity Commission (“EEOC”) indicates that employers may require employees to get a vaccine under equal employment opportunity (“EEO”) laws as long as employers make exceptions for employees with disabilities or religious beliefs that prevent them from receiving the vaccine, but many states such as New York (discussed herein) are contemplating more employee-protective legislation. In the midst of this legal uncertainty, companies must also grapple with the reputational and morale risks associated with requiring vaccinations. This memorandum outlines liability risks employers should consider in setting their own vaccine policies.

I. Federal Health Standards for At-Will Employees

Generally, employers can set health requirements for at-will employment. At the federal level, the EEOC has long taken the position that employers may require employees to receive a flu vaccine but generally has recommended that employers encourage, rather than require, vaccination.¹ Similarly, the Occupational Safety and Health Administration (“OSHA”) noted in 2009 that employers may require employees receive the H1N1 vaccine, characterizing H1N1 as a “pandemic influenza virus.”²

In many cases, employers may impose a vaccination requirement to ensure employees do not pose a “direct threat” to the health or safety of individuals in the workplace.³ A direct threat is one that poses 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.”⁴ In determining whether a particular employment situation presents a “direct threat,” the employer must evaluate “the individual’s present ability to safely perform the essential functions of the job” as well as “(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.”⁵ The EEOC has found that the COVID-19 pandemic meets the

¹ *Pandemic Preparedness in the Workplace and the Americans With Disabilities Act*, Equal Employment Opportunity Commission, at III(B) (updated March 21, 2020) available at <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> (hereinafter “Pandemic Preparedness Guidance”).

² *OSHA’s position on mandatory flu shots for employees*, Occupational Safety and Health Administration (November 2009), available at <https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09>.

³ *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws*, Equal Employment Opportunity Commission (December 2020), available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (hereinafter “What You Should Know About COVID-19”).

⁴ 29 CFR § 1630.2(r)

⁵ *What You Should Know About COVID-19*, at G.4.

“direct threat” standard, but that assessment may change as case numbers decrease in a particular region.⁶ Notably, EEOC regulations provide that the “direct threat” assessment must be based on “a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.”⁷

In establishing vaccine protocols, employers must also satisfy applicable provisions of the Americans with Disabilities Act (the “ADA”)⁸ and Title VII of the Civil Rights Act (“Title VII”).⁹ Specifically, under the ADA and Title VII, employers must provide reasonable accommodations, absent undue hardship, for those who cannot comply with a vaccine requirement because of disabilities or sincerely held religious beliefs.¹⁰ “A ‘reasonable accommodation’ is a change in the work environment that allows an individual with a disability to have an equal opportunity to apply for a job, perform a job’s essential functions, or enjoy equal benefits and privileges of employment.”¹¹ “An accommodation poses an ‘undue hardship’ if it results in significant difficulty or expense for the employer, taking into account the nature and cost of the accommodation, the resources available to the employer, and the operation of the employer’s business.”¹² Accommodations could include requiring, for example, the employee wear a mask and other personal protective equipment (“PPE”) or work remotely. If the direct threat cannot be reduced, the employee may be entitled to continue to telework or take leave under the Families First Coronavirus Response Act, Family and Medical Leave Act (“FMLA”), or employer’s leave policies.¹³ If no other rights apply, the employer may terminate the employee.¹⁴

Finally, employers should ensure that any vaccine program, whether mandatory or otherwise, complies with federal anti-discrimination laws by ensuring that it does not treat employees differently because of protected characteristics. For example, under the Age Discrimination in Employment Act, employers may not “limit, segregate, or classify” employees “because of such individual’s age.”¹⁵ Similarly, employers should not single out employees they believe may be at a higher risk for severe COVID-19 illness based on other medical factors.¹⁶ Employers *may* classify employees on the basis of job-related characteristics, however. For example, employers could include customer-facing employees in a mandatory vaccination policy while excluding employees who can work remotely, so long as the policy allows for accommodations as discussed above.

⁶ *Pandemic Preparedness Guidance*, at I(B).

⁷ 29 CFR § 1630.2(r).

⁸ 42 U.S.C. § 12101.

