

The COVID-19 Vaccine An Employment Law Guide

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Topics to Discuss

- Can employers mandate vaccinations?
- Employment laws to consider
- What if employees refuse to get vaccinated?
- Best employer practices to keep workplaces safe from now until the vaccine is widely available and rates of infection decrease

Can Employers Mandate Vaccinations?

- Yes, but notable exceptions include:
 - Certain employees protected under the ADA
 - Certain employees protected under Title VII
 - Employees with an employment agreement
 - Employees governed by a collective bargaining agreement
 - Special rules if employer administers vaccine
 - State prohibitions
 - EUA arguments (?)



Americans with Disabilities Act (“ADA”)

- What is the ADA?
 - **Prohibits discrimination in job application procedures, hiring, firing, advancement, compensation, job training, and other terms, conditions, and privileges of employment**



Who is protected?

- A qualified individual is a person with a **disability** who, with or without a **reasonable accommodation**, can perform the **essential functions** of the job.



What Is A Disability?

- How is “**Disability**” Defined Under the ADA?
 - **A physical or mental impairment that substantially limits a major life activity, such as walking, talking, seeing, hearing, learning, working, etc;**
 - A record or history of an impairment (e.g. cancer that is in remission); or
 - An assumption of having a physical or mental impairment (“regarded as”).



Physical Impairments

- A **physical impairment** is any medical disorder, condition, disfigurement or loss affecting one of the body systems, such as neurological, musculoskeletal, special sense organs, respiratory, cardiovascular, reproductive, digestive, immune, circulatory, lymphatic, skin, and endocrine.

Mental Impairments

- A **mental impairment** is any mental or psychological disorder, such as intellectual disability, organic brain syndrome, emotional or mental illness, and specific learning disabilities.



“Major Life Activity”

- A “major life activity” is an activity that the average person in the general population can perform with little or no difficulty.
- Major life activities include, but are not limited to:
 - Caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communication, and working.
- A “major life activity” also includes the operation of a major bodily function, including but not limited to:
 - Functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.

What Is A Reasonable Accommodation?

- Change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities.
- Three general categories of modifications/adjustments:
 - To a job application process;
 - To the work environment, or to the manner or circumstances under which the position held or desired is customarily performed; or
 - Other adjustments that enable the qualified employee to enjoy equal benefits and privileges of employment as are enjoyed by similarly situated employees without disabilities.



What is **Not** a Reasonable Accommodation?

- Hiring another person to perform the essential functions of the job
- Lowering production or performance standards
- Eliminating essential job functions
- Reassignment of essential job functions to someone else



Tips for Considering Requests for Accommodations

- Consider the accommodation requested and any other options that would be effective
- Will the accommodation allow the employee to perform essential functions of the job?
- Will the accommodation cause an undue hardship on the company?
- Consider contacting the Job Accommodation Network – 1-800-526-7234 or www.askjan.org

Tips for Handling Requests for Accommodations

- **If the accommodation is provided, clearly document:**
 - The request
 - The interactive process
 - The efforts taken to identify the accommodation
 - The accommodation
 - Conditions under which the accommodation is being provided
 - How long the accommodation will be provided
 - Next steps (e.g. re-evaluate in 6 months)

Tips for Handling Requests for Accommodations

- **If the accommodation is not provided, clearly document the following:**
 - The request
 - The interactive process (keep it going ... “he who ends the interactive process first has a much more difficult time in litigation”)
 - The efforts taken to identify the accommodation
 - Identify any undue hardship or direct threat issues
 - Will discuss in more detail
 - Identify all efforts taken to identify an alternative accommodation
 - The rationale should relate to the job and business operations

Examples:

- Cannot accommodate request to work in the evenings because the building is closed after business hours
- Cannot accommodate manager’s request to work from home permanently because the manager needs to be on-site to be available to answer questions, provide guidance, coaching and supervision to team of direct reports

Undue Hardship Defense

- “Undue hardship” is when the provision of an accommodation would result in **significant difficulty or expense** when considered in light of certain factors, such as:
 - Nature and cost of accommodation;
 - Overall financial resources of the facility, number of persons employed at the facility and effect on expenses and resources;
 - Overall financial resources of the employer, size of business, number of employees, type and location of its facilities;
 - Type of operations; and
 - Impact of accommodation upon operations of the facility.
- Determined on a case-by-case basis.
- Assessment of undue hardship is an ongoing process as resources and situations change.
- The employer has the burden of proving the defense.

Direct Threat Defense

- Applies when the individual poses a direct threat to the health or safety
 - To the employee; or
 - To other employees
- “Direct threat” is defined as a “significant risk of substantial harm to health or safety of self or others that cannot be eliminated or reduced by reasonable accommodation.”



Direct Threat Defense

- Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists:
 - Duration of the risk;
 - Nature and severity of the potential harm;
 - Likelihood the potential harm will occur; and
 - Imminence of the potential harm.
- Employer has the burden of proving the defense.



Direct Threat and COVID-19

- The EEOC stated that, under the ADA:
 - Employers are permitted to maintain a workplace free of threats to the health or safety of workers
 - A direct threat exists where there is determination that an unvaccinated individual will expose others to the virus at the worksite

Direct Threat?

