

CLINE WILLIAMS

WRIGHT JOHNSON & OLDFATHER

COVID-19 VACCINATION POLICIES: IMPORTANT CONSIDERATIONS FOR EMPLOYERS

In 1964, the Disney movie *Mary Poppins* featured an English nanny singing an endearing tune entitled “A Spoonful of Sugar.” The song conveyed a message that an unpleasant situation can become a bit more tolerable when accompanied by something more pleasurable. The genesis of this song was the songwriter’s young son telling his father that he had received the polio vaccine that day. When his father (assuming the vaccine was administered by a shot) asked him if it hurt, the son replied that the vaccine was simply put on a sugar cube for him to eat. The next day, the song “A Spoonful of Sugar” was born.

As promising vaccines develop and are administered in response to COVID-19, employers should consider how a vaccine rollout will impact their workplaces and what kind of vaccination policy is most appropriate. Mandatory COVID-19 vaccination as a condition of employment will likely be permissible, but several factors indicate that a softer “spoonful of sugar” approach of encouraging vaccination may be more effective for many employers. No matter the terms, any vaccination policy should be carefully drafted *and* consistently applied. This article discusses issues relating to vaccination policies in the workplace as well as strategies for employers who are considering requiring employees to be vaccinated.

A. Mandatory Vaccination Policies in General

Can an employer require employees to take a vaccine as a condition of employment or before returning to the workplace? Generally speaking and subject to a few exceptions, yes. The two main legal exceptions from a mandatory vaccination requirement include reasonable accommodation of disabilities and sincerely-held religious beliefs.ⁱ

1. Reasonable Accommodation Because of a Disability

First, employees may be entitled to an exemption from mandatory vaccination because of a disability that prevents them from taking the vaccine. In this context, employers must keep in mind both the Americans with Disabilities Act (“ADA”) as well as applicable state and local laws prohibiting disability discrimination.

The law on this issue primarily has developed through the lens of the annual seasonal flu shot. In this context, the U.S. Equal Employment Opportunity Commission (“EEOC”) has stated that if an employee refuses to take a required influenza vaccine because of a covered disability, the employer must engage in an interactive process with the employee to consider the employee’s condition, the nature of the employee’s request or objection, and whether a reasonable accommodation exists that would enable the employee to still perform the essential functions of their position. For example, potential accommodations may include having the employee work from home, work from a more isolated location, or wear a mask and other personal protective equipment (“PPE”) while being physically present and around other people in the workplace.

The employer may refuse to provide a reasonable accommodation exempting the employee from mandatory vaccination if the employer can establish *undue hardship*, or a

showing that the accommodation would result in significant difficulty or expense. This can be a difficult hurdle for employers to overcome. Regardless, like all ADA accommodation requests, employers must individually assess employees' requests for exemption from a vaccine mandate and potential accommodations on a case-by-case basis.

The ADA's application to a mandated COVID-19 vaccine is less clear. The EEOC takes the view that the decision regarding vaccination involves the employer making a medical inquiry to its employees. Under the ADA, an employer may only undertake covered medical inquiries if they are *job-related and consistent with business necessity*.ⁱⁱ For example, healthcare employers who require employees to take a flu shot clearly fit within these parameters.ⁱⁱⁱ Ordinarily, it may be more difficult for non-healthcare employers to meet the "job-related and consistent with business necessity" standard, but the COVID-19 pandemic presents a unique scenario.

Courts and the EEOC may be more willing to allow employers to mandate a COVID-19 vaccine because of the nature of the global pandemic. The EEOC has stated that the COVID-19 pandemic meets the ADA's "direct threat" standard, which allows employers to make more extensive medical inquiries in the workplace than the ADA typically permits.^{iv} For example, in light of the COVID-19 pandemic, the EEOC recognizes that non-healthcare employers may take employees' temperatures—which is clearly a medical inquiry—before allowing them to enter the workplace, based on the EEOC's position that the pandemic meets the ADA's "direct threat" standard.

The EEOC currently advises that ADA-covered employers "should consider simply *encouraging* employees to get the influenza vaccine rather than requiring them to take it."^v Although it is unclear how the EEOC will ultimately address this issue for COVID-19 vaccinations, many legal practitioners expect similar guidance that *will allow* employers to mandate COVID-19 vaccinations with limited exceptions, but *express a preference for simply encouraging vaccination*.

