

LEGAL ALERT

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Answering the Top 10 Questions Employers Have About the COVID-19 Vaccine

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Over the past few months, the COVID-19 vaccine has dominated news coverage and is at the forefront of the current administration's agenda. On Thursday, September 9, 2021, President Joe Biden announced a sweeping new federal vaccine mandate that will apply to millions of American workers. As employers navigate the rapidly evolving issues that COVID-19 presents to the workplace, there are several important questions about vaccinations that must be addressed.

1. Can an employer require employees to be vaccinated against COVID-19?

The short answer is yes, an employer can develop a mandatory vaccination policy for the workplace. The authority to mandate vaccines is derived from the Americans with Disabilities Act (ADA), which sets the requirement that no individual shall pose a direct threat to the health and safety of other individuals in the workplace. Employers whose workforce is represented by a labor union will need to bargain with the labor union over the effect of the decision to implement the policy.

2. Are there any exemptions to a mandatory vaccination policy?

Yes, there are two exemptions to a mandatory vaccination policy. If an employee opposes getting vaccinated based on a sincerely held religious belief or is unable to be vaccinated on account of a disability, the employee is entitled to a reasonable accommodation that does not pose an undue hardship on the employer's business operation.

After the employee raises an objection based on a sincerely held religious belief or disability, the employer must undertake an individualized interactive process to identify potential accommodations and whether any of the potential accommodations, if implemented, would cause the employer an undue burden. For an objection based on a disability, the undue burden on the employer must be significant enough to deny the accommodation, as compared to an objection based on a religious belief, where even a de minimis burden is sufficient to deny the accommodation.



As a related matter, there is no exemption for employees who have a strong personal objection or fear of getting vaccinated that is neither grounded in a sincerely held religious belief or a disability. The law does not require employers to engage in the interactive process to accommodate someone who has a strong personal objection or fear of getting vaccinated.

3. Can an employer with a mandatory vaccination policy ask an employee why they are refusing the vaccine?

If there is a policy in place, the employer is entitled to speak to the employee about why the employee cannot follow the policy. Depending on the reason, employers may be permitted to request documentation of the need for an accommodation.

4. How should an employer administer a mandatory vaccination policy?

The best practice is to instruct the employee to get vaccinated with a healthcare provider of their choice and to provide to the employer proof of the same. Employers may also retain a vendor to administer the vaccine at the workplace or contract with a vendor to supply the vaccine to employees, but employers taking this approach must be careful not to make disability-based inquiries. Pre-vaccination questionnaires can be deemed prohibited disability inquiries under the ADA, and the prohibition applies to agents of an employer engaged to administer vaccines to employees.

5. Can human resources disclose who has and has not been vaccinated?

It may come up in the workplace that employees want to know whether the other people they are working with have been vaccinated. The best practice is that employers should not disclose to employees whether or not a specific employee is vaccinated. On a related note, employers should handle positive COVID-19 tests in the same manner, never disclosing the identity of an employee who has tested positive, even if the identity is obvious.

6. Can an employer require employees to submit documentation to demonstrate their vaccination status?

Even if the employer stops short of requiring vaccination, the employer is entitled to ask the employee to submit documentation of vaccination. Any medical information on the vaccination card beyond vaccination status should be redacted. This information, like all medical information, must be kept confidential and stored separately from the employee's personnel files.

7. How are private employers impacted by President Biden's new vaccine mandate?

This is a developing situation. As it stands now, The Occupational Safety and Health Administration (OSHA) is developing a rule that will be issued through an Emergency Temporary Standard. The rule will require all employers with 100 or more employees to either have a fully vaccinated workforce or require that unvaccinated employees must produce a negative COVID-19 test result on a weekly basis. More guidance will become available once OSHA issues the rule.

8. Under President Biden's new vaccine mandate, does an employer have to pay employees for their vaccination appointment or COVID-19 test?

Yes, employers will be required to provide their employees with paid time off for their vaccination appointments to allow them time to recover from any potential side effects. Most COVID-19 testing is free, so it is unlikely that employers will have an additional cost for employees who choose to get tested. The Emergency Temporary Standard should outline whether employers are responsible for COVID-19 testing costs.

9. How is the 100-employee requirement calculated?

Until OSHA issues the Emergency Temporary Standard, it is unclear whether the 100-employee threshold will be considered on a per location or company-wide basis. However, a Senior Advisor at OSHA said during a September 10, conference call that the 100-employee requirement will be apply on a company-wide basis.

10. What type of COVID-19 test will be required?

Given that there are several different COVID-19 tests available, it is still unclear whether the Emergency Temporary Standard will require a particular type of test.

Hahn Loeser's Labor and Employment group will continue to monitor for new developments and provide updates as OSHA implements the Emergency Temporary Standard.

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