



RETURN TO WORK VIRTUAL TOOLKIT | KEY TAKEAWAYS

THE COVID-19 VACCINE: WHAT CAN EMPLOYERS REQUIRE

The Regulatory Landscape Creates Specific Obligations That Employers Will Need to Adhere to When Implementing a Mandatory Vaccination Program

Organizations that implement mandatory COVID-19 vaccination programs should pay close attention to their responsibilities under Title VII of the Civil Rights Act (Title VII), the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), Occupational Safety and Health Administration (OSHA) guidelines and the Employee Retirement Income Security Act (ERISA) as many of the traditional applications of those laws apply to this type of program. For example, employees that have specific ADA or Title VII challenges such as a sincerely held religious belief, practice or observance or disabilities that could prevent them from complying with the policy will need to be provided with reasonable accommodations unless it would pose an undue hardship. With the opportunity for employers to request additional supporting information to verify an employee's request under ADA or Title VII, employers should assess these situations on an individual basis and look to understand various factors when evaluating:

1. Severity of the harm
2. Likelihood of harm to others
3. Imminent consequences of the threat

To Track or Not to Track: The "Million-Dollar" Compliance Question

To maintain the integrity of a mandatory vaccination program and ensure compliance within the organization, employers should commit to deploying a comprehensive tracking system. The intention behind a mandatory program is to ensure your workforce is protected so that you can resume normal business activities and operations to pre-COVID-19 levels. By having a robust tracking system, employers can stay on top of the employees who have been vaccinated, the individuals challenging the policy, the professionals who need accommodations and other unique circumstances. On the contrary, it is not recommended to implement a tracking system for a voluntary vaccination program as the ambiguous ask for employees to self-report leaves a lot of unknowns and inconsistencies.

Undoubtedly, there is an administrative burden that accompanies any kind of tracking system; however, the benefit outweighs those concerns and should be considered early on as your organization looks to deploy a mandatory program.

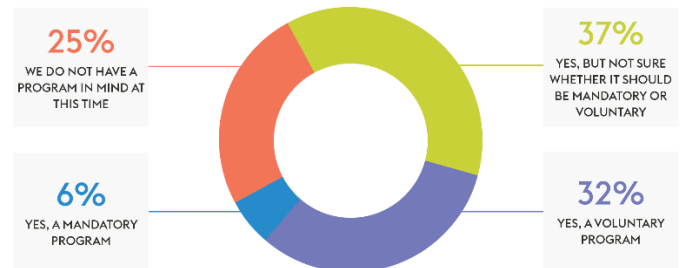
Be Cautious About the Employee Data Provided to Your Organization as Proof of Vaccination or Pre-Vaccination Screening

Employers will have to carefully manage the information that employees provide as a means to verify their vaccination and/or as part of a pre-screening vaccination process. Due to strict parameters set by GINA, ADA and The Health Insurance Portability and Accountability Act (HIPAA), employers will need to be clear with the information the company is requesting through targeted forms and other means to ensure employees are only providing the necessary details that demonstrate compliance with the overall policy. With ADA, employers must show that pre-screen questions are job-related and consistent with business necessity. Under GINA, employers cannot inquire about an individual's or family member's genetic information, including:

- Genetic tests
- Family medical history
- Requests for, receipts of or participation in clinical research including genetic services
- Genetic information about a fetus carried or an embryo legally held using assisted reproductive technology

Employers also need to be aware of instances where an employee inadvertently provides medical information. Depending on the circumstances, such instances may require the employer to maintain a separate set of protocols to be in compliance with HIPAA.

IS YOUR COMPANY CURRENTLY CONSIDERING A COVID-19 VACCINATION PROGRAM?





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Determining if Your Organization Should Implement a Mandatory or Voluntary COVID-19 Vaccination Program