2. Reasonable Accommodation for Sincerely-Held Religious Beliefs

Second, employers who require employees to take a vaccine must allow for reasonable accommodations if taking the vaccine would violate an employee's sincerely-held religious beliefs. Under federal law, Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employers from discriminating against employees on the basis of religion. Many state and local anti-discrimination laws contain similar prohibitions and govern an employee's religious objections to vaccination.

An employee can request an exception to mandatory vaccination if taking the vaccine would violate the employee's sincerely-held religious beliefs, observances, and practices. Once an employee requests such an exception, employers should engage in a three-part analysis, considering the following:

- a. whether the employee's belief is religious in nature;
- b. whether the employee's belief is sincerely-held; and
- c. whether providing a reasonable accommodation would impose an undue hardship on the employer.

The EEOC takes the position that religious beliefs typically concern ultimate ideas about life, purpose, and death, but generally do not include personal preferences or social, political, or economic philosophies.^{vi} In addition, employers generally should assume an employee's request for religious accommodation is based on a sincerely-held religious belief, unless the following factors exist:

- a. the employee has behaved in a manner noticeably inconsistent with the employee's professed belief;
- b. the accommodation is sought for particularly desirable and likely secular (non-religious) reasons;
- c. the timing of the employee's request is suspect; or
- d. the employer otherwise has legitimate reason to believe the employee does not seek accommodation for religious reasons.^{vii}

However, this assumption in favor of employees is not without reasonable limitation. For example, in a 2017 case from the Third Circuit Court of Appeals, an employee requested an exemption from a mandatory flu shot based upon religious grounds. The court held that the employee's belief that he should not harm his body and that a vaccine was potential harm was not a *religious* belief.^{viii} Still, anti-vaccination beliefs can be protected as sincerely-held religious beliefs *if* they are associated with religious adherence.

B. Additional Legal Considerations

1. Occupational Safety and Health Administration ("OSHA")

OSHA has not yet issued guidance related to COVID-19 vaccination. However, OSHA's past pandemic-specific approaches suggest that OSHA will allow employers to mandate vaccination but recommend merely encouraging vaccination.

Specifically, in a 2009 Interpretation Letter addressing H1N1 vaccines, OSHA stated that it does not require employees to take vaccines, but an employer *may* require vaccination.^{ix} More recently, in a 2014 guidance document aimed at protecting workers during a pandemic, OSHA noted that, if a vaccine is available to protect people from illness in a given pandemic, "employers may offer appropriate vaccines to workers to reduce the number of those at risk for infection in their workplace."^x OSHA has also encouraged employers to develop a pandemic preparedness plan that encourages employees to get a seasonal flu vaccination.^{xi}

2. National Labor Relations Act ("NLRA") and Related Laws

Employers with unionized workforces should review their current collective bargaining agreements. Requiring employees to take a vaccine may affect the terms and conditions of employment, which may require bargaining with the union. To avoid allegations that the employer has engaged in an unfair labor practice, employers seeking to require employee vaccination should address this issue with the relevant union group *before* implementing such a requirement.

3. Workers' Compensation and Insurance Policies

If an employee has an adverse reaction to an employer-mandated vaccine, the employer may find itself responding to and defending against a workers' compensation claim. The viability of a workers' compensation claim arising from an employer-mandated vaccine policy will vary based upon applicable state law and the specific facts of the case. Before implementing a mandatory vaccination policy, employers should reach out to their workers' compensation insurance carrier (and consult with legal counsel, if warranted) to discuss workers' compensation coverage in the event of an employee's adverse reaction to a mandated vaccine.

Similarly, employers should review current insurance policies, including employment practices liability insurance ("EPLI"), to contemplate coverage and potential claims should an employee have an adverse reaction to an employer-mandated vaccine.

C. An Important Employee Relations Decision

Until federal agencies publish more definitive guidance, vaccine policies seem best handled as an employee relations issue with specific consideration of the following.

