

Does the Americans with Disabilities Act Impose Limitations on a Mandatory Vaccine Policy?

- However, vaccine pre-screening questions about “contraindications” (*i.e.*, conditions that increase the risk for a serious adverse reaction) are medical inquiries. Thus, employer-administered vaccine programs create complications, and the employer must be able to show that requiring the vaccine is job-related and supported by business necessity
- **Simple solution:** Don’t administer the vaccine. Have employees go to third-party providers and give proof of their vaccination status.

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- Moreover, employers must engage in the “interactive process” and provide reasonable accommodations to employees who have a disability that prevents them from receiving the vaccine
- Possible accommodations include: remote work or requiring masking, physical distancing, regular diagnostic testing, and other precautions for those who cannot be vaccinated

Must You Excuse Pregnant Employees from the Mandatory Vaccine Requirement?

- Pregnancy-related medical conditions may be disabilities under the ADA, even though pregnancy itself is not. If so, the usual ADA rules apply.
- The Pregnancy Discrimination Act requires employers treat women affected by pregnancy, childbirth, and related medical conditions the same as others who are similar in their ability or inability to work. This means that a pregnant employee should not be treated less favorably than other employees seeking to be excused from a mandatory vaccine policy. If you require employees with medical conditions to provide a medical certification showing the need for a policy exception, you may impose the same requirement on pregnant employees.

Must You Excuse Employees Who Object to the Mandatory Vaccine Policy on Religious Grounds?

- Title VII's prohibition of religious discrimination requires employers to make reasonable accommodations (*i.e.*, exceptions) to mandatory vaccination policies for employees with sincerely-held religious beliefs that prevent them from being vaccinated
- The EEOC recommends you assume a religious accommodation request is legitimate, unless you have an objective basis to question the employee's sincerity

Must You Excuse Employees Who Object to the Mandatory Vaccine Policy on Religious Grounds?

- No accommodation is required when it would impose “more than a *de minimis* cost” on the employer
- This includes accommodations that would impair workplace safety, *e.g.*, the increased risk of COVID-19 exposure might meet this standard, but you must consider whether such risks could be reduced through alternative accommodations, such as remote work, masking, etc.

Does the National Labor Relations Act Provide Any Protections to Employees?

- Section 7 prohibits union or nonunion employers from interfering with protected, concerted activities – which may include voicing workplace safety concerns or protests about vaccination policies
 - OSHA’s anti-retaliation provision may also apply here
- Unionized employers also likely have collective bargaining obligations prior to implementing a mandatory vaccine policy, unless the union has waived the duty to bargain

Are There Privacy Issues?

- **ADA and Genetic Information Nondiscrimination Act (“GINA”)**
- The EEOC has stated that employers do not violate the ADA or GINA by inquiring about vaccination status because the question is not a disability-related inquiry or a medical examination
- The EEOC states that the ADA’s confidentiality requirement applies to information about an employee’s vaccination status, although this position is at odds with precedent

Privacy Issues

- **Health Insurance Portability and Accountability Act** (“HIPAA”) restricts use and disclosure of certain individually identifiable health information. Although it usually does not apply to employers, it does apply to employer-sponsored group health plans. Employees who receive the vaccine as a benefit through a group health care plan should complete a HIPAA-compliant authorization, so the plan can notify the employer that the employee has received the vaccine. Also employers who contract with a third-party health care provider to administer vaccines must ensure employees complete a HIPAA-compliant authorization, so the provider can release vaccine status to the employer.

Wage & Hour Considerations

- Although somewhat unclear, time spent for a mandatory vaccine is likely compensable time under the Fair Labor Standards Act
- State wage laws may also be interpreted to treat time spent getting mandatory vaccinations as compensable hours worked. Also some states and local governments have passed laws requiring paid time off for vaccination.
- The Family First Coronavirus Response Act, as recently, amended allows employees to receive paid leave benefits to obtain a COVID-19 vaccination and to accompany family members getting vaccinated, if an employer chooses to offer; expires Sept. 21
- Some states require employers to reimburse employees for business expenses, including transportation costs (*e.g.*, Illinois); consider those laws before implementing a mandatory vaccination policy

Key Takeaways and Practical Advice

- **Stay Vigilant.** The Delta variant teaches us the pandemic isn't over! You have a duty to provide a safe workplace and must continue to address this risk.
- **Follow the CDC- and OSHA-Recommended Processes.** Meet regularly as a team, monitor developments in the pandemic and guidance, assess risk, select controls, document your plan and edits to your plan, and communicate your plan to employees.
- **Analyze state and local laws.** State and local governments have their own guidelines and mandates, which should be reflected in your plan.

