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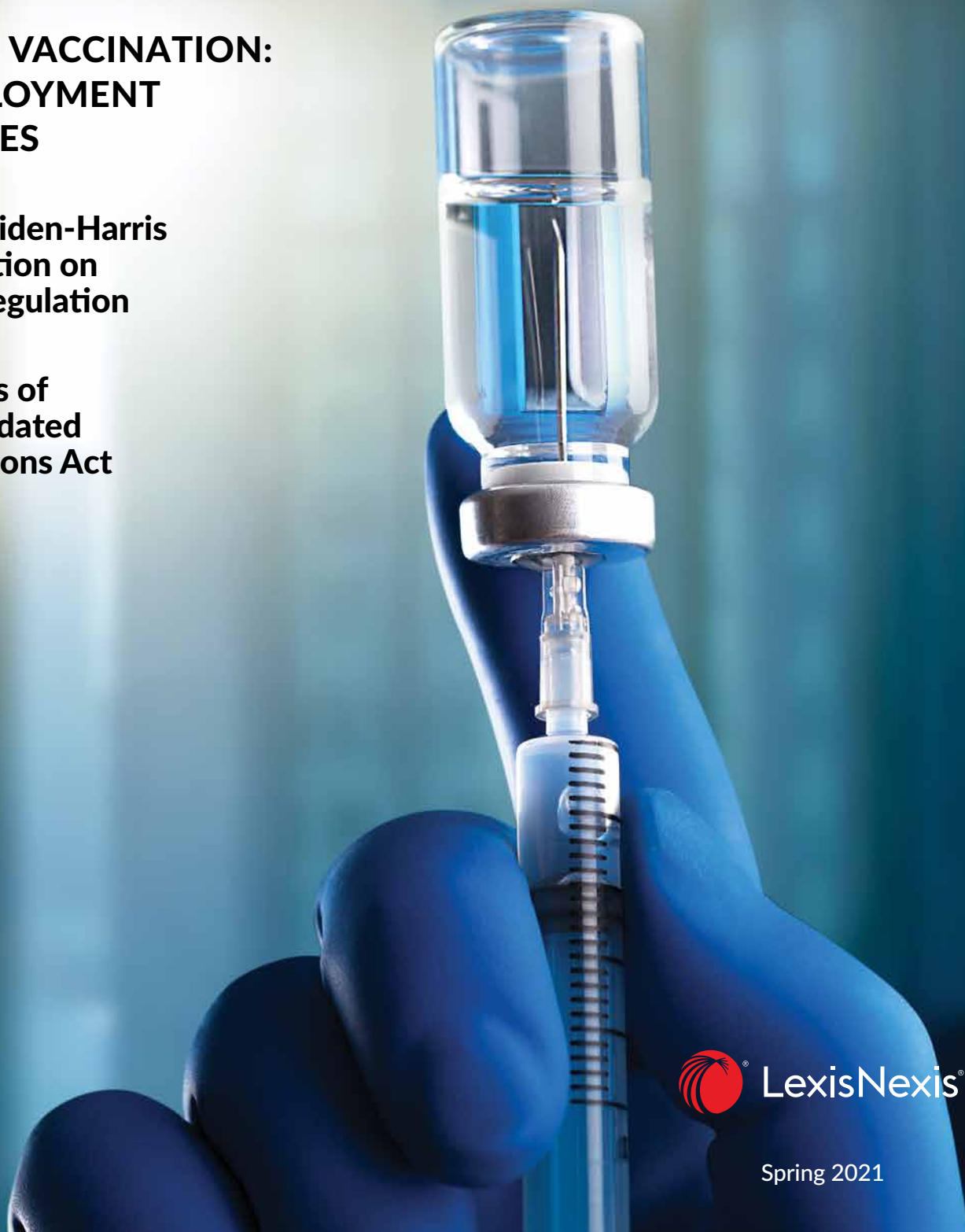
COVID-19 VACCINATION: KEY EMPLOYMENT LAW ISSUES

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COVID-19 Vaccination: Key Employment Law Issues

This article provides practical guidance to employers in connection with the coronavirus (COVID-19) vaccine, including whether an employer may require its workforce to be vaccinated for COVID-19 and whether employees can properly avoid being vaccinated.

