



ALERTS

COVID-19 Vaccines Are On The Horizon, Can Employers Mandate Them?

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Highlights

New COVID-19 vaccines are likely to be approved by FDA for emergency use

Employers may decide to implement mandatory vaccination programs

Key considerations will be making reasonable accommodations under the ADA for employees with a disability or for religious beliefs under Title VII

Unionized employers must be aware of the possible duty to bargain any such program collective bargaining agreements

The COVID-19 data is bleak as the pandemic continues to rage across the United States. In November, the reported cases of COVID-19 across the country exceeded 4 million, doubling the [record number of new infections](#) set in October. Virtually [every state](#) experienced an upward trend in new cases in November, with the Midwest and rural areas being hit particularly hard, and hospitalizations are at record levels.

There may be light at the end of the tunnel, however, as three

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pharmaceutical companies, AstraZeneca, Moderna and Pfizer, announced the development of COVID-19 vaccines. Both Pfizer and Moderna have sought [emergency use approval](#) by the Food and Drug Administration (FDA), and Pfizer's vaccination has received [approval in the United Kingdom](#) for distribution, with an estimated 800,000 doses being shipped for use next week.

This has led to the inevitable question: Can employers in the United States require that their employees get a COVID-19 vaccination if and when one becomes available? State and federal courts, as well as the federal agencies that deal with employment issues – the Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB) – have not yet been confronted with this issue as it relates to COVID-19. However, in its prior guidance on pandemic preparedness, the EEOC recommended generally that employers should encourage employees to get the influenza vaccine, not mandate it.

Notably, [mandatory flu vaccination policies](#) have been fairly common, particularly in the healthcare industry. That precedent suggests a policy requiring a COVID-19 vaccination for employees may be lawful. However, before implementing any such policy, there are a number of legal considerations.

At the federal level, there are no laws or regulations that prohibit mandatory vaccination policies. However, the [EEOC's Pandemic Preparedness in the Workplace and the Americans with Disabilities Act Guide](#) (which has been updated to cover the COVID-19 pandemic) notes that under a mandatory vaccination policy, an employer must take into account disabilities under the Americans with Disabilities Act (ADA) that may prevent an employee from taking a vaccine, and must engage in an interactive process to explore reasonable accommodations for that disability.

Reasonable accommodations for vaccines

Under the ADA, an employer is required to provide a reasonable accommodation for an employee's disability unless the employer can establish "undue hardship." An accommodation results in an undue hardship if it results in significant difficulty or expense for the employer, considering the nature and cost of the accommodation, the resources of the employer and the operation of the employer's business, according to the EEOC's Pandemic Preparedness Guide. Given the availability of other accommodations, such as requiring an employee to use specific personal protective equipment, physical distancing, the use of barriers, and/or reconfiguring an employee's workspace, establishing undue hardship with regard to mandatory vaccinations may be a challenge, depending on the industry and specific facts. Moreover, given the success many businesses have had with teleworking during the pandemic, it seems likely that this would be considered a reasonable accommodation, if practical.

The EEOC's Pandemic Preparedness Guide also notes that reasonable accommodations must be provided for employees who have sincerely held religious beliefs, practices or observances, under Title VII's prohibition against religious discrimination. It should be noted that the standard for reasonable accommodation for religious beliefs is defined differently than the definition under the ADA. For reasonable

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accommodations for religious beliefs, courts have held that an employer is required to reasonably accommodate an employee's sincerely held religious beliefs absent "undue hardship" under Title VII, which means "more than de minimus cost" to the operation of the employer's business. This is a fact-sensitive inquiry to be evaluated on a case-by-case basis.

Collective bargaining agreements

In addition, when considering mandating vaccinations, unionized employers must bear in mind their collective bargaining agreements and the legal obligation under Section 8(d) of the National Labor Relations Act to bargain with the union representing their employees over terms and conditions of employment. The starting point is to determine whether or not the collective bargaining agreement permits (or prohibits) the employer from implementing a mandatory vaccination policy for its employees.

Absent a specific authorization (or prohibition) in the collective bargaining agreement, the next step would be whether or not the employer is privileged to implement such a policy unilaterally without discussing the issue with the union pursuant to a management rights clause or comparable provision that broadly authorizes the employer to implement reasonable new work rules or policies. In the absence of a grant of such authority, the employer is likely required to bargain with the union over implementation of a mandatory vaccination policy, as the [NLRB has previously held](#) that a hospital's implementation of a flu prevention policy for its unionized nurses, which included a requirement that nurses take a specific anti-viral drug, or wear a protective mask at all times, was a mandatory subject of bargaining under the NLRA.

Employers should also thoroughly review applicable state and local laws and regulations that may limit their ability to implement mandatory vaccinations.

To obtain more information, please contact the Barnes & Thornburg attorney with whom you work, or Mark Keenan at 404-264-4044 or mark.keenan@btlaw.com or Patricia Ogden at 317-231-7712 or patricia.ogden@btlaw.com.

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