Key Takeaways and Practical Advice

- **Document.** Document your efforts to provide a safe workplace, *e.g.*, employee trainings, screenings, contact tracing, quarantine and isolation logs, cleaning and sanitation logs, etc. This is good evidence if you need to respond to an OSHA investigation or lawsuit.
- **Implement a Reasonable Accommodation Policy and Forms.** You should have a written policy and consider whether to reiterate it in applicable COVID-19 policies (*e.g.*, masking, vaccine, etc.). Develop forms to manage the “interactive process,” including a request form, medical certification, and decision form. Train your supervisors to recognize requests for reasonable accommodation.
 - Note: The Fair Housing Act also makes it unlawful for any person to refuse “to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford ... person(s) [with disabilities] equal opportunity to use and enjoy a dwelling.”
 - FHA requires housing providers allow residents to make reasonable structural modifications to units and public/common areas in a dwelling when those modifications may be necessary for a person

Key Takeaways and Practical Advice

- **Maintain Confidentiality.** Store vaccine and other COVID-related medical information in your confidential medical files. Take steps to protect electronically stored medical information. Limit the dissemination of this information. Only those supervisors or managers who need to know for business purposes (*e.g.*, those who manage policies that differ based on vaccine status) should know. Make sure supervisors who receive confidential information know it's confidential and not to share it. Disclosure to third parties, *e.g.*, vendors, customers, etc., is not provided for under ADA regulations and should be avoided. Avoid asking follow up questions of employees who are not vaccinated, such as, "Why are you not vaccinated?" These kinds of questions may elicit information regarding a disability and trigger ADA protections. Consider whether state laws impose additional limitations here.

Key Takeaways and Practical Advice

- **Implement a Vaccine Policy.** Assess what's right for you based on your culture, competitors, labor considerations, and other issues. Consider starting by encouraging and incentivizing vaccinations. The EEOC states that employers may lawfully incentivize its employees or employees' family members to obtain COVID-19 vaccination outside the workplace (*i.e.*, from a third party unrelated to the employer). The ADA and GINA may be triggered and limit incentives where the employer itself is administering the vaccination or engaging an agent to do so. If you mandate vaccines, ensure exceptions are made as legally required. Consider the consequence of employees who do not get vaccinated (*e.g.*, termination v. diagnostic testing, masking, etc.) How will you verify vaccine status? Verification v. vaccination card.

Key Takeaways and Practical Advice

- **Disparate Impact Issues.** Some individuals or demographic groups may face greater barriers to receiving the vaccination than others; therefore, employers requiring vaccines may need to address these concerns and offer solutions to increase vaccine access.
- **Public Employers.** Public employers mandating vaccines may face constitutional challenges (e.g., Fourteenth Amendment), which – although unsuccessful to date – complicate the analysis
- **Comply with Collective Bargaining and Traditional Labor Obligation.** Employers with unionized workforces may need to bargain with unions prior to implementing safety procedures, including vaccination programs. Moreover, employee protests may trigger NLRA Section 7 protections.

Key Takeaways and Practical Advice

- **Consider Other Policy Exceptions, Even if Not Legally Required.** Employers may want to add flexibility to make exceptions to their mandatory vaccine policies when such exceptions make sense (*e.g.*, remote workers) even if not legally obligated to provide them.
- **Communication and Morale Strategies.** Recognize vaccines, masking, and other COVID-19 issues are polarizing. Regardless of what you chose (*e.g.*, mask mandate/no mask mandate), you will upset some employees. Good communication – explaining your decisions, reasoning, and expressing empathy – help with these labor issues. Proactively encourage respect of differing opinions and approaches.

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What if...

First Scenario and Questions

- A housing authority is considering mandating that its employees be vaccinated. What should it do to evaluate and execute a mandatory vaccine program?
 - For example, can it take any steps to encourage or incentivize employees to be vaccinated before mandating it?
 - If so, what works?
 - How will the housing authority know what percentage of its employees is vaccinated?
 - What if employees don't choose to get vaccinated, can the housing authority mandate it?
 - If so, what steps should it take to rollout the mandatory vaccine program?

First Scenario and Questions (Con't)

- What policies and forms does it need to manage the mandatory vaccine program?
- What are the consequences to employees if they do not comply with the mandatory vaccine program? Can the housing authority fire them?
- What if an employee claims to have a sincerely-held religious belief that prevents him from being vaccinated?
 - Should the housing authority ask questions about the sincerity of that belief?
 - When can the housing authority lawfully refuse to accommodate if it questions the sincerity of the belief?
 - What accommodations can be provided to allow the employee to continue safely working without being vaccinated?

Second Scenario and Questions

- A housing authority implemented a screening process, whereby each morning employees were to answer the following questions:
 - Have you experienced any of the following symptoms of COVID-19 within the last 48 hours?
 - Have you tested positive for COVID-19 in the past 10 days?
 - Are you currently awaiting results from a COVID-19 test?
 - Have you been diagnosed with COVID-19 by a licensed healthcare provider (for example, a doctor, nurse, pharmacist, or other) in the past 10 days?
 - Have you been told that you are suspected to have COVID-19 by a licensed healthcare provider in the past 10 days?