⁹ 42 U.S.C. 2000e *et seq.*

¹⁰ [What You Should Know About COVID-19](#); see also *Norman v. NYU Langone Health System*, 2020 U.S. Dist. LEXIS 180990, *13 (2020) (“Discrimination in violation of the ADA includes, *inter alia*, not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.”) (internal quotations omitted) (quoting *McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 96 (2d Cir. 2009)). See also *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 273 (5th Cir. 2000) (under Title VII, “[a]n employer has the statutory obligation to make reasonable accommodations for the religious observances of its employees, but is not required to incur undue hardship).

¹¹ *Pandemic Preparedness Guidance*, at II(C).

¹² *Id.*

¹³ [What You Should Know About COVID-19](#), at K.7.

¹⁴ *Id.* See also, e.g., *Horvath v. City of Leander*, 946 F.3d 787 (5th Cir. 2020) (finding the defendant not liable for violations of Title VII after the defendant-employer terminated an employee who did not comply with the employer’s flu vaccine policy after the employer offered to transfer the employee to a position that did not require the vaccine).

¹⁵ 29 U.S.C. § 623(a)(2).

¹⁶ HIPAA prohibits discrimination against participants in group health plans on the basis of a “health factor,” which includes health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, or disability. 29 CFR § 2590.702.

II. Recent Challenges to Vaccine Mandates

Notwithstanding the EEOC guidance, some commentators have argued that employers may not mandate that employees receive a COVID-19 vaccination because the vaccines currently approved by the Food and Drug Administration (“FDA”) have been approved through its Emergency Use Authorization (“EUA”) process. The subsection of the Federal Food, Drug, and Cosmetic Act that gives the FDA the ability to grant EUAs requires that the Secretary of Health and Human Services ensure individuals receiving the product are informed “of the option to accept or refuse administration of the product, [and] of the consequences, if any of refusing administration.”¹⁷ However, the statute regulates the actions of public officials, not private employers.

Plaintiffs in two recent lawsuits have challenged their employers’ vaccine mandates on this basis, but in both cases the plaintiffs were employed by public entities. In a lawsuit filed in the District of New Mexico in February of 2021, an employee at the Dona Ana County Detention Center challenged a “Mandatory COVID-19 Vaccine Directive” requiring first responders to receive a COVID-19 vaccination as a condition of ongoing employment.¹⁸ The employee initially moved for, but then withdrew, a motion seeking a temporary restraining order or injunction preventing his termination. In March of 2021, teachers and employees of the Los Angeles Unified School District brought a similar suit challenging its vaccine mandate.¹⁹ The plaintiffs also brought claims asserting their due process rights had been violated and under California’s Protection of Human Subjects in Medical Experimentation Act by subjecting them to medical experimentation without consent.

The plaintiffs in both the California and New Mexico cases have raised the argument that the law governing EUAs preempts state law and does not permit the defendant employers to require vaccinations where a vaccine has been authorized under an EUA.²⁰ While both cases are still in the earliest stages, and indeed the complaint has not yet been answered in either, this may be a challenging argument for either set of plaintiffs. When analyzing if a federal statute preempts state laws, courts apply the “presumption against preemption” and require evidence that preemption was “the clear and manifest purpose of Congress.”²¹ Such purpose may be particularly difficult to demonstrate given that the United States Centers for Disease Control and Prevention (“CDC”) has stated that: “whether a state, local government, or employer, for example, may require or mandate COVID-19 vaccination is a matter of state or other applicable law.”²²

II. New York State Legislation Regarding Vaccine Mandates

New York state legislators have recently introduced several bills addressing COVID-19 vaccinations. Assembly members David DiPietro, Karl Brabenec, and Brian Maktelov have proposed A4602, which would prohibit the COVID-19 vaccine from being required for: employment or continued employment; attendance or employment at a public or private educational institution; or residency at a nursing home. On the other hand, Assembly member Richard Gottfried is sponsoring A2081, which would require residents and employees of long-term care facilities to receive the COVID-19 vaccine in addition to the vaccines already required. Two other proposed laws, S02677 (religious exemption) and S02678 (physician liability), add an exemption to school vaccine requirements for those

¹⁷ 21 U.S.C. § 360bbb-3(e)(1)(A)(iii)(III).

¹⁸ *LeGaretta v. Macias*, 2:21-cv-00179-MV-GBW (D.N.M. Feb. 28, 2021).

¹⁹ See *California Educators for Medical Freedom v. Los Angeles Unified School District*, 2:21-cv-02388-DSF-PVC (C.D. Cal. March 17, 2021).

²⁰ See 21 U.S. Code § 360bbb-3, Section (e)(1)(A).