First, employers should reflect on their own work environments and circumstances, including the proximity of workers, the frequency of close contact, and the risk of disease transmission. In circumstances where the risk of transmitting disease among employees may be low (e.g., remote workforces, physically distanced employees, etc.), a vaccination requirement might have little practical impact compared to circumstances with a high risk of transmitting disease among employees and third parties (e.g., healthcare facilities/workers, employees in close proximity with one another, etc.).

Second, employers should consider the potential advantages of a vaccination policy, including preventing employees from spreading disease, protecting high-risk employees and customers, returning to normal operations in a shorter timeframe, and advancing the overall goal of providing a safe workplace.

Third, employers should consider the impact of an employer-mandated vaccine requirement on employee morale. Recent surveys indicate that many Americans are skeptical about the effectiveness of COVID-19 vaccines and, in light of politicization, many may refuse vaccination for reasons unrelated to disability or sincerely-held religious beliefs.^{xii} An employer-mandated vaccine policy that requires employees to vaccinate or be terminated from employment may significantly adversely impact morale in already-challenging circumstances. Enforcing such a termination policy could be devastating to employers' resources, and employee pushback may spur concerted protected activity, such as mass communications, complaints, petitions, and employee walk-offs or protests.

Fourth, employers should establish a clear, robust process for reviewing and documenting employees' requests for accommodations of disabilities and sincerely-held religious beliefs. Potential accommodations for employees exempt from vaccination may include working from home, masking/wearing other PPE, and using social distancing measures.

Finally, although a vaccine mandate may be suitable for those employers who deal with a high risk of disease transmission (e.g., healthcare employers), other employers should consider simply adopting a policy expressing a strong preference for employees to be vaccinated and the reasons for doing so. Employers should begin crafting a plan to maximize effectiveness of such a policy, such as offering incentives or administering vaccines at the workplace (as many employers do with the seasonal flu shot) if possible.

For more information on these issues or other questions arising from the impact of COVID-19, please reach out to a member of Cline Williams' [Labor and Employment Law Section](#) and [Employee Benefits Section](#).

ⁱ U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC-NVTA-2009-3, [PANDEMIC PREPAREDNESS IN THE WORKPLACE AND THE AMERICANS WITH DISABILITIES ACT](#) (2020).

ⁱⁱ See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC-CVG-2000-4, [ENFORCEMENT GUIDANCE ON DISABILITY-RELATED INQUIRIES AND MEDICAL EXAMINATIONS OF EMPLOYEES UNDER THE ADA](#) (2000).

ⁱⁱⁱ See *Hustvet v. Allina Health Sys.*, 910 F.3d 399 (8th Cir. 2018).

^{iv} See PANDEMIC PREPAREDNESS, *supra* note 1.

^v *Id.* (emphasis added).

^{vi} See U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC-NVTA-2008-2, [QUESTIONS AND ANSWERS: RELIGIOUS DISCRIMINATION IN THE WORKPLACE](#) (2008).

^{vii} U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC-CVG-2008-1, [SECTION 12 RELIGIOUS DISCRIMINATION](#) (2008).

viii See *Fallon v. Mercy Catholic Med. Ctr.*, 877 F.3d 487, 492 (3d Cir. 2017).

ix OCCUPATIONAL SAFETY AND HEALTH ADMIN., [OPINION LETTER ON OSHA'S POSITION ON MANDATORY FLU SHOTS FOR EMPLOYEES](#) (Nov. 9, 2009). This vaccination requirement is subject to employees' reasonable beliefs that they have medical conditions that create a real danger of serious illness or death.

x OCCUPATIONAL SAFETY AND HEALTH ADMIN., [PROTECTING WORKERS DURING A PANDEMIC](#) (2014).

xi OCCUPATIONAL SAFETY AND HEALTH ADMIN., OSHA 3327-06R, [GUIDANCE ON PREPARING WORKPLACES FOR AN INFLUENZA PANDEMIC](#) (2009).

xiii Kwame Opam, *Americans Are More Willing to Take a Coronavirus Vaccine, Poll Suggests*, N.Y. TIMES (Nov. 17, 2020), <http://www.nytimes.com/2020/11/17/health/gallup-poll-coronavirus-vaccine.html>.

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