



# COVID-19 VACCINATIONS – WHAT EMPLOYERS SHOULD CONSIDER

The slow pace of the vaccine administration in Massachusetts has given employers time to assess whether to mandate employee COVID-19 vaccinations when the vaccine becomes available to the general public. Many employers may be considering the best options for their business, given their industry, whether they have unionized workers, and the culture of their organization.

## Emergency Use Authorization

Currently, and most likely for some period of time in the near future, COVID-19 vaccines will only be available pursuant to the U.S. Food & Drug Administration's ("FDA") Emergency Use Authorization ("EUA"), which requires consent of the person being vaccinated. Employers may want to consider an employee's objection to vaccination while the vaccine remains subject to the EUA, but where the employee would otherwise consent to vaccination upon the FDA's final authorization. For more information regarding the FDA's EUA, [click here](#).

## Reasonable Accommodations for Disabilities and Sincerely Held Religious Beliefs

In December 2020, the Equal Employment Opportunity Commission ("EEOC") published additional Frequently Asked Questions ("FAQs") that provide some guidance for employers considering mandatory vaccinations. [See EEOC Issues Updated COVID-19 Technical Assistance Publication](#) ("EEOC Guidance") updated December 16, 2020. The EEOC did not prohibit mandatory vaccinations. However, mandatory vaccination programs come with some significant restrictions, as the Americans with Disabilities Act ("ADA") and Title VII of the Civil Rights Act ("Title VII") obligate employers to reasonably accommodate employees' refusal of vaccinations due to disability or sincerely held religious beliefs.

## Disability Accommodation

According to the EEOC's Guidance FAQ K.5., the ADA permits an employer to have a qualification standard that includes "a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace." However, if under this safety standard a vaccination requirement screens out or tends to screen out an individual with a disability, the employer must show that an "unvaccinated employee would pose a direct threat due to 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.'" The employer can require that the employee provide reasonable supporting documentation to verify the accommodation request and to assist the employer in determining whether a reasonable accommodation can be made in the employee's specific situation. Employers will be required to maintain the confidentiality of employees' medical information related to their disability.

## Religious Accommodation

With respect to religious objections to vaccines, when an employer is placed on notice that an employee's sincerely held religious belief, practice or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice or observance unless it would pose an "undue hardship" under Title VII, which is defined as having more than a de minimis cost or burden on the employer.

## Individualized Assessment

With both disability and religious objections, the employer must make an individualized assessment of whether an employee can be provided with a reasonable accommodation. Employers will have administrative burdens in dealing with these accommodation requests and in making certain that they are in compliance with the ADA and Title VII, including maintaining the confidentiality of disability accommodations.

According to the EEOC, if an employee is unable to be vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice or observance and there is no reasonable accommodation possible, it would be lawful for the employer to exclude the employee from the workplace. However, exclusion from the workplace does not mean automatic termination of employment because the employee may have other protections under other federal or state laws which the employer may need to assess. In addition, termination of an employee who refuses a COVID-19 vaccine can potentially expose the employer to a wrongful termination claim.

### **Other ADA Considerations**

The EEOC Guidance states that the administration of a vaccination is not a medical examination. However, pre-screening vaccination questions are likely to elicit information about an individual's disability and may implicate the ADA's provisions on disability-related inquiries. If the employer administers (or retains a vendor to administer) the vaccine, it must show that such pre-screening questions of employees are "job-related and consistent with business necessity." Furthermore, to the extent that pre-screening vaccination questions may elicit information about the immune systems of family members, such questions may violate the Genetic Information Nondiscrimination Act ("GINA"). On the other hand, if the employee gets the vaccine from a public vaccination clinic or their health care provider, these concerns relating to inquiries do not apply.

### **Proof of Vaccination**

Regardless of whether vaccinations are mandatory or voluntary, employers may want proof of an employee's receipt of a COVID-19 vaccination. EEOC's FAQ K.3. states that asking employees about whether they have been vaccinated is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry. However, follow-up questions regarding why an individual did not receive a vaccination may elicit information about a disability and would be subject to the pertinent ADA standard that they be "job-related and consistent with business necessity." If an employer decides to require proof that employees have received a COVID-19 vaccination from a pharmacy or their own health care provider, the employer should advise the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA.

### **Addressing Distrust of Vaccines**

Some employees may voice a sincere distrust of vaccines, particularly during the period the vaccine is available under the FDA's EUA. Whether mandating or strongly encouraging vaccinations, employers should address employees' concerns by providing information regarding the safety and effectiveness of vaccines.

Employers will need to continue assessing a variety of workplace safety issues brought on by the COVID-19 pandemic. The path an employer takes regarding mandating vaccinations should be carefully thought out in advance in order to prepare for the various legal issues that will arise in the coming months.



**Mary Jo Kennedy**

---

✉ [mkennedy@bulkley.com](mailto:mkennedy@bulkley.com)  
☎ 413-272-6242



**Mary-Lou Rup**

---

✉ [mrup@bulkley.com](mailto:mrup@bulkley.com)  
☎ 413-272-6291



**Sarah Willey**

---

✉ [swilley@bulkley.com](mailto:swilley@bulkley.com)  
☎ 413-272-6228