

MP INSIDER:

The COVID Vaccine: HR Policy Development Playbook



» Introduction

As the COVID vaccine becomes more widely available, employers are wondering what to do next. Should they require that their workers get vaccinated? Should they incentivize it? If they do require it, what do they need to do to stay in compliance and reduce legal risk? This eBook will cover what employers need to know right now, including how to stay in compliance with the ADA, what reasons employees might refuse vaccination, general compliance concerns, and how to develop an action plan that best fits their organization. The book also includes a section on reducing legal risk, a contribution from Tawny Alvarez, employment and labor law attorney at Verrill.



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Employers should consider providing vaccine resources to employees to help them make an informed decision.

- Amanda Bridge, SHRM-CP, MP



The Americans with Disabilities Act (ADA)

Employers should take note of the ADA because it will come heavily into play when they are deciding if and how to require COVID vaccination. The Americans with Disabilities Act of 1990, frequently referred to as the ADA, was passed to protect people with disabilities from discrimination in employment, programs and activities offered by state and local governments, and in accessing goods and services offered in places like stores, restaurants, hotels, doctor's offices, etc. To be ADA compliant, employers will be most concerned with Title I, which protects qualified individuals with disabilities from employment discrimination or from retaliation for asserting their rights under the ADA. The law applies to employers with 15 or more employees, but it's worth noting that many states have supplemental laws to protect employees at smaller workplaces.



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» Who the ADA Protects

The ADA protects workers and job applicants who have:

- physical or mental impairments that substantially limit a major life activity
- a record of, or are regarded as, having a substantially limiting impairment

Examples of conditions that qualify under the ADA include, but are not limited to: blindness, cancer, diabetes, muscular dystrophy, schizophrenia, autism, depression, and anxiety.

To be protected under the ADA, the individual must be able to perform the tasks that are essential to the job, with or without a reasonable accommodation. They must also satisfy the legitimate job requirements for their role, including education, experience, skills, licenses, etc. (Employers must be careful to ensure that the qualifications are essential to that particular employment position.) It's a best practice for employers to have updated job descriptions and identify the essential job functions of every role in the workplace. [HR consulting](#) experts like MP's can assist in tasks like this.

» Reasonable Accommodations and the Interactive Process

The most important part of the ADA is what it requires of employers. Employers should be ready to engage in the interactive process and discuss providing appropriate reasonable accommodations to employees who qualify for and request them. A reasonable accommodation is a change to an employee's job, the work environment, or procedures that will give them the opportunity for equitable employment and to make it possible for them to complete the essential functions of the job. A reasonable accommodation also cannot create an "undue hardship," which means it is costly or disruptive to the operation of the workplace (taking into account the size, resources and overall business operations of the employer). It must be something that works for the employee and the business. (Employers should know that the bar to claim an undue hardship is a relatively difficult standard to meet.)

The interactive process is the discussion by which the employer and the employee who has made the request come to the reasonable accommodation together. It's a conversation held privately with HR or trained managers, and it focuses on exploring what options are best for all sides in order to help the employee or applicant be able to perform the essential functions of their job. The employee's initial request does not necessarily have to be granted if the employer and employee can come to a better, mutually beneficial arrangement. In this case, the interactive process may require the employer to engage both the employee and the employee's doctor to determine an appropriate accommodation.





» The ADA and COVID Vaccination Policies

Employers who decide to create a mandatory COVID vaccination policy should be aware of how the ADA might be applicable in their compliance. Firstly, the ADA does not bar some employers from making a mandatory vaccination policy. Generally, medical offices will be able to create a policy because they can make a case for unvaccinated workers being a direct threat to themselves, coworkers, patients, clients, etc. (For other businesses that cannot make this case, the Equal Employment Opportunity Commission (EEOC) suggests that they simply encourage their workers to get the vaccine.)

