

Employee Benefit ■ Plan Review

The New Employee Status: Vaccinated or Unvaccinated

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With the highly transmissible Delta variant surging, and vaccination rates stagnating, employers are facing new pressures to reinstate mask mandates for everyone, regardless of vaccination status, and encourage COVID-19 vaccines through workplace mandates.

On August 23, 2021, the Food and Drug Administration (“FDA”) fully approved the Pfizer-BioNTech COVID-19 vaccine for use in those age 16 and older. This upgrade to full approval from “emergency use” status is predicted to lead to a rise in vaccine requirements from employers, schools, and local governments. Health officials are also hopeful that the approval will lead to higher vaccination rates. Note that the Pfizer vaccine is only one of three COVID-19 vaccines to receive full approval. At this writing, the Moderna and Johnson & Johnson vaccines remain in emergency use status only.

IN THE STATES

Even under the FDA’s prior emergency use approval, major companies¹ – including Google, Facebook, BlackRock, and Morgan Stanley – initiated policies insisting that workers get vaccinated before returning to the office. Meanwhile, California and New York City became the first state and major city, respectively, to require public workers to be

vaccinated. Illinois very recently joined the returning wave of COVID-19 related restrictions by enacting another statewide mask mandate and requiring all teachers and health-care workers be vaccinated or subject to weekly testing. The Biden administration also requires all federal workers to attest to being vaccinated or face strict testing protocols.

The legal considerations surrounding workplace mandates – how to implement them and how to respond to employees who refuse – remain uncertain. Earlier this year, Montana became the first state to make vaccination status a protected class under the law. That puts an employee’s vaccination status in the same category as race, sex, and religion when it comes to employment discrimination. Under the new law, Montana employers are not allowed to discriminate against non-vaccinated employees and are not allowed to mandate vaccines. Other state legislatures – including in New York,² New Jersey,³ Maryland,⁴ and Illinois⁵ – have also introduced similar bills. However, as discussed further below and with the exception of Montana, non-governmental employers in the 49 remaining states may still legally require employees to be vaccinated as of the date of this publication.

A slate of employment-related COVID-19 cases have already hit the courts, and more litigation is expected as workplaces reopen with

varying levels of vaccination requirements and accommodations issues. How can employers protect against potentially costly lawsuits as they bring workers back to the office? What follows is what you need to know.

CAN EMPLOYERS REQUIRE VACCINATIONS?

The Equal Employment Opportunity Commission (“EEOC”) and Department of Justice (“DOJ”) issued guidance saying that federal laws do not prevent employers from requiring all employees physically entering the workplace to be vaccinated, so long as they provide reasonable accommodations under the Civil Rights Act of 1964 and the Americans with Disabilities Act. This means that employers must accommodate those who are unvaccinated due to a disability or religious objection. It is also unlawful for an employer to enforce vaccination policies that treat employees differently based on their disability, race, color, religion, sex (including pregnancy), national origin, age, or genetic information. So, if an employee cannot be vaccinated due to one of these protected characteristics, a vaccine mandate could constitute illegal discrimination and give rise to a lawsuit if reasonable accommodations are not offered. This EEOC guidance is still valid for non-governmental employers – with the exception of those in Montana.

Federal guidance does not preempt state law. In Montana, for instance, vaccine status is now a protected class and employers would be discriminating under the state’s employment laws by making employment decisions – like hiring and firing – based on vaccination status. This will become increasingly relevant for employers as more states consider similar legislation.

In addition, several states have issued bans preventing state and local governmental entities from

requiring that their employees receive COVID-19 vaccines. These states include Arkansas, New Hampshire, Texas, and Utah. Additional states have banned state employers from requiring proof of vaccination as a condition of employment, a small but relevant distinction. Most recently, the governor of Texas issued an executive order banning state and local governmental bodies from mandating COVID-19 vaccinations even after the Pfizer-BioNTech vaccine obtained full FDA approval. Notably, these bans do not have an effect on non-governmental employers who may still implement vaccination mandates. Some state governors have previously indicated that they may allow or consider vaccine mandates after full FDA approval of one or more of the vaccines.

