

Can Employers Require Employees to take a COVID-19 Vaccine? It's complicated.



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This week marks the one-year anniversary of many employers closing their offices and directing employees to work from home. Others were forced to institute expensive, intrusive, or inconvenient protective measures. Now, with declining infections and increasing vaccinations, employers are thinking about when, and under what conditions, they may reopen their offices or end cumbersome practices. A common question among these employers is whether they can or should require employees to get vaccinated. An internet search will uncover countless websites, including by reputable sources and media outlets, giving the thumbs up. But the answer is a bit more complicated—a good reminder to never rely on “Google, Esquire.”

Yes, as a general matter, employers can, within certain limits, require employees to be vaccinated against an infectious disease. Covid is no different. But there is a big asterisk right now. That is because the current vaccines are being distributed

under an Emergency Use Authorization, or “EUA,” issued by the Food and Drug Administration. Under an EUA, the FDA permits medical treatments, such as vaccines, to be distributed and used before the treatment has been subjected to the same rigorous approval process required to obtain normal approval. Under the statute permitting EUAs, the Secretary of Health and Human Services must require those administering the authorized treatment to inform recipients that they have the option of refusing. In the past, this requirement has been interpreted as prohibiting employers from requiring employees to take a treatment distributed under an EUA. If the employer terminated an employee for refusing, the employer may be liable for unlawfully terminating the employee in violation of public policy. But that interpretation has never been tested in court.

To further complicate the issue, in December, the EEOC issued guidance suggesting employers could require Covid vaccinations. But the guidance is ambiguous, specifically noting that the current vaccines are subject to an EUA and citing the FDA’s obligation to inform recipients that they may refuse the vaccine. The rest of the guidance refers to employers mandating “vaccinations when they are available.” Does “available” mean accessible under the EUA? Or does it refer to final FDA approval? The answer is unclear, and people may come to different conclusions. In fact, Dakota County’s Covid guidance, updated earlier this month, still states that, “Under an EUA, employers cannot require employees to get the Covid-19 vaccine.” The ambiguity alone may give employers pause about instituting a vaccination requirement.

Even if requiring the current vaccines is permitted, the Americans with Disabilities Act and Title VII of the Civil Rights Act of 1964 can also restrict employers’ ability to require employees to be vaccinated. For example, some employees may have a medical condition that prevents the employee from receiving the vaccine. The ADA allows employers to have a qualification standard that includes a requirement that an individual not pose a direct threat to the health or safety of other individuals in the workplace, which can include vaccines. But

if that requirement screens out or tends to screen out individuals with a disability, the employer must show that an unvaccinated employee would pose a direct threat due to a significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation. Employers requiring vaccines would need to conduct individual assessments of the risk of unvaccinated employees and determine if that risk can be addressed through reasonable accommodations, such as allowing the employee to continue working remotely.

Vaccination requirements can also run into restrictions on religious discrimination. Some employees may object to taking the vaccine based upon a sincerely held religious belief, practice, or observance. If an employer receives such an objection, it must provide the employee a reasonable accommodation unless the accommodation would pose an undue hardship. This presents another risk of a vaccination mandate. In fact, in the wake of the H1N1 pandemic, some hospitals were sued by objecting employees or the EEOC over their failure to provide reasonable accommodations to employees who objected to being vaccinated for the virulent strain.

After a long and difficult year, the promise of widespread availability of Covid vaccines should be welcome news to socially distanced, Zoom-fatigued employees, while employers may see mandatory vaccinations as a means to reopen their offices. But unless there are specific reasons for doing so, employers should consider forgoing mandates in favor of incentives or other means of encouraging employees to receive a vaccine

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