The ADA also doesn't bar some employers from requiring the COVID-19 vaccine because the EEOC has stated that it doesn't count as a "medical examination" under the ADA. Vaccination policies won't seek information about a worker's physical or mental health. Employers should be aware that prescreening vaccination questions may violate this tenet, though. In this case, employers should let their staff know they are *not required* to provide medical information. Likewise, asking for proof of a receipt of a COVID vaccination won't conflict with the tenets of the ADA. This is because the request is unlikely to elicit information about a disability. If employers ensure questions about a COVID vaccination are job-related and about this very specific query, they mitigate their chances of running afoul of the ADA.

» Three Reasons Why Employees Might Refuse the Vaccine

The EEOC has emphasized that workers may be excused from mandatory vaccine policies if they have medical reasons, religious reasons, or a disability covered by the ADA.



1. Religious Exceptions: Workers who request a religious exemption should ideally be able to articulate how taking the COVID vaccine would violate their “sincerely held religious beliefs, practices, or observances.” Employers will need to provide a reasonable accommodation to employees who ask for it unless doing so would pose an “undue hardship” to the operation of the business. Workers who request a religious exemption are protected under the religious accommodation provision of Title VII of the Civil Rights Act of 1964.



2. Disability: Under the ADA, workers with a disability (covered by the ADA) that prevents them from taking the vaccine should be exempt from being required to take it. As above, the employer must provide a reasonable accommodation if it doesn't cause them undue hardship.



Three Reasons Why Employees Might Refuse the Vaccine



3. Medical Reasons: Workers may refuse vaccination for a few medical reasons. Allergies, especially to vaccinations or the particular components of the COVID vaccines available, are some of the most obvious reasons. Women who are pregnant, might become pregnant, or lactating may also avoid vaccination per medical advice. Lastly, the vaccine is only approved for teenagers 16 and up, with less data about its effects on 16 and 17-year-olds. (Teenagers who are 16 and 17 will need written permission from a guardian to get the vaccine.) This means employers who have workers who are 16, 17, or younger, may find that they won't be getting vaccinated, either. As with all medical matters, employers must treat these situations with the utmost confidentiality, not sharing a worker's health information with other employees or prying for more information than needed to discuss COVID vaccination.



» Top Compliance Considerations

Because these are unprecedented times and there is such a lack of prior litigation, managers are blazing new trails when it comes to COVID vaccinations. This means compliance concerns and considerations should be top of mind when considering whether to require the vaccine.

Compliance with the ADA: When a worker requests an exemption from a mandatory vaccination policy because of a disability, their workplace must avoid ADA discrimination. The first step in this process would be to conduct a test to determine if the unvaccinated worker would pose a direct threat. This test has 4 factors: the duration of the risk, the severity of the risk, the plausibility the harm will occur, and imminence of the harm. If the worker *does* pose a direct threat, the employer needs to engage in the interactive process with the employee to attempt to find an accommodation. If none can be found, the employer can ask the worker to operate remotely, take leave, etc. Employers should not simply fire them. They also cannot retaliate against the worker for asking for the accommodation, nor can they share the details of the request or interactive process with anybody else who does not need to know the information for their job (such as somebody in HR or a manager).

Compliance with GINA: Besides the ADA, employers who find it necessary to create a mandatory COVID vaccination policy may be interested to know that doing so does *not* violate title II of the Genetic Information Nondiscrimination Act (GINA). This is because it won't involve genetic information to make employment decisions or decisions about the terms, conditions, or perks of employment. However, prescreening questions may potentially run afoul of GINA. Employers should examine them for this reason and let employees know they don't need to provide genetic information for these questions.



Even if they choose not to receive the vaccine, employers may still require staff to take precautionary measures to limit exposure and increase the safety of themselves and those around them.

- Max Doyle, HR Generalist, MP



Developing an Action Plan

Employers can take a few paths when it comes to the COVID vaccine and their workplace.

Not requiring it: For employers that aren't in the medical field or a managed care facility, this will likely be their best choice. Not requiring the vaccine is also the least risky choice, lowering the chances of running afoul of state regulations, being noncompliant with the ADA, potentially inspiring morale issues, or lawsuits.