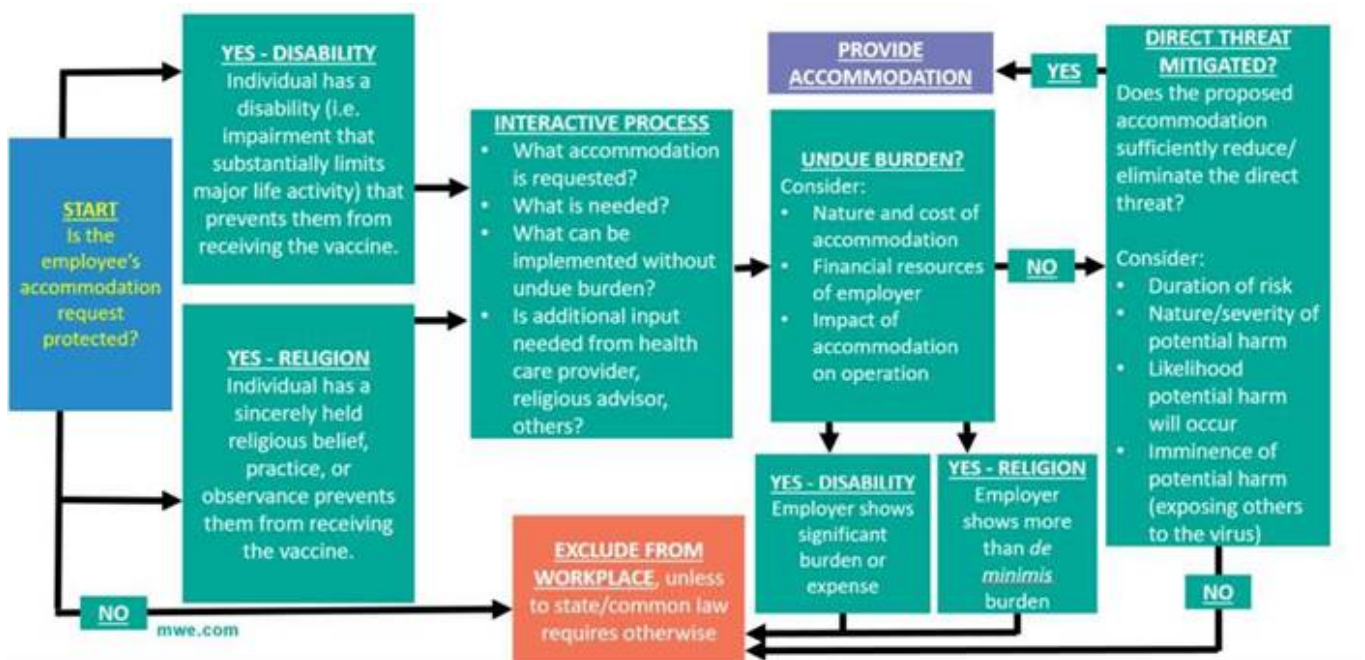
There are many factors that an organization should consider before deciding if a mandatory vaccination program is the right path for it to take. The upside of having a vaccination program is that it can bring a lot of benefits to an organization as it looks to return to “normal,” including motivating its workforce, expediting the return of employees to a traditional work setting, relaxing COVID-specific policies and eliminating the health concerns in high-risk environments. However, there are drawbacks that employers should evaluate before fully committing to this kind of program, including:

- Required compliance tracking and data management of information provided by employees, including the challenges presented by outsourcing the management of this information
- Limited impact on social distancing protocols, as companies will still need to have employees comply with those policies
- Increased need to provide special accommodations to address the challenges raised by ADA, Title VII and OSHA, including the risk of providing an uneven application of accommodations that may lead to discrimination claims
- Potential for workers' compensation claims related to adverse reactions to the vaccination

Employers also need to be aware of instances where an employee inadvertently provides medical information that would be constituted as health data as it will require a separate set of protocols the company will need to follow to be comply with HIPAA.

For voluntary programs, there are expected benefits from a self-reporting system, but drawbacks as well. Employees will be less likely to raise retaliation claims or other adverse actions, while an employer has more flexibility with the types of information it can solicit through pre-screen questions as a result of ADA and a GINA-compliant voluntary wellness programs. In addition, ADA and Title VII accommodations do not apply as the program is completely voluntary. Keeping that in mind, a voluntary program offers far less benefits in terms of the control an employer has to ensure its workforce is fully vaccinated, can open up operations where safety concerns exist and pull back on COVID-19 policies like social distancing.

Defining a "Reasonable Accommodation" as Employers Look to Address Potential Title VII and ADA Concerns





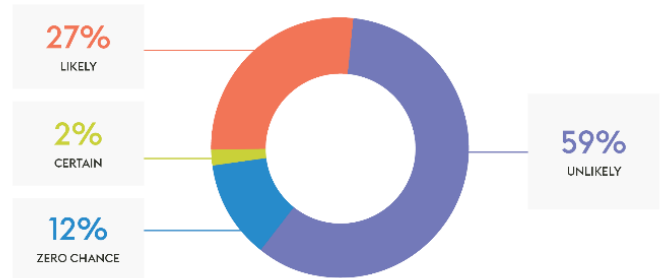
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Consider the Application of ERISA

Application of ERISA will be determined by how involved the employer is in the vaccine program. Employers opting for an incentive program and are not offering to pay or provide the vaccine are not required to create an ERISA plan. However, employers considering sponsoring onsite or near-site vaccine programs (or using a third party to administer vaccines to employees) will have to be mindful of their ERISA plan. While it should not be a heavy lift on the employer's part, they must be sure to dot their I's and cross their T's, including adding the necessary information to the summary plan description and updating the participant count. Additionally, while there might be compliance obligations to bear in mind, ERISA preemption allows employers to not have to worry about some of the state and local laws.