- The housing authority also implemented a policy requiring employees to quarantine if they answer yes to any of those questions. On Monday, Jane, a housing specialist, answered no to all those screening questions and entered the workplace. She worked the entire day and came in close contact with several co-workers and clients. While in the office, Jane coughed incessantly and displayed several other COVID-19 symptoms, which her supervisor, John, noticed but allowed her to continue working. The next day, the housing authority received a call from Jane's husband, who told the executive director that Jane was in the hospital with COVID-19. Jane's husband said Jane had tested positive on Saturday, and he had regretted allowing her to go to work. However, according to Jane's husband, Jane felt like she had to go to work because she did not have any additional paid time off. Five days later, Bob, a housing authority employee, who had limited contact with Jane came down with symptoms, and so did two of the tenants Jane met with on Monday.
 - What should the housing authority have done after Jane's husband called on Tuesday?
 - Must the housing authority report Jane's illness to OSHA? What about Bob's illness?
 - Do either Jane or Bob have a valid claim against the housing authority?
 - Do the tenants who contracted COVID have a valid claim against the housing authority?
 - If so, could the housing authority have avoided these claims by having its employees or tenants sign an assumption of the risk and release agreement?
 - Should the housing authority discipline Jane?
 - Should the housing authority discipline her supervisor?
 - What else could the housing authority have done to avoid this situation?

Third Scenario and Questions

- We believe a tenant in one of our buildings is infected with COVID-19.
 - Can we require her to tell us?
 - What if the tenant confirms she has COVID-19, can this tenant be evicted as a safety precaution?
 - Can we preclude the tenant from entering the building?
 - What *should* the housing authority do?

Fourth Scenario and Questions

- We implemented a mask mandate for tenants in common areas. Steve, a tenant, has come forward and said he cannot wear a mask because of a medical issue.
 - Can we prohibit him from using the common area?
 - If not, what can we do to ensure our employees and tenants remain safe?

Fifth Scenario and Questions

- We implemented a mask mandate for all employees. Terry, an employee, refuses to wear her mask and a tenant complained.
 - Can we discipline Terry?
 - If so, what's the appropriate level of discipline?
 - What steps can we take to avoid a discrimination claim by Terry?
 - What do we do if Terry comes forward with note from the doctor saying she has anxiety and cannot wear a mask?
 - Do we have to accommodate her?
 - If so, what are possible accommodations?

Sixth Scenario and Questions

- A housing authority wants to take a mask-optional approach for vaccinated employees.
 - Is that lawful?
 - Is it lawful in light of the new OSHA guidance?
 - Can the housing authority distinguish between vaccinated and unvaccinated employees for purposes of masking and other COVID-19 precautions?
 - If so, how does the housing authority determine who is vaccinated?
 - Honor system?
 - Certification process?
 - Vaccine card?
 - Who gets to know the employees vaccine status? HR? Supervisors? Everyone?
 - Can the housing authority have vaccinated employees wear a wrist band or pin to indicate their vaccinated status?
 - What if someone who is vaccinated still wants to wear a mask – is that allowed?
 - Could this lead to workplace altercations? Is there anything the housing authority can do to avoid them?

Seventh Scenario and Questions

- A housing authority implemented a robust COVID-19 plan, with masking requirements, improved ventilation and other engineered controls, physical distancing requirements, and much more. Still, Frank, a maintenance technician, does not want to come to work because he is afraid of becoming infected with COVID-19.
 - What can the housing authority do to encourage Frank to come to work?
 - What if Frank still refuses to report to work, can the housing authority fire him?
 - If so, can Frank collect unemployment?

Eighth Scenario and Questions

- While the housing authority is discussing the issue with Frank, he presents a note from his doctor saying that he has a medical condition that heightens his risk of death should he contract COVID-19, and the doctor recommends Frank be allowed to work remotely.
 - Is remote work a “reasonable” accommodation here?
 - If remote work is not a reasonable accommodation, can the housing authority fire Frank?
 - If not, what must it do to manage this situation?
 - Let’s change the hypothetical. What if Frank works in the accounting department, does that change the analysis?

Eighth Scenario and Questions (Con't)

- Could remote work be a reasonable accommodation then?
- Does it matter that Frank worked from home early on during the pandemic when the state had imposed a shelter-in-place order? Frank performed some, but not all, of his duties while sheltering-in-place.
- The housing authority decides to allow Frank to work remotely, and the executive director comes to you and says she's worried other employees will ask to work remotely. She asks if the housing authority should implement a remote work policy? If so, what should be included in such a policy? The housing authority executive director also says she's worried about managing Frank while he works remotely.
 - Should the duties and responsibilities of the parties be memorialized in a remote work agreement? If so, what should be included?
 - What remote management strategies can be used?
 - How can the housing authority maintain culture with employees working remotely?



Acknowledgement & Disclaimer

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