- If a direct threat is established and *no reasonable accommodation* is available that would eliminate or reduce the risk that the unvaccinated employee poses a threat, the employee may be prevented from entering the workplace
- Tough standard to meet
- Do not terminate automatically

Accommodations to Consider

- When a disabled employee requests not to be subject to a vaccine mandate, consider:
 - Allowing employee to work remotely
 - Implementing robust safety protocols and create special workspace for employee
 - Modifying schedules (allowing employee to work before and after “regular” hours in order to avoid others)
 - Modifying duties to avoid/limit interaction with others
 - Taking paid or unpaid leave (FMLA, ADA, FFCRA, PTO, PST, Worker’s Compensation)
 - Requiring employee to determine whether a different vaccine may be safe for the employee
 - Requiring the employee to be evaluated by a healthcare professional selected and paid for by the company
 - **Do not automatically terminate!**

Title VII (Religion)

- Religion is a “moral or ethical belief as to what is right and wrong which is sincerely held with the strength of traditional religious views.”
- A religious belief “typically concerns ultimate ideas about life, purpose and death.”
 - *It does not include social, political, economic philosophies or personal preferences.*
 - Do not jump to conclusions that a given set of beliefs and practices, no matter how unusual, are not religious.



Title VII (Religion)

- Religion includes not only traditional, organized religions such as Christianity, Judaism, Islam, Hinduism, and Buddhism.
- Religion also includes beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others.



Title VII (Religion)

- Religious harassment in violation of Title VII occurs when employees are:
 - Required or coerced to abandon, alter, or adopt a religious practice as a condition of employment



Title VII (Religion)

Employers must provide a **reasonable accommodation** for requests that are based on employees' sincerely held religious beliefs or practices unless doing so would impose an undue hardship on their business operations.

Employers must ensure that employees are not **discriminated** against or **harassed** on the basis of religion.



Religious Accommodation

- A reasonable religious accommodation is any adjustment to the work environment that will allow the employee to comply with his or her religious beliefs.



Religious Accommodation

- Employers must accommodate an employee unless it imposes an undue hardship (more than a *de minimis* cost or burden on the business).



Requests for Religious Accommodation

- Employers with a “*bona fide* doubt” about the religious basis of the request may inquire about the basis and make a **limited** inquiry into the relevant circumstances, as to whether a belief or practice is religious and sincerely held.

Religious Accommodation

- Common Religious Accommodations
 - Scheduling changes
 - Changing an employee's job tasks or providing a lateral transfer
 - Making an exception to dress and grooming rules
 - Use of the work facility for a religious observance
 - Accommodating prayer, proselytizing, and other forms of religious expression

Accommodations to Consider

- When an employee requests not to be subject to a vaccine mandate due to a sincerely-held belief, consider:
 - Making a limited inquiry (if you have a *bona fide* doubt) of the religious beliefs
 - Allowing employee to work remotely
 - Scheduling changes (allow employee to work before and after “regular” hours in order to avoid others)
 - Implementing robust safety protocols and creating a special workspace for employee
 - Taking paid or unpaid leave (FMLA, ADA, FFCRA, PTO, PST, Worker’s Compensation)
 - **Do not automatically terminate!**



Contract Concerns

- Employees may have certain rights under an employment agreement
 - May only allow termination for defined “cause” reasons
- Employees may have certain rights under a collective bargaining agreement
 - Employer may be required to bargain in good faith with the union before mandating vaccines

State and Local Concerns

- States are considering legislation relating to vaccine mandates
 - Some states would prohibit employer-mandated vaccinations
 - Some states would permit employer-mandated vaccinations but only for employees who work in a healthcare facility or with medically vulnerable populations
 - Some states would permit employer-mandated vaccinations but expand the religious exemption to recognize philosophical objections or objections of the conscience



Alternatives to Mandating Vaccines

- Education and encouragement
 - Bring in a healthcare / infection disease specialist to review the science
 - Consider an incentive for those who get the vaccine (but do not penalize those who do not)
- Stress that the vaccine is for the safety of the employee, other employees, family and friends, and the community
- Stress that widespread vaccinations will help the economy
- Stress that widespread vaccines will help relieve the burden on healthcare workers/hospitals



What Happens if ...

- Employee has had COVID already?
 - Caution ... do not ask (but listen!)
 - Timing?
 - May need advice from a healthcare provider
- Employee takes first but not second dose?
- Employee refuses just because?
- Employee gets sick because of the vaccine?
 - Employer liability?
 - Worker's compensation issue?

Can an employer...

- Ask if an employee has had a COVID-19 vaccination?
 - Yes, per the EEOC because such request is not likely to elicit information about a disability
 - **Caution** ... 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 the questions be “job-related and consistent with business necessity”
 - The employer may want to warn the employee **not** to provide medical information as part of the proof of vaccination in order to avoid implicating the ADA

Should an employer...

- Try to “jump” in front of the vaccination line so its employees are safe and business can return to normal more quickly?
 - Not recommended unless the employer is providing front line healthcare services, is a first responder, is a nursing home, or other similar type of business chosen by a government agency to be first in line
 - Think of the bad press if and when word gets out (**and it will!**) that the employer “pulled strings,” was granted “favours,” or otherwise “gamed” the system

Practices for a Safe Workplace

- COVID-19 Preparedness Plan
 - Train employees of symptoms and prevention measures
 - Require wellness certificates every day
 - Protocols if employee experiences symptoms (at work or home)
 - Plan for COVID-positive test results (interview employee(s); contact tracing; notification of others; notify worker's compensation carrier if required; clean and disinfect; quarantine per CDC guidelines; notify government if required)
 - Travel and self-quarantine policy

Practices for a Safe Workplace

Consider continued COVID-19 safety protocols and requirements even for those who have been vaccinated and/or who have already had COVID-19 (again, do not ask if someone has had COVID-19, but you can listen!)



QUESTIONS?

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