HOW LIKELY IS YOUR COMPANY TO USE FINANCIAL INCENTIVES TO ENCOURAGE INDIVIDUALS TO RECEIVE THE COVID-19 VACCINE?



Other Benefits Considerations Involved in Vaccine Programs

- If offering an incentive program, be careful of what is taxable and what is not. Time off is taxable, while gifts like a water bottle are considered de minimis and are not taxed.
- Participation: Will this benefit be offered to all employees or just those under the company health coverage, and will you extend the program to dependents?
- Funding: The cost of an onsite or even near-site program can become very steep. Under the Affordable Care Act (ACA), vaccines are considered preventive medicine, and group health plans (GHP) will be responsible the entire cost of vaccine administration.
- HIPAA privacy implications involved in vaccine programs: If providing an onsite clinic or vaccination fair, HIPAA and state privacy should be top of mind.
 - Using a third party who will store participants will help insulate the employer from HIPAA.

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1. Where do "mandatory" vaccination workplace policies stand in light of (yet) undetermined widespread confirmation of the efficacy and effectiveness of the COVID-19 vaccines currently available? The law is no different today for the COVID-19 vaccine as it was for the H1N1 vaccine. Notwithstanding skeptics, it is permissible to mandate the vaccine, subject to Title VII of the Civil Rights Act (Title VII) (religious accommodation) and Americans with Disabilities Act (ADA) (disability accommodation) issues and parallel state counterparts. As a practical matter, until it is readily available to a workforce, it does not make sense to make it mandatory. Moreover, because of the wide range of views (both scientific and unscientific) as to the efficacy and effectiveness of the COVID-19 vaccines, many employers are opting and will continue to opt for voluntary programs. As time passes that information and those views may evolve.

2. Can you mandate some employees to get the vaccine and not others, such as unions versus non-union administrative employees? Having different rules for union versus non-union employees does not violate the National Labor Relations Act, so long as the different treatment isn't retaliatory or motivated by antiunion *animus*.

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3. Can an employee refuse to return to the workplace indefinitely without need/request for an accommodation, making the argument that they have been able to successfully complete their job requirements remotely since the start of COVID-19? Under what circumstances could an employer refuse that request? The answer is going to turn on whether working in the office is an essential function of the job. If yes, then the employee cannot indefinitely work remotely. But proving working in the office is an essential function of the job is going to be hard for employers if the employee has spent the last nine months performing their job duties well remotely.

4. The Equal Employment Opportunity Commission (EEOC) guidance seems to suggest that not all workplaces would be viewed the same under the "individualized inquiry" framework. E.g., meatpacking versus office setting might be viewed differently in terms of mandatory vaccinations. Can you comment on this? According to the EEOC guidance, in the context of a mandatory vaccination program, employers should conduct an individualized assessment in determining whether an unvaccinated employee would pose a direct threat at the worksite (*e.g.*, would expose others to the virus at the worksite). Factors such as the type of workplace, the prevalence in the workplace of employees who already have received a COVID-19 vaccination, and the amount of contact the unvaccinated employee has with others whose vaccination status could be unknown may impact the undue hardship consideration. Employers should therefore consider these factors when engaging in the interactive process to identify workplace accommodation options that do not constitute an undue hardship.

5. What implications come into play if a program is voluntary, but an employer allows for paid time off to get the vaccine from an unrelated third party and agrees to reimburse for any out-of-pocket cost (admin fees, etc.)? Are these incentives an Employee Retirement Income Security Act (ERISA)/federal government concern? Admin fees may not be charged, so vaccines must be provided at no cost to individuals—whether through a group health plan, Medicare or the Health Insurance Marketplace (the Exchange). Therefore, this approach will *not* create an ERISA plan.