²¹ *Medtronics, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

²² *Workplace Vaccination Program*, Centers for Disease Control and Prevention (updated March 25, 2021), available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html>.

with sincerely held religious beliefs that prohibit them from receiving the vaccine and clarify that a physician's failure to immunize a patient or provide a certificate exempting a patient does not constitute professional misconduct. All of these bills are pending before the relevant legislative committees.

In setting vaccine policies, employers should be cognizant of pending legislation in their states and may want to seek specific legal guidance.

IV. Collecting Vaccination Status Information from Employees

Generally, employers may collect information about whether employees have been vaccinated and, under federal law, *may* require employees to show proof of receipt of a COVID-19 vaccination.²³ If employers ask employees to provide proof of vaccination, employers should consider restrictions under federal law that prevent employers from making disability-related inquiries and ensure vaccine-related information is kept private and confidential.²⁴

Employers should be aware of prohibitions in the ADA on making inquiries regarding the existence, nature or severity of an employee's disability. As there can be numerous reasons an employee has not been vaccinated, the EEOC has recently confirmed that asking an employee to show proof of receipt of a vaccine is not a disability-related inquiry.²⁵ The EEOC has cautioned, however, that "subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be 'job-related and consistent with business necessity.'"²⁶ Information is considered "job-related and consistent with business necessity" when an employer "has a reasonable belief, based on objective evidence, that (1) an employee's ability to perform essential job functions will be impaired by a medical condition; or (2) an employee will pose a direct threat due to a medical condition."²⁷

Even though proof of vaccination is not considered a disability-related inquiry, separate confidentiality provisions in the ADA²⁸ may still apply to data gathered related to employee vaccinations. For diagnoses of COVID-19, the EEOC has advised that "[t]he ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this confidential information."²⁹ It is prudent to

²³ *What You Should Know About COVID-19*, at K.3. See also *Workplace Vaccination Program*, Centers for Disease Control and Prevention (updated March 25, 2021), available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html>.

²⁴ "A covered entity may require a medical examination (and/or inquiry) of an employee that is job-related and consistent with business necessity." 29 C.F.R. § 1630.14(c). "Information obtained under paragraph (c) of this section regarding medical condition or history of any employee shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record." 29 C.F.R. § 1630.14(c)(1).

²⁵ *What You Should Know About COVID-19*, at K.3.

²⁶ *Id.* The EEOC has further recommended that, "[i]f an employer requires employees to provide proof that they have received a COVID-19 vaccination . . . the employer may want to warn the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA." *Id.*

²⁷ *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA*, EEOC (July 27, 2000), available at <https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees>.

²⁸ See 29 C.F.R. § 1630.14(c)(1) (providing that information regarding the medical history or condition of any employee that has been voluntarily collected "shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that: (A) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; (B) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment. . . .")

²⁹ *What You Should Know About COVID-19*, at B.1.

assume that information about vaccinations will also be considered employee “medical history” that should be treated with similar precautions. State laws may also impose additional confidentiality and security requirements.³⁰

IV. Additional Liability Considerations

When drafting vaccine policies, employers should also consider their duty to provide a safe workplace. Under Section 5 of the Occupational Safety and Health Act of 1970, employers must provide “employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.”³¹ Employees who feel their employer is not taking adequate COVID-19 precautions may request OSHA inspect their workplace by filing a complaint with the Secretary of Labor. As of January, 2021, OSHA issued 310 COVID-19-related citations with total initial penalties of \$4,034,288.³² Employees may also sue the employer, but employees run the risk of the case being dismissed under the doctrine of primary jurisdiction if the court determines OSHA is better suited to assess the workplace.³³

Employers should also be aware that they may face legal liability for violations of equivalent state laws as well. For example, New York Attorney General Letitia James filed a lawsuit against Amazon for failing to provide a safe workplace in violation of New York state law on February 17, 2021. The complaint alleges that Amazon did not comply with cleaning and disinfection requirements, provide adequate contact tracing, or permit employees to engage in necessary social distancing and hygiene practices.³⁴ While likely a remote possibility, an employee may try to argue that a lax vaccination policy would also create an unsafe work environment.

