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## Employment Issues and the COVID-19 Vaccine

By Glenn Grindlinger

As more individuals become eligible to receive a COVID-19 vaccine, employers need to understand what policies and protocols they can establish in order to ensure compliance with applicable laws and continue to maintain a safe workplace. Employers often ask whether they can require their employees to be vaccinated. Under federal law, with certain exceptions explained below, the answer is “yes.” Nevertheless, whether or not an employer requires workers to obtain a vaccine, there are some basic employment issues to consider.

### Can employers require employees to be vaccinated?

The Equal Employment Opportunity Commission (EEOC) has issued guidance that allows employers to institute a policy that requires employees to be vaccinated against COVID-19. Most state and local jurisdictions appear to be following EEOC guidance on this issue. However, the EEOC and applicable law recognize four exceptions. **First, the vaccine must be generally available to the employee population.** For some industries, such as health care, all employees are likely already eligible for vaccination. For other industries, such as retail, the number of employees eligible for vaccination is currently limited (*e.g.*, only individuals over 65 years of age). Once the vaccine is available to the employee population in question, subject to a few exceptions, an employer can mandate that employees be vaccinated.

**Second, employers must provide exceptions to a mandatory vaccine policy for those individuals who cannot obtain a vaccine due to their own personal health or disability.** Under the

Americans with Disabilities Act (ADA), individuals with disabilities must be provided with reasonable accommodations that enable them to perform the essential functions of their job. An employee may have a health condition that prevents them from getting the vaccine. In such cases, the employer must discuss the matter with the employee — engage in the so-called “interactive process” — to arrive at a reasonable accommodation. For example, if an employee cannot get the vaccine for a health-related reason, a reasonable accommodation might be excusing the employee from getting the vaccine and requiring the employee to continue to wear PPE in the workplace. Another reasonable accommodation might be to excuse the employee from getting the vaccine and permit the employee to continue to work from home. Reasonable accommodations are determined on a case-by-case basis and there is no “one size fits all” approach.

**Third, employers must excuse those employees who have a sincerely held religious belief that prohibits them from getting the vaccine.** The belief does not have to be common or part of a “recognized religion.” However, it must be sincerely held — a real religious belief — and not one developed solely to avoid the vaccine. If an employee has a sincerely held religious belief, the employer will have to provide that employee with a reasonable accommodation similar to the accommodations made available to employees with disabilities.

**Fourth, if the employee is a member of a bargaining unit, any mandatory vaccine policy could raise issues under the National Labor Relations Act.** The terms of the collective bargaining agreement will determine whether

such a policy can be unilaterally implemented or whether it the employer must first bargain with the union.

Employers should also consult their attorney on whether there are other necessary exceptions under state and local law. Further, if the employer does require its employees to be vaccinated, the time spent obtaining the vaccine may be deemed “working time” under the Fair Labor Standards Act and analogous state law. If it is working time, the employee must be compensated.

### **Can an employer encourage employees to get a vaccine?**

The employer may encourage employees to get vaccinated. However, there are limitations on what enticements an employer can provide. The main issue is that it is unclear whether a vaccination incentive plan, whether formal or informal, would be considered a “wellness program” by the EEOC. Under the ADA, if the wellness program inquires into disability-related issues, the wellness program must be voluntary. Employers can offer *de minimus* gifts, such as a water bottle or a sticker, to participate in a wellness program but anything more could run afoul of the ADA.

The EEOC has stated that asking whether an employee has been vaccinated is not a disability-related question. Yet, the EEOC has warned employers that medical screening necessary to obtain a vaccine is a disability-related question. Many vaccination programs require individuals to answer questions about their health so that the provider of the vaccine can evaluate if there is a medical reason for the individual not to get the vaccine at that time. COVID-19 is no different. When individuals get the COVID vaccine, they often are asked questions about their general health. These questions could be deemed disability-related and therefore any COVID-19 vaccination program that is encouraged by the employer could be a wellness program under the ADA.

What is an employer to do? The employer could provide small incentives such as a sticker, water bottle or similar gift — this would not run afoul of applicable law. If the employer wants to provide a greater incentive, such as additional paid time off, a cash gift or something else of significance, the employer should first consult counsel. The employer might want to provide the incentive to all those who obtain the vaccine as well as those who cannot obtain the vaccine due to disability or religious reasons.

Even if it is acceptable and lawful for the employer to provide incentives beyond *de minimus* gifts to employees to get the vaccine, the employer needs to consider the wage and hour implications of such benefits for their non-exempt employee population. Indeed, a cash gift of \$100 to get the vaccine might need to be included in employee compensation when calculating overtime premiums for non-exempt employees. In short, while employers might think they are doing the “right thing” by providing incentives to employees to get vaccinated, they need to consider the legal issues surrounding such incentives and consult counsel on these issues.

### **Must an employer give employees time off to get vaccinated?**

Many states and municipalities have enacted sick leave laws that could require employers to provide leave for employees to get vaccinated. For example, under the New York State Paid Sick Leave Law, employers must provide employees with time off for, among other things, “the diagnosis, care or treatment of a mental or physical illness, injury or health condition of, or need for medical diagnosis of, or preventive care for, such employee or such employee’s family member.” It is almost certain that time needed to obtain the COVID-19 vaccine qualifies for leave under this provision. As such, in New York, employers are required to provide time off for employees to get a COVID-19 vaccine if the employees have accrued such time.

If an employer is in a jurisdiction without a paid sick leave law or employees have not accrued sick

leave under applicable law, there is no legal requirement to provide time off for employees to obtain the vaccine. However, it might be prudent for employers to do so. This “benefit” would encourage employees to get vaccinated, and would help the employer ensure that its workplace remains healthy and safe.

**Do employers need to pay employees who take time off to get vaccinated?**

If the employee has accrued time under applicable sick leave laws, such time can be used to obtain the COVID-19 vaccine (or likely any vaccine). For example, if an employee has accrued leave time under New York’s or New York City’s Paid Sick Leave laws, the employer must pay the employee for the time the employee takes to obtain the vaccine. If the employee does not have any accrued time (or insufficient accrued time) or the employer is located in a jurisdiction without a paid sick leave law, then there is no legal requirement to pay the employee when the employee takes time off to get vaccinated.

**What proof can an employer require from an employee to demonstrate they have been vaccinated?**

Vaccination records are “health records” under applicable law. Therefore, the employer must be very cautious in determining what information, if any, to obtain regarding proof that an employee has been vaccinated.

In many states, when an individual is vaccinated against COVID-19, the vaccine provider issues them a card or document as evidence of vaccination. Other jurisdictions provide proof of vaccination only upon request. If an employer wants to have employees submit proof of vaccination, it could require the employee to submit a copy or picture of the vaccination card or other documentation that is available from the provider upon request. If the employer wants to obtain such information directly from the vaccine provider, the employer would first need to have the employee submit a HIPAA authorization

permitting such communication. However, if the employer does require such documentation, the employer must ensure that the vaccination record is kept confidential and access to it strictly limited to those individuals with a business need to know the information. Failure to do so could lead to significant liability. For this reason, employers should be extremely careful with vaccination records. Further, it is prudent for an employer to consult counsel to determine whether it has the procedures in place to protect the confidential nature of the vaccination record and whether it makes sense to require the submission of such records.

*For more information about this Alert, please contact Glenn S. Grindlinger at [ggrindlinger@foxrothschild.com](mailto:ggrindlinger@foxrothschild.com) or 212.905.2305, or any member of Fox Rothschild’s [Labor & Employment Department](#). Visit us on the web at [www.foxrothschild.com](http://www.foxrothschild.com).*