Requiring it: Employers that can make a case for requiring employees to get the vaccine based upon industry and business needs can go this route. Generally, they are going to be medical and long-term care facilities, where staff are constantly working with vulnerable populations. (Even in these organizations, though, not every employee's job duties will make vaccination a necessity.) Employers must be able to prove that an unvaccinated employee poses a direct threat to the business, clients, patients, etc.

If employers are choosing to require the vaccine, a written policy should be drafted. (MP's HR services team can help with creating these policies. Also, at this time, it is recommended that the policy is also reviewed by legal counsel.) The policy should also articulate the business necessity for workers' vaccinations. It should allow workers to request exemptions or accommodations based on medical reasons or religious reasons. Employers will need to detail out who will handle exemption and accommodation requests and what the process will be. They are required to disclose information about the risks or side effects of the vaccine. If they don't, the third-party providing the vaccine must do so.

Developing an Action Plan

If employers do create a mandatory vaccination policy, they should share the policy with all workers as soon as possible to give them notice before it's implemented. The whole process should be as free of political and ideological discussion as possible. Bringing either of these things into the conversation could create conflict or make workers feel uncomfortable. Employers should also train managers and prepare for the interactive process if workers do request exemptions.

Employers may want to think ahead of time about how they can accommodate workers who cannot or will not be getting vaccinated. These solutions can include letting an employee work remotely or in an isolated location, letting them work off-hours, or giving them extra PPE. If alternative accommodations would pose an undue hardship, employers could consider options for a leave of absence for the employee. FMLA is unlikely to be an option, as is FFCRA leave. PTO vacation time, personal time, or an unpaid leave of absence might be a good fit depending on the circumstances.

Employers should also take job applicants into account when they create a mandatory vaccination policy. Because job applicants are covered under the ADA, employers should ensure that they do not discriminate against employees with a disability that prevents them from getting vaccinated. Employers should also not hold off on hiring an employee because they have a medical or religious reason for not getting vaccinated. Doing so could lead to a discrimination lawsuit.

If the workplace is unionized, consider getting their support in creating and implementing the policy. If the union is backing the vaccination requirement, this might help workers to feel more comfortable with it. If the workplace uses [HR consulting](#) like MP, this is a great time to work with them to ensure that the process is fully in compliance.

Depending on the employer's industry, they can either facilitate a vaccine clinic through a third party on-site or they can ask workers for proof of vaccinations that occurred off-site. If the policy permits off-site vaccination, it may be helpful to provide a list of places where workers can go to get vaccinated. If they need to do so during work hours, the employer is responsible for paying them for the time they took to do so.



Developing an Action Plan

Encouraging vaccination, then later requiring it if necessary: This is an ideal way to approach the process because it could be much smoother and less legally complicated. Employers may find that all of their workers already planned to get vaccinated (excepting those that have legitimate reasons not to). They might also find that if they set up a vaccination clinic onsite, employees will jump at a convenient option to do something they already were considering. It's extremely important for employers to consult with HR or legal counsel if they're considering providing incentives to workers for getting vaccinated, as this could lead to accusations of discrimination or potential lawsuits.

Employers may also want to wait to require COVID vaccination because it's possible that governors of individual states will issue Executive Orders mandating vaccination. These orders could be challenged with various lawsuits and rendered moot. On the other hand, the Supreme Court upheld a mandatory vaccination law in 1905, so Executive Orders requiring COVID vaccination may be upheld, too.



» 8 Legal Pitfalls to Avoid

Because the COVID vaccine has only been available for a few months, there remains a litany of questions that employers must consider from a legal standpoint when instituting policies and practices that may involve COVID vaccination. Employment and labor law attorney [Tawny Alvarez](#) at Verrill suggests that employers can mitigate their legal risk by keeping 8 potential areas of concern in mind:



Requiring vaccinations: Vaccination policies may be permissible in certain circumstances if the employer simultaneously offers exceptions to that requirement for matters including religious beliefs and health conditions. In some states, additional exceptions under public policy exceptions and/or specific state laws, may dictate that employers cannot mandate that employees are vaccinated. Accordingly, the best way to mitigate any argument that an employer improperly required employees vaccinate is to encourage COVID vaccination, rather than require it. Should receipt of the vaccine be directly related to the employee's job duties and responsibilities, employers should be mindful of how they ask applicants if they have been vaccinated. They should clarify that the employer only wants to know if the worker received the vaccine—no other medical or genetic information.



