

MEMORANDUM

RE:           **Mandatory Vaccination Policy**  
(Last Updated: December 21, 2020)

The recent rollout of COVID-19 vaccines has many employers considering whether to implement a mandatory vaccination policy. The issue is sensitive. It requires employers to balance their duty to maintain a safe and healthy workplace with the legal rights of individual employees. This memorandum provides general guidance for employers trying to strike this balance. Notably, this memorandum incorporates helpful guidance that the Equal Employment Opportunity Commission (“EEOC”) provided on December 16, 2020.<sup>1</sup>

**1. May an Employer Require an Employee to Receive a COVID-19 Vaccination?**

In general,<sup>2</sup> an employer may implement a mandatory COVID-19 vaccination policy. However, if an employee cannot receive the vaccine due a qualifying disability or sincerely held religious belief, practice or observance, then the employer may have to provide that employee with a reasonable accommodation or exemption.

When a qualifying disability prevents an employee from receiving the vaccine, the employer must “conduct an individualized assessment” as to whether allowing the person to work without being vaccinated poses a direct threat<sup>3</sup> to workplace health and safety. If the employer determines, based upon objective evidence, that a direct threat exists, it must engage in an interactive process with the employee. The aim of such interactive process is to identify a reasonable accommodation that reduces the threat posed by COVID-19 and enables the unvaccinated employee to continue working. The EEOC has provided detailed instructions regarding the anticipated interactive process, stating:

Employers and employees should engage in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship (significant difficulty or expense). The process should include determining whether it is necessary to obtain supporting documentation about the employee’s disability and considering the possible

---

<sup>1</sup> The EEOC’s recently issued “Guidance Sheet” is available at the following link: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

<sup>2</sup> The analysis and applicable rules may be different for employees who are part of a union or employees who work under an employment agreement.

<sup>3</sup> The EEOC has noted that COVID-19 constitutes a direct threat to workplace health and safety.

options for accommodation<sup>4</sup> given the nature of the workforce and the employee's position. The prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration.<sup>5</sup>

Employers must follow a similar process for employees who cannot receive the vaccine due to a sincerely held religious belief, practice or observance.<sup>6</sup> In such instances, the employer must provide a reasonable accommodation for the religious belief, practice or observance unless it imposes an undue hardship on the employer. The term undue hardship (as used in this Title VII context) means something "more than a de minimis cost or burden on the employer."<sup>7</sup>

The employer should not exclude an unvaccinated employee (i.e., one who declines or refuses vaccination for legitimate disability or religious reasons) from the workplace until it finishes the interactive process with the employee. If the employer concludes, as a result of that process, that no reasonable accommodation is possible, "then [and only then] it would be lawful for the employer to exclude the employee from the workplace."<sup>8</sup>

## **2. Practical Considerations Regarding a Mandatory COVID-19 Vaccination Policy.**

If an employer adopts a mandatory COVID-19 vaccination policy, it should have an administrative system in place to handle employee objections and to process requests for an accommodation or exemption based upon a disability or religious belief. Carefully navigating the accommodation process is likely to take a significant amount of time. The novelty of COVID-19 makes the determination of what is, or is not, a reasonable accommodation challenging. There is little, if any, court guidance concerning the issue. Further, scientific understanding of the virus, including prudent protocols to prevent its spread and protect others, is constantly changing which complicates the reasonable accommodation analysis.

A vaccine mandate may also have a negative impact on employee morale. As human resource professionals and management personnel are aware, low employee morale creates its own challenges. Employers should consider these practical issues before making a final decision on whether to implement a mandatory vaccination policy.

---

<sup>4</sup> The EEOC directs employers and employees to COVID-19 specific pages on the Job Accommodation Network (JAN) website, [www.askjan.org](http://www.askjan.org), as "a resource for different types of accommodations[.]"

<sup>5</sup> EEOC Guidance Sheet, § K.5.

<sup>6</sup> It is not within the scope of this memorandum to describe in detail what constitutes a sincerely held religious belief, practice or observance other than to say that determining what falls into that category is, as one court described, "a difficult and delicate task."

<sup>7</sup> EEOC Guidance Sheet, § K.6.

<sup>8</sup> *Id.* at § K.7.

Finally, if an employer decides to implement a mandatory COVID-19 vaccination policy, it must decide how to administer the vaccine;<sup>9</sup> identify a reasonable effective date for the policy;<sup>10</sup> and take steps to clearly communicate the policy to its employees.<sup>11</sup>

### 3. Considerations Regarding Administration of the Vaccine.

As alluded to in the prior section, employers who implement a mandatory COVID-19 vaccination policy must decide how to administer the vaccine. Recent EEOC guidance provides some helpful information.

The EEOC has clarified that administration of the vaccine by an employer (or a third-party with whom the employer has directly contracted) is not, in itself, a “medical examination” under the ADA.<sup>12</sup> However, the pre-vaccination screening questions recommended by the CDC may constitute medical examinations under the ADA and may constitute a request for genetic information protected by the Genetic Information Nondiscrimination Act (“GINA”).

Due to these concerns, employers should consider reducing their administrative burden and liability exposure by sending employees to their own health care professional for the vaccine instead of offering it in the workplace. The EEOC guidance seems to push employers in the direction of sending employees outside of the workplace for the vaccine by identifying various administrative burdens and legal risks associated with self-administering the vaccine.

Assuming the employer requires employees to receive the vaccine from their own source, the employer is allowed to ask the employee to provide proof of vaccination. In asking for proof of vaccination, the employer “may want to warn the employee not to provide any additional medical information as part of the proof in order to avoid implicating the ADA.”<sup>13</sup>

---

<sup>9</sup> See Point 3, *infra*.

<sup>10</sup> The employer cannot impose the policy on employees who do not have access to the vaccine. To date, there is little clarity as to when the vaccine will be widely available to the general public.

<sup>11</sup> Providing employees with advance notice of the policy and an explanation as to why the employer chose to implement a mandatory vaccination policy will reduce friction and, hopefully, reduce the number of employees who claim unnecessary exemptions. Employers should inform employees of the policy in advance, clearly communicate the purpose of the policy (i.e., to reduce costs of absence, protect workplace safety and health, and ensure that the business can open and stay open during turbulent economic times), and provide accurate and reader-friendly information about the vaccine.

<sup>12</sup> EEOC Guidance Sheet, § K.1.

<sup>13</sup> *Id.* at § K.3.