IN AUGUST 2020, GALLUP INC. RELEASED A [SURVEY](#)¹ reporting that 35% of Americans intended to refuse any COVID-19 vaccine approved by the U.S. Food and Drug Administration (FDA), even if it is offered for free. Follow-up polls in September showed an even greater unwillingness to be vaccinated. Since the end of October, however, the numbers have begun to rebound.² The continued reluctance to be vaccinated by a large portion of the population potentially presents employers with a serious problem.

Reasons for Vaccine Skepticism

Several reasons appear to account for the large number of Americans who continue to express a reluctance to be vaccinated: the influence of a political movement that opposes vaccines in general; concerns about the fast-tracking of the vaccine, which will be the first of its kind; the absence of a record of long-term safe use; and the possibility that the Trump administration has rushed the vaccine's approval process to aid the president's reelection efforts.

According to the Centers for Disease Control and Prevention (CDC), the annual rate of effectiveness for the flu vaccine is somewhere between 40% and 60%.³ Dr. Anthony Fauci, the top U.S. infectious disease expert, has indicated that the material effectiveness rate of the COVID-19 vaccine is also likely to be lower than 100%. As a result, those who decline the COVID-19 vaccine will increase the risk of infection even for those who get it. Fortunately, the Pfizer and Moderna COVID-19 vaccines approved by the FDA have shown greater than 94% effectiveness.

The news that a large percentage of Americans are still expressing reservations about vaccination has placed employers in a complicated situation, as many of their workers will want the vaccine and will want their coworkers to have it for everyone's protection. Employees will realize at some point that some of their coworkers will refuse to get the vaccine, and employers will have to prepare for workplace health and safety concerns, as well as conflict between employees.

In addition, some businesses have begun to question whether they can even require their workers to receive the vaccine as a condition of employment. There is no guidance from the courts or the Occupational Safety and Health Administration (OSHA) addressing the advisability or lawfulness of a mandated COVID-19 vaccine.

Fortunately, the U.S. Equal Employment Opportunity Commission (EEOC) has recently issued guidance on the subject.⁴

EEOC's Guidance on Mandating Coronavirus (COVID-19) Vaccination

Per the EEOC's new guidance, employers may lawfully mandate that its employees receive COVID-19 vaccinations. However, employers must still make accommodations for employees who refuse to be vaccinated based on (1) the [Americans with Disabilities Act \(ADA\)](#)⁵ for bona fide medical concerns with vaccination and (2) Title VII of the Civil Rights Act of 1964 (Title VII)⁶ for bona fide religious exceptions.

The EEOC's COVID-19-related guidance states that the pandemic meets the ADA's direct threat standard, which allows more extensive medical inquiries and controls in the workplace than typically permitted under the ADA. A direct threat finding means that having someone who tests positive for COVID-19 in the workplace or showing symptoms is a significant risk of harm to others. This finding has allowed employers the freedom to impose medical protocols and standards that might be unlawful without the pandemic.

Employers are required to provide a reasonable accommodation to employees who refuse to be vaccinated for disability-related or sincerely held religious beliefs. That said, "[i]f an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace."⁷ However, employers are not then simply free to terminate the employee. Rather, employers will still "need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities."

Key Considerations Regarding Mandatory Vaccinations

Nearly all employers will soon be faced with an important initial decision—whether to require employees to be vaccinated or instead merely encourage employees to be vaccinated on a purely voluntary basis. Below are some key considerations in making this important determination.