Finally, another concern faced by employers is whether they face liability if an employee has an adverse reaction to a vaccination they have required. Employers are unlikely to face civil liability in this situation. Although the law differs by state, in most states, this type of injury will be deemed to fall under workers’ compensation laws, which typically supply an employee’s exclusive remedy.³⁵ Where worker’s compensation law applies, employers generally face tort liability only for gross negligence, recklessness, or intentionally exposing employees to harm. And even where the workers’ compensation law does not apply, employers will generally be held to at least a negligence

³⁰ The privacy protections under HIPAA will not be implicated for most employers, as HIPAA applies to “covered entities,” limited to: “(1) A health plan; (2) A health care clearinghouse; [and] (3) A health care provider who transmits any health information in electronic form.” 45 CFR § 160.103; *see also Employers and Health Information in the Workplace*, U.S. Department of Health & Human Services Nov. 2, 2020), available at <https://www.hhs.gov/hipaa/for-individuals/employers-health-information-workplace/index.html>.

³¹ 29 U.S.C. § 654. *See also Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, Occupational Safety and Health Administration (January 2021), available at <https://www.osha.gov/coronavirus/safework>. For further analysis *see* Cahill Gordon & Reindel LLP Firm Memo, “Employer Waivers of COVID-Related Liability” (Feb. 12, 2021) at <https://www.cahill.com/publications/covid-19-insights/2021-02-12-employer-waivers-of-covid-related-liability/res/id=Attachments/index=0/Employer%20Waivers%20of%20COVID-Related%20Liability.pdf>.

³² *Inspections with COVID-related Citations*, Occupational Safety and Health Administration (January 14, 2021), available at <https://www.osha.gov/enforcement/covid-19-data/inspections-covid-related-citations>.

³³ *See e.g., Palmer v. Amazon.com, Inc.*, 2020 U.S. Dist. LEXIS 203683 (E.D.N.Y. 2020) (granting defendant’s motion to dismiss failure to provide a safe workplace claim because plaintiffs did not request an OSHA inspection).

³⁴ *People of N.Y. v. Amazon.com, Inc.*, Index No. 45362/2021 (N.Y. Sup. Ct. Feb. 16, 2021).

³⁵ For example, in a 2015 decision, the New York State Workers’ Compensation Board found that a social worker’s arm injury stemming from a flu vaccine arose out of and in the course of employment where, *inter alia*, her employer offered the vaccine on premises, strongly encouraged employees to receive the vaccine, and in the absence of receiving the vaccine, required employees in her position to wear masks, which would be detrimental to their work. *Matter of Mt. Sinai Medical Center*, Case No. G0695787, 2015 NY Wrk. Comp. LEXIS 11474 (Dec. 2, 2015). *See also generally* 1 New York Workers’ Compensation Handbook § 1.01 (2020).

standard. Given the safety information currently available about the vaccines, it is unlikely that a court would find an employer was negligent, let alone grossly negligent, in requiring their use.³⁶

IV. Practical Considerations

As employers consider implementing a mandatory vaccine policy, they should weigh the benefits against potential liability, legality in their state, customer expectations, and employee morale.

It appears that the vast majority of employers so far have been encouraging or incentivizing, rather than requiring, employees to get the vaccine.³⁷ For example, employers have encouraged vaccination by giving employees paid time off to get the vaccine and recover from any side effects.³⁸ Some employers, including Amazon and JBS SA (meatpacking), offer employees cash bonuses to get vaccinated.³⁹ In some states, such as New York, employers may be required by law to provide paid leave for employees to receive the vaccine,⁴⁰ and President Biden has called on all employers to provide employees with paid time off to get vaccines and recover from any after effects.⁴¹

When considering a vaccine incentive program, employers should consider evolving areas of federal law governing permissible incentives related to workplace wellness programs, and the EEOC has indicated it expects to issue more guidance on this topic.⁴² Employer-sponsored wellness programs that provide medical care are classified as group health plans, subject to federal regulation, and it is likely that a program to incentivize vaccines will fall within this category of wellness plans.⁴³ In January 2021, the EEOC proposed a new rule clarifying that participation in an employer-sponsored wellness program must be voluntary, and that employers could only provide *de minimis*

