

## **Dinse Brief - COVID-19 Vaccine and Employer Vaccination Policies**

In light of the Food and Drug Administration's Emergency Use Authorization of the Pfizer COVID-19 vaccine, and with the same authorization of the Moderna vaccine expected imminently, many Vermont employers will be considering the implications of a COVID-19 vaccine in the workplace, including whether to implement a COVID-19 vaccine policy. In short, employers are legally entitled to establish mandatory COVID-19 vaccine policies for their employees, as long as the policy includes appropriate exemptions under the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act. Nevertheless, as discussed in greater detail below, employers may be better served by implementing voluntary COVID-19 vaccine policies, at least for the time being.

### **Vaccine Policies in General**

Prior to the COVID-19 epidemic, the Equal Employment Opportunity Commission (EEOC) and Occupational Safety and Health Administration (OSHA) interpreted mandatory flu vaccination policies by employers as permissible, as long as those policies are job-related and provide the proper exemptions for ADA-covered disabilities and sincerely held religious beliefs under Title VII.

- ADA:
  - Prohibits employers from excluding individuals with disabilities from the workplace for health and safety reasons unless they pose a "direct threat."
- Title VII:
  - Employer must make a reasonable accommodation to an employee with a sincerely held religious belief, including if that belief prevents him or her from taking a vaccine, unless the accommodation would present an undue hardship to the employer.

Unsurprisingly, the EEOC has supported mandatory flu vaccine policies in the health care sector, stating that whether a health care employer would face an undue hardship as a result of an unvaccinated employee depends on factors such as public risk posed and the availability of effective alternative means of infection control.

### **COVID-19 Context**

Employers must consider the same ADA and Title VII exemptions in the context of a COVID-19 vaccination policy.

- ADA:
  - Under the ADA, the EEOC has explicitly determined that COVID-19 constitutes a "direct threat," such that "a significant risk of substantial harm would be posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time."

- Based on this interpretation, the EEOC has determined that inquiries by employers about potential COVID-19 symptoms, even if disability-related, are justified. This has enabled employers to implement broader medical inquiries and procedures in the workplace than normally permitted under the ADA, including temperature checks, health questionnaires, and other screening measures.
- The EEOC has also determined that asking or requiring an employee to show proof of receipt of the COVID-19 vaccine is not a disability-related inquiry.
- Title VII:
  - If an employee's sincerely held religious belief prevents the employee from receiving the COVID-19 vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship to the employer.
  - Employers should generally assume that an employee's request for a religious accommodation is based on a sincerely held religious belief, unless the employer has an objective reason for questioning that belief, which would justify asking the employee for further information.

In new guidance issued on December 16, 2020, the EEOC clarified that if an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, and there is no reasonable accommodation possible, **then the employer may exclude the employee from the workplace under a mandatory COVID-19 vaccine policy.** However, even if the employer can physically exclude an employee from the workplace, the employer cannot automatically terminate that employee, and instead must consider whether the employee is eligible for remote work or another arrangement.

### **Practical Considerations**

Though employers are legally entitled to implement mandatory COVID-19 vaccine policies, several practical considerations suggest that employers may be better served by voluntary COVID-19 vaccine policies:

- Unionized workforces:
  - For employers with a unionized workforce, a mandated vaccination policy is likely a subject of bargaining, and therefore the employer will need to negotiate with the union before implementing such a policy.
- Emergency Use Authorization (EUA):
  - The Pfizer and Moderna vaccines are only currently available under EUA, which is not equivalent to full Food and Drug Administration (FDA) approval. EUA status requires the FDA to inform recipients of the **option to accept or refuse the vaccine.**
  - A mandatory COVID-19 vaccination policy could be perceived as at odds with the FDA's instruction that the vaccine is optional.
  - The vaccines could ultimately gain full approval over time, at which point employers could reconsider implementing a mandatory vaccination policy.

- Vaccine safety:
  - Recent polls demonstrate that while public confidence in COVID-19 vaccines is rising, a large percentage of Americans would not be comfortable taking an early vaccine, and 21% report that they will likely never get the vaccine, even as more information becomes available.
  - Employers may want to avoid employee backlash based on varying vaccine risk perspectives.
  
- Administrative burden and legal claims:
  - A mandatory COVID-19 vaccine policy would likely increase the number of disability and religious accommodation requests by employees. This could present an administrative burden to employers in fielding, responding to, and documenting requests for accommodations, especially as the guidance from health authorities, and the status of the vaccines, continue to evolve.
  - A mandatory vaccine policy also could expose the employer to Title VII, ADA, OSH Act whistle blower, and/or privacy claims.
  
- Vaccinations on a voluntary basis:
  - A voluntary vaccination policy could encourage employee goodwill and avoid administrative, legal, and perceived political clashes.
  - Employers may want to consider if it is possible to provide the vaccine at no or minimal cost to employees, and whether vaccines can be made available on site and during business hours, to encourage voluntary vaccination.
  
- If a mandatory COVID-19 vaccine policy is unavoidable, the employer should:
  - Ensure the policy includes protective provisions for those with disability, religious, and/or medical objections to the vaccine.
  - Consider limiting the mandatory policy to high-risk areas, positions, departments, and/or worksites, where other means of containing COVID-19 spread are not viable.
  - Consider making the vaccine available at no or minimal cost to employees and on site during working hours, as described above.

### **Additional Resources:**

In addition to the guidance noted above, employers can find information and resources from the following sites:

- Centers for Disease Control and Prevention (CDC) resources for employers:
  - <https://www.cdc.gov/coronavirus/2019-ncov/community/workplaces-businesses/index.html>
- OSHA resource webpage:
  - <https://www.osha.gov/coronavirus>
- OSHA publication offering COVID-19 guidance to employers:
  - <https://www.osha.gov/Publications/OSHA3990.pdf>
- EEOC resource page for employers:
  - <https://www.eeoc.gov/coronavirus>
- EEOC’s Technical Assistance Questions and Answers on “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws”
  - <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

For more information, or for assistance with other employment-related questions pertaining to the COVID-19 pandemic, please contact Amy McLaughlin ([amclaughlin@dinse.com](mailto:amclaughlin@dinse.com)), Karen McAndrew ([kmcandrew@dinse.com](mailto:kmcandrew@dinse.com)), Kendall Hoechst ([khoechst@dinse.com](mailto:khoechst@dinse.com)), or Haley Peterson ([hpeterson@dinse.com](mailto:hpeterson@dinse.com)).