6. My company provides in-person job safety training. Do we have any jurisdiction to require our students (who are all adults) to be vaccinated before they enter our premises? We are not aware of any current guidance related to requiring proof of vaccinations from customers. Current EEOC guidance regarding COVID-19 vaccinations focuses on Title I of the ADA, which governs employment relationship. If your company is a public accommodation, Title III of the ADA would apply. We anticipate the EEOC will issue Title III guidance in the future, as the vaccine becomes more widely available to the US population.

7. How should an employer deal with employee anti-vaccination advocacy on the job? Particularly where an employee disseminates misinformation? Because purely political objections to a vaccination program are not protected under federal law, an employer is under no obligation to exempt an employee from taking a vaccine simply because the employee is an "anti-vaxxer." Moreover, an employer is generally allowed to limit anti-vaccination misinformation disseminated by an employee and should do so consistent with its discipline policies. Keep in mind, however, that some states (such as California) prohibit employers from taking actions that tend to control or direct their employees' political activities or affiliations. Therefore, an employer should be careful to communicate to an employee engaging in anti-vaccination advocacy that they are free to do so outside of the workplace.

8. Can employers create a hybrid approach where the program is voluntary, but if the employee chooses not to get vaccinated, they are required to work remotely from home? Under current guidance, an employer can implement a "hybrid" approach if implementing a voluntary vaccine program but requiring employees who are not vaccinated to continue to work remotely.

9. Can employers "advertise" that all employees have been vaccinated or would employers risk claims from employees that their personal health information has been disclosed? Employers should be careful not to disclose employees' immunization histories as those may be protected from disclosure under state statutory or common law. To minimize the risk of potential claims, employers should consider using broad/general language when "advertising" their mandatory/voluntary vaccination programs (*e.g.*, "to ensure a safe environment for employees and customers, the Company has implemented a vaccination program for its employees").

10. Will having a third party administer the test on company property subject a company to any additional Health Insurance Portability and Accountability Act (HIPAA) regulations? Can employers simply ask if an employee has been vaccinated? Employers may simply ask about vaccination status—nothing more. This will not implicate HIPAA privacy. If, however, the employer administers the vaccine, there will likely be a questionnaire (*e.g.*, comorbidity factors), which would implicate HIPAA privacy.



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11. If your employer vaccine program is voluntary, can an employee refuse to return to the workplace because they are uncomfortable working among employees who may not be vaccinated? While general concerns that other employees are not vaccinated may not be protected under the ADA or Title VII, employers should listen to employee concerns and, if they are genuine, explore alternative working arrangements with them, such as continuing to work remotely. Employers should keep in mind that accommodations made for one employee may set a precedent regarding how other employees should be managed in similar situations. Additionally, employers should be mindful that if employees come together to protect or refuse to return to work, their concerned efforts could be protected under the National Labor Relations Act.

12. What sort of governance and protocols would be necessary if reviewing religious exemption requests? An employer should engage in the interactive process as it would with any other request for religious accommodation. Generally, an employer should assume an employee's request for a religious exemption is based on a sincerely held religious belief, practice or observance given the broad definition of religion under EEOC guidance. However, if the employer has an objective basis for questioning the sincerity of the particular belief or its religious nature, it may seek additional supporting information from the employee. The employer should then assess whether providing a religious exemption would pose an undue hardship on the employer.

13. Under a mandatory program (or for that matter, a voluntary vaccine program), is there an obligation (or a business reason) to consider requiring a COVID-19 test before coming back to work? There is no legal obligation that employers require COVID-19 testing as part of a vaccine program. However, employers may have separate obligations under state or local regulations, orders and ordinances to require COVID-19 testing before employees may return to work.

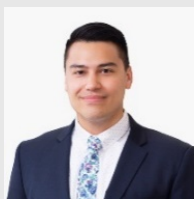
14. What are the potential workers comp claims related to possible adverse reactions to vaccine? Should we mandate vaccinations? Is the employer truly responsible? If an employer implements a mandatory vaccine program, then the vaccination is considered work-related. Under most state laws, an adverse reaction to a vaccine would fall under workers' compensation. Employers should check with their workers' compensation policies to determine whether injuries and illnesses from mandated vaccines are covered.

15. Does it matter if the company has different kinds of employees (e.g., back-office versus customer-facing) with different vaccination requirements or incentives? Employers may consider whether to implement different vaccination policies with respect to employees in different roles (such as those who directly interact with other employees or the public versus those who do not). However, employers should ensure that they are not treating (or appear to be treating) employees differently based on a protected class.

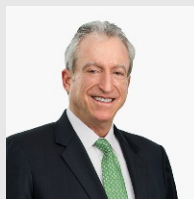
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