¹ <https://news.gallup.com/poll/317018/one-three-americans-not-covid-vaccine.aspx>. ² See Willingness to Get COVID-19 Vaccine Ticks Up to 63% in U.S. ³ <https://www.cdc.gov/flu/vaccines-work/vaccineeffect.htm>. ⁴ See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws. ⁵ Pub. L. No. 101-336, 104 Stat. 327 (July 26, 1990). ⁶ 42 U.S.C. § 2000e-2. ⁷ EEOC Guidance (December 16, 2020).



There are myriad reasons why mandating a COVID-19 vaccination for employees makes good business sense. Employers have the opportunity to be (or at least be seen) as an upstanding community health steward. They also can ensure the health and safety of workers and their families. With respect to business reasons, mandatory vaccinations should reduce lost work time, increase productivity, maximize revenues, and cut down on COVID-19-related legal risks and liabilities. Furthermore, because more than a majority of Americans are already willing to be vaccinated, many of your employees are likely to see a mandatory vaccination regimen as a significant benefit.

On the other hand, there remain valid business justifications for choosing to merely encourage employees to be vaccinated while stopping short of making it a workplace requirement. First, as noted above, the willingness of Americans to be vaccinated was still only 63% as of October 2020. To the extent that the vaccination approval rating remains in this range, this still leaves a large swath of Americans, many of whom make up your workforce, unwilling to be vaccinated. The reasons behind this unwillingness, as noted, range from true health and safety concerns (i.e., FDA fast-tracking,

limited data regarding long-term safety, etc.) to firmly held political persuasions. The reality employers must face is that mandating a COVID-19 vaccine has the very real possibility of alienating a subset of the current workforce. Further, depending on the location and/or sensibilities of your employee base, the number of those disenchanted could be higher. As such, decreased employee morale and possible retention issues could become a reality in those settings.

Moreover, to the extent that there are a significant number of mandatory vaccination detractors, the administrative burden and risks associated with managing a mandatory COVID-19 policy and process could be considerable. It is also reasonable to assume that most employees won't simply refuse to be vaccinated, but rather may seek to qualify for one or more of the EEOC's recognized exceptions to a mandatory vaccine—namely that either (a) an employee's disability under the ADA prohibits the employee from receiving the vaccine, or (b) an employee's sincerely held religious belief, practice, or observance under Title VII prevents the employee from receiving the vaccine.

If an employer learns that an employee refuses to be vaccinated because of a sincerely held religious belief or practice, the EEOC advises that you should strive to reasonably accommodate the religious belief unless the accommodation would pose an undue hardship.

ADA Exemptions

In light of the rights and protections afforded to employees by the ADA, an employee's claim that a disability prevents him or her from receiving the vaccine must be handled with care. For example, certain employees may not be able to be vaccinated due to a disability that may be exacerbated by one or more components of the vaccine. Employers should first follow their normal protocols of obtaining medical evidence of the claimed condition and risks associated with taking the vaccine. Assuming medical verification, the ADA would then require the employer to engage in an interactive process with the employee to determine the existence of a reasonable accommodation that would allow the employee to avoid the harm potentially caused by the vaccine while continuing to perform the essential functions of their position.

Employers must keep in mind that they are neither required to offer a reasonable accommodation that would pose an undue hardship, nor is the employee simply entitled to their reasonable accommodation of choice (i.e., continuing to telework while all of their colleagues return to the workplace). Rather, employers and employees are required to work together to come to the most reasonable accommodation considering the entirety of the circumstances. This resolution could mean the start or continuation of teleworking, but could also mean returning to the workplace with enhanced social distancing (perhaps even moving to a different location in the workplace) and other heightened personal protective equipment (PPE) requirements (i.e., mask, gloves, face shields, etc.).

If, after engaging in the above referenced interactive process, an employer determines (a) there are no available reasonable accommodations that would allow the employee to perform the essential functions of his or her job (i.e., teleworking not feasible, no safe manner of social distancing and PPE available, etc.) and (b) allowing the unvaccinated employee to physically enter the workplace poses a direct threat to the health and safety of the other employees, only then can you begin to consider a potential termination. However, even at this point, you ought to consider the implications of other laws and leave entitlements, such as the

Families First Coronavirus Response Act, the Family and Medical Leave Act, applicable state leave law, and your other leave-related policies.