While the full FDA approval of the Pfizer-BioNTech vaccine brings hope of increased vaccination rates and more legal protections for employers, it is, as previously noted, only one of three vaccines on the market in the U.S. While the Pfizer-BioNTech vaccine is currently the most widely available vaccine, it is far from the exclusive option and may not be the locally available option for your employees. Employers should ensure the Pfizer vaccine is readily available in your area before basing any vaccine policy changes on its full FDA approval.

Note that, without an affirmative ban on state and local governmental agencies requiring COVID-19 vaccines, it is generally considered permissible for state or local governments to even require vaccinations of all citizens (not just governmental employees), with certain religious or medical exemptions. This governmental power was recognized in a 1905 U.S. Supreme Court case arising out of a smallpox outbreak in Massachusetts and the resulting vaccine mandate for local citizens. This 115+ year-old Supreme Court precedent still forms the basis of vaccine-related judicial rulings today.

DO HOSPITALS AND UNIVERSITIES GET SPECIAL TREATMENT?

Generally, courts have allowed hospitals and universities (or other institutions of higher learning) to maintain their mandatory vaccination policies in response to legal challenges. Given the obvious high-risk status of many patients and staff, hospitals and other healthcare facilities are often explicitly exempted from state laws and executive orders prohibiting governmental employers from requiring COVID-19 vaccinations (i.e., Texas). As you may have seen, in July 2021, a federal court in Indiana upheld Indiana University’s requirement that all students returning to campus be vaccinated. This ruling was upheld in August by the U.S. Court of Appeals for the Seventh Circuit (the Seventh Circuit encompasses Illinois, Indiana, and Wisconsin) and the Supreme Court decided not to review the Seventh Circuit’s decision, leaving the ruling in place. The Seventh Circuit relied on the 1905 smallpox vaccine mandate case in upholding the district court’s ruling.

WHAT WOULD CONSTITUTE “REASONABLE ACCOMMODATIONS” FOR UNVACCINATED EMPLOYEES?

Under the ADA, employers must provide reasonable accommodations for employees unless it would pose an undue hardship, which typically means a significant difficulty or expense. EEOC guidance provides a host of examples.⁶ This includes having unvaccinated employees wear a face mask, social distance from colleagues or clients, work a modified shift, get periodic COVID-19 tests, telework, move office locations, or accept a reassignment. It is important to note that, as with other ADA-related accommodations, the employer only needs to offer an accommodation that is reasonable under the circumstances, it does not

need to be the employee's preferred accommodation.

CAN EMPLOYERS CREATE SEPARATE POLICIES FOR VACCINATED AND UNVACCINATED EMPLOYEES?

Generally, an employer can have separate policies for vaccinated and unvaccinated employees (i.e. regarding masks). However, if a person's vaccination status is connected to a protected class (or if your state treats vaccination status as a protected class), then an unvaccinated employee is protected from both unlawful discrimination and harassment. This means employers could be violating the law by treating employees differently based on their vaccination status and by allowing unvaccinated (or vaccinated) employees to be harassed by managers, colleagues, or clients. For instance, if an employee objects to a vaccination for religious reasons or due to pregnancy, adverse employment actions against that employee could constitute religious or sex discrimination.

CAN EMPLOYERS OFFER VACCINE INCENTIVES RATHER THAN IMPLEMENT A VACCINE MANDATE?

Under EEOC guidance, employers may incentivize vaccination so long as those incentives (both rewards and penalties) are not so substantial that they become coercive – think of offering a \$10.00 gift card rather than a \$1,000.00 bonus payment. Some employers are validly offering additional paid time-off to employees who get vaccinated.

In a novel twist on the idea of vaccine incentives, Delta Airlines will begin docking the pay of unvaccinated employees on the company's healthcare insurance plan \$200 per month – effectively a vaccine penalty. (You can promote this as “increased employee costs of health insurance” rather than a “penalty”). The airline

justifies this approach by noting that the average COVID-related hospital stay costs the company \$40,000, and all airline employees who were recently hospitalized with COVID were not fully-vaccinated. Unvaccinated Delta Airlines employees will face weekly COVID testing in addition to the unvaccinated surcharge.