³⁶ According to the FDA, the COVID-19 vaccines in use are safe and effective. For the most serious potential side effect, anaphylaxis, the FDA reported an anaphylaxis rate of 2.5 out of one million first doses of the Moderna vaccine and 11.1 cases of anaphylaxis for every million first dose of the Pfizer-BioNTech vaccine. Allergic Reactions Including Anaphylaxis After Receipt of the First Dose of Moderna COVID-19 Vaccine — United States, December 21, 2020–January 10, 2021, *Centers for Disease Control and Prevention* (Jan. 29, 2021); Allergic Reactions Including Anaphylaxis After Receipt of the First Dose of Pfizer-BioNTech COVID-19 Vaccine — United States December 14–23, 2020, *Centers for Disease Control and Prevention* (Jan. 15, 2021), at <https://www.cdc.gov/mmwr/volumes/70/wr/mm7002e1.htm#>. The CDC and FDA have also shown they will act quickly to pause the use of a vaccine where there are even suspicions of safety concerns. See *Joint CDC and FDA Statement on Johnson & Johnson COVID-19 Vaccine* (Apr. 13, 2021), available at <https://www.cdc.gov/media/releases/2021/s0413-JJ-vaccine.html>.

³⁷ Marketwatch, “Just 0.5% of U.S. companies mandate COVID-19 vaccination for all employees,” (Feb. 12, 2021), at <https://www.marketwatch.com/story/just-0-5-of-u-s-companies-mandate-covid-19-vaccination-for-all-employees-11612928585>.

³⁸ CNN, “These companies are paying their employees to receive the Covid-19 vaccine” (Mar. 25, 2021), at <https://www.cnn.com/2021/03/24/business/covid-vaccine-incentives-companies/index.html>.

³⁹ Dallas Morning News, “Amazon, Aldi, Walmart, Trader Joe’s and other retailers begin to encourage workers to get the vaccine” (Jan. 22, 2021), at <https://www.dallasnews.com/business/retail/2021/01/22/amazon-aldi-walmart-trader-joes-and-other-retailers-begin-to-encourage-workers-to-get-the-vaccine/>.

⁴⁰ See *Public and Private Employees Will Be Granted Up to Four Hours of Excused Leave Per Injection*, Governor Andrew M. Cuomo (March 12, 2021), available at <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-granting-employees-time-receive-covid-19-vaccination>.

⁴¹ See *FACT SHEET: President Biden to Call on All Employers to Provide Paid Time Off for Employees to Get Vaccinated After Meeting Goal of 200 Million Shots in the First 100 Days*, the White House (Apr. 21, 2021), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/21/fact-sheet-president-biden-to-call-on-all-employers-to-provide-paid-time-off-for-employees-to-get-vaccinated-after-meeting-goal-of-200-million-shots-in-the-first-100-days/>.

⁴² See Letter from Carol R. Miaskoff, EEOC Acting Legal Counsel, to Edwin Egee et al., National Retail Federation (April 15, 2021), available at <https://aboutblaw.com/WTZ>.

⁴³ Group health plans include employee welfare benefits plans to the extent that the plan provides medical care, including items and services paid for as medical care. 45 CFR § 160.103. Relevant federal laws include the Health Insurance Portability and Accountability Act (“HIPAA”), the Patient Protection and Affordable Care Act (“ACA”), the Genetic Information Nondiscrimination Act (“GINA”), and the ADA.

incentives for participation (such as a water bottle), but the rule has since been frozen by the Biden administration.⁴⁴ Employers should also consider whether the incentives can be made available to employees who cannot or will not get vaccinated for protected reasons such as disability or religious belief.

Given the potential challenges of implementing a mandatory vaccine policy, and current uncertainty about providing incentives for employees to receive vaccines, employers may also consider engaging in educational efforts to better inform their employees about the safety and utility of the vaccine. For example, OSHA has recommended features of the “most effective workplace COVID-19 prevention programs,” including making the vaccine available at no cost to all eligible employees and educating employees on the benefits and safety of the vaccines.⁴⁵

Educational efforts and policies to encourage vaccination, in addition to following other best practices recommended by the CDC like requiring PPE and distancing, can help employers fulfill their duty to provide both a safe work environment and safe environment for customers.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Helene Banks (partner) at 212.701.3439 or hbanks@cahill.com; Geoffrey E. Liebmann (partner) at 212.701.3313 or gliebmann@cahill.com; Lauren Perlgut (counsel) at 212.701.3558 or lperlgut@cahill.com; or Taylor Elicequi (associate) at 212.701.3062 or telicequi@cahill.com; or email publications@cahill.com.

⁴⁴ See <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/>.

⁴⁵ *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, Occupational Safety and Health Administration (January 2021).

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