Title VII Religious Exemptions

The second potential exemption to mandatory vaccination is an employee's sincerely held religious belief or practice—where an employee will tell you he or she cannot be vaccinated because doing so would run afoul of the tenets of his or her religious beliefs and/or practices. If an employer learns that an employee refuses to be vaccinated because of a sincerely held religious belief or practice, the EEOC advises that you should strive to reasonably accommodate the religious belief unless the accommodation would pose an undue hardship.

However, the EEOC also comments that employers do not have to automatically accept the validity of an employee's claimed sincerely held religious belief. Rather, if you have an objective basis for questioning either the religious nature or the sincerity of the employee's religion-based objection, you are authorized to ask for additional supporting information regarding the religious nature of the objection and the sincerity of the belief. If the employee is unable to establish the religious nature or sincerity of the religious objection, you may deny the employee's request to not be vaccinated.

For example, if you can establish that the employee is actually seeking an exemption for non-religious reasons, you may deny the employee's request. In *Fallon v. Mercy Catholic Med. Ctr.*,⁸ the U.S. Court of Appeals for the Third Circuit denied an employee's request for exemption from a mandatory flu vaccine, finding that the employee's concerns were really about health-related side-effects of the flu vaccine, meaning they were actually medical concerns rather than religious.

Beyond questioning the authenticity of the exemption request, you also don't have to grant an accommodation where doing so would constitute an undue hardship. Importantly, the definition of an undue hardship under Title VII is markedly different than the definition under the ADA. In the Title VII and religious

8. 877 F.3d 487 (3d Cir. 2017).

accommodation context, an undue hardship means “more than a de minimis cost or burden on the employer”—meaning that even relatively small costs and burdens will qualify as an undue hardship under Title VII.

Further, while the issue has yet to be tested before the EEOC or courts in the context of a mandatory COVID-19 vaccine, it is not a stretch to predict that allowing an unvaccinated employee to enter a workplace in the midst of the global pandemic would be deemed to be more than a de minimis cost or burden on the employer. As noted above, the EEOC has already stated COVID-19 meets the ADA’s direct threat standard, which certainly leads experts to believe Title VII’s undue hardship standard could also be met under these circumstances. In any event, as discussed in the ADA context above, the accommodation discussion does not necessarily end there—you would also need to explore whether there are other viable accommodations short of termination (i.e., teleworking, enhanced social distancing and PPE, changing job location, etc).

Additionally, some states have their own immunization requirements for healthcare workers developed by Advisory Committees on Immunization Practices (ACIPs)—committees within the CDC that develop guidance that many local and state governments rely on for organizations such as schools. ACIPs may provide additional guidance on this issue. For example, virtually all states direct specific types of healthcare facility employees to receive various vaccinations—such as influenza; hepatitis B; and measles, mumps, rubella (MMR). Some states, such as Illinois, significantly limit the reasons why healthcare employees may refuse certain vaccinations. Other states—for example, Alabama, Kentucky, Massachusetts, North Carolina, Pennsylvania, and Tennessee—take the opposite approach, generally allowing healthcare employees to decline certain vaccinations for any reason cited by the employee, as long as the employer adequately informed the employee of the health risks associated with the refusal.

State lawmakers are also taking varying approaches to the question of mandating the COVID-19 vaccine. While some New York state lawmakers have introduced a bill that would require the state to administer the vaccine and would mandate vaccinations in certain situations, other states have done the exact opposite. For example, lawmakers in Florida, Kentucky, Missouri, South Carolina, Tennessee, and Washington have either introduced or pre-filed legislation banning or limiting vaccine mandates.