WHAT IF AN EMPLOYEE REFUSES TO GET VACCINATED?

Before determining whether to discipline or terminate an employee for refusing to comply with a lawful vaccine mandate, make sure you are not running afoul of the applicable laws or executive orders in your area. However, unless state law provides otherwise, employers may generally be permitted to terminate an employee who refuses a COVID-19 vaccine out of personal preference and who cannot be reasonably accommodated.

WHAT CAN EMPLOYERS DO TO PROTECT AGAINST COVID-RELATED DISCRIMINATION LITIGATION?

The legal landscape surrounding back-to-work and vaccination policies is quickly evolving. To reduce risk associated with potential vaccine discrimination claims, employers should be updating workplace policies and keeping abreast of local law. Employers will be better prepared against vaccination-related legal claims if they adhere to Centers for Disease Control and Prevention (“CDC”) guidelines and other safety guidelines published by state and local health agencies (e.g. mask mandates). Because nothing can prevent a current or former employee from filing a claim (meritless or not) against an employer, especially in such a novel area of the law, it is generally safest to explore possible accommodations of unvaccinated employees prior to termination.

For specific examples to promote workplace safety and, therefore, also minimize potential legal liability, the CDC has extensive guidance for employers⁷ that was last updated in March 2021. In addition, to use as a supplement or complement to CDC guidance, OSHA very recently updated its guidance⁸ for employers to consider in creating a safe work environment.

DOES AN EMPLOYEE'S REFUSAL TO GET VACCINATED MAKE THEM A “DIRECT THREAT” TO COWORKERS?

Maybe. The concept of a “direct threat” is an exception to the general rule under the ADA that employers must accommodate persons with disabilities. Employers do not have to accommodate an employee who is a “direct threat,” defined as someone who presents “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” In the COVID-19 arena, someone who cannot get a vaccine due to a disability could potentially be a considered a direct threat, but only if there is no reasonable accommodation to eliminate the threat to the health of others or their own health. Even with the known dangers of COVID-19, an extensive, case-by-case analysis is required to establish whether an employee is a direct threat to others under the ADA.

In short, the direct threat analysis only applies in the context of someone who is not able to receive a vaccine due to a disability (potentially including pregnancy-related disabilities or complications, depending on the jurisdiction).

WHAT IS GOING ON IN FLORIDA (AS IT RELATES TO EMPLOYERS)?

The state of Florida has been in the news for recent COVID-19 related legislation and executive

orders. Mainly such statutes and executive orders are aimed at preventing places of public accommodation (restaurants, movie theaters, retailers, etc.) from requiring documentation of vaccine status from patrons who enter into their establishment – this documentation is commonly known as a “vaccine passport.” (Florida is only one of several states to restrict the use of vaccine passports). Other restrictions are being placed on Florida public school districts and educational institutions. However, employers in Florida may

still require their employees to be vaccinated at this time.

To paraphrase a line from a Florida attorney: You have to get the job to keep the job. 🌀

NOTES

1. <https://www.cnn.com/2021/07/28/business/companies-vaccine-mandate/index.html>.
2. <https://www.nysenate.gov/legislation/bills/2021/A4602>.
3. <https://www.njleg.state.nj.us/bills/BillView.asp?BillNumber=A5607>.
4. <http://mgaleg.maryland.gov/mgawebsite/Legislation/Details/HB1171?ys=2021RS>.
5. <https://www.ilga.gov/legislation/BillStatus.asp?DocNum=3682&GAID=16&DocTypeID=HB&SessionID=110&GA=102>.

6. <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.
7. https://www.cdc.gov/coronavirus/2019-ncov/community/guidance-business-response.html#anchor_1609684593562.
8. <https://www.osha.gov/coronavirus/safework#executive-summary>.

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