8 Legal Pitfalls to Avoid



Pre-screening questions: Employers who are considering providing access to vaccines on-site must consider privacy implications of their practice. Vaccine pre-screening questions provided by the employer prior to vaccination have the potential to create ADA (Americans with Disability Act) compliance issues. This is because they may elicit disability-related information. Some state-law disability anti-discrimination laws may provide employees with similar protections. Employers can limit risk that is created through pre-screening questions by using a public provider (like a pharmacy) or a third party to handle the vaccination process.



Workers' compensation coverage: One of the potential liability concerns is the side effects workers may experience should they be vaccinated at work. Employers are concerned that requiring the vaccine, or providing the vaccine on-site, might create liability if a worker experiences an intense allergic reaction to the vaccine. While severe allergic reactions to the vaccine have been rare, more information will certainly become available on this topic in the coming months. Generally, however, state workers' compensation laws are set up to protect employees as broadly as possible. A reaction to a vaccine received during work hours, or required by an employer, is likely to fall within coverage.



8 Legal Pitfalls to Avoid



Continued social distancing and hygiene protocols:

Employers are required by OSHA to provide a safe working environment for employees. Because so much remains unknown about COVID transmission by vaccinated workers, social distancing, masking, and COVID-related hygiene protocols must be continued. Employers should continue to monitor OSHA and CDC guidance, as it is ever-changing. As of this writing, current advice indicates that quarantine requirements will be reduced if the worker who has been exposed (or potentially been exposed) to COVID was vaccinated.



Incentives: As briefly mentioned earlier in this eBook, providing incentives to employees who receive a COVID vaccination could open a legal can of worms. If some staff cannot get the vaccine because of legal reasons or because they have a disability (especially one covered under the ADA) that prevents them from getting the vaccine, the incentive itself could be viewed as discriminatory. It could also expose an employer to liability under state or federal anti-bias law. Incentives may also be seen as unlawfully coercive, can create wage and hour concerns, and, depending on vaccination availability, could create arguments in support of discrimination claims.



8 Legal Pitfalls to Avoid



Personal health information: Employers should treat vaccinated and unvaccinated workers the same. Though employers might be tempted to create teams or shifts of vaccinated workers to handle certain tasks, doing so could create the risk of discrimination claims or arguments that personal health information has been shared. Employers must treat a worker's vaccination status as private medical information. They should not share it, nor should they mark workers with "vaccinated" badges or buttons.



Recordkeeping: Employers should always be vigilant about their recordkeeping, but the pandemic makes this need more acute. Per the ADA, medical records must be kept separated from general personnel files. Personal data must be protected and there should be limited access to workers' medical information. Additionally, depending on their industry, employers may have OSHA recordkeeping requirements as well.

» 8 Legal Pitfalls to Avoid



Workplace exposure: The question on many employers' minds is "Can a worker sue if they get COVID in the workplace?" Depending on the state of employment, some statutes have already been created to limit employer exposure. In many cases, an employer's workers' compensation insurance should protect employers from liability claims. Workers-rights advocates have, however, creatively set forth claims concerning violation of public policy and other state-law claims founded upon an employer's failure to follow state or federal safety guidance. As a result, employers should stay updated on local, state, and federal operational standards and ensure all possible safety and hygiene protocols are followed (whether workers are vaccinated or not). Employers should also speak to an employment attorney about their particular workplace, industry, and circumstances. In some workplaces, such as medical or long-term care facilities, requiring vaccinations might be important to protect against the risk of spreading COVID to non-employees.





Tawny Alvarez, Esq.

Tawny Alvarez is a Partner in Verrill's employment and labor practice group. She centers her practice on the understanding that the employment landscape is ever-changing and that organizations do not have the time or resources to keep abreast of all these changes. Tawny has represented diverse clients in a broad range of industries, from small, family-owned businesses and non-profits to Fortune 100 companies across the country.

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Verrill

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