GINA Issues

The EEOC has also addressed whether COVID-19 vaccinations implicate Title II of the Genetic Information Nondiscrimination Act (GINA). Specifically, the EEOC has stated that Title II of GINA is not implicated by “[a]dministering a COVID-19 vaccination to employees

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For guidance on a wide variety of COVID-19 legal issues, including employment issues, see

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> **DECLINATION OF CORONAVIRUS/COVID-19 VACCINATION FOR MEDICAL CONTRAINDICATION**

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or requiring employees to provide proof that they have received a COVID-19 vaccination.”⁹ However, if the pre-screening questions regarding the vaccination inquire about genetic information, such questions may violate GINA.¹⁰

⁹ See [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#) (Question K.8) (12/16/20). ¹⁰ Id.



Considerations Related to the FDA's Emergency Use Authorizations

Notwithstanding the generally permissive approach under federal workplace discrimination laws, a mandatory vaccination program in the workplace is not entirely without legal risk. The Emergency Use Authorizations (EUAs) for both the Pfizer-BioNTech and Moderna vaccines require that recipients be advised of their option to accept or refuse the vaccine, as required by the EUA statute.¹¹ This statute also requires medical professionals to advise possible recipients about any potential consequences (if they exist) of declining an EUA-authorized product. Since some FDA guidance surrounding the EUAs does not articulate the actual consequences other than stating an individual's standard medical care will not be changed for refusing or stopping treatment, it is unclear whether an employee who is subjected to a vaccine mandate by an employer could use the EUAs as a legal shield from a such mandate. For example, if an employee

is terminated for refusing the vaccine, he or she might bring a legal action for wrongful termination in violation of public policy on the basis of the EUA language allowing recipients to accept or refuse the vaccine. Alternatively, an employee who suffers health complications from a mandated vaccine might be able to bring a legal action outside of workers' compensation and/or Public Readiness and Emergency Preparedness Act Act shields if he or she can show that the employer was grossly negligent or reckless in ignoring the EUAs guidance. Future litigation on this issue may ensue and provide an answer.

Other Considerations and Practical Steps

Now that a vaccine is available and distribution has started, employers should be ready for potential workers' compensation claims resulting from adverse reactions to the vaccine. This is particularly the case where an employer mandates that its employees receive a COVID-19 vaccination.

¹¹. See 21 U.S.C.S. § 360bbb-3(e)(1)(A)(ii)(III).



In addition, employers with a unionized workforce must be mindful of potential obligations under the National Labor Relations Act (NLRA) and/or collective bargaining agreements. Specifically, employers are generally required to bargain with the union with respect to workplace policies governing employees' health and safety. On the flipside, unionized employers should also review their collective bargaining agreements for language that might bar mandatory vaccines. For non-unionized workplaces, a mandatory vaccine program might have NLRA repercussions, particularly where a subset of the employee population is generally resistant to the COVID-19 vaccine. More specifically, Section 7 of the NLRA protects employees' rights to engage in concerted activities for the purpose of mutual aid and protection. To the extent employees complain about or band together to boycott mandatory vaccination efforts, such activities would likely fall within the auspices of Section 7.

In addition, employers should be prepared to adopt and enforce various COVID-19-related policies and should consider a policy requiring employees to get vaccinated, subject to disability-related and religious exemptions. In line with the guidance above, such a policy should outline the process to consider claims of disability-related exemptions under the ADA and religion-based exemptions under Title VII.

The ADA process should follow your regular protocol for any request for an accommodation under the ADA—(a) requiring medical documentation to corroborate the claimed need for the accommodation, (b) engaging in the interactive process to determine the availability of a reasonable accommodation that would allow the

employee to perform the essential functions of the position, and (c) a direct threat analysis if there are no available accommodations.

The Title VII religious accommodation process should also follow your normal protocols for when an employee makes a request for an accommodation based on a sincerely held religious belief. Such a process should generally (a) require initial supporting information regarding the religious nature of the objection and the sincerity of the belief; (b) engage in a similar interactive dialogue with the employee regarding the availability of an accommodation; and (c) to the extent an accommodation is not available, conduct an analysis regarding whether allowing the unvaccinated employee into the workplace would pose an undue hardship. **L**

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