

BURR ALERT

The COVID-19 Vaccine: An Update for Employers

By Nafela Hojeij Helou

January 19, 2021

As of January 19, 2021, two vaccines have been authorized for emergency use by the FDA, with two additional vaccines nearing the end of clinical trials. With vaccines now available, employers are questioning whether they can require employees to be vaccinated and what legal considerations may exist.

WHAT MATTERS

Can employers mandate vaccination and what legal considerations exist?

Can we require our employees to be vaccinated?

Yes, with some caveats. While the Americans with Disabilities Act (ADA) generally imposes restrictions on medical inquiries and examinations, the EEOC has recently issued guidance that seemingly indicates that, under the ADA, employers can require employees to be vaccinated. However, employers must be prepared to respond to employees who may be unable to get the vaccine or who refuse the vaccine, which could raise various issues. Considerations for mandating the vaccine include: (1) the availability of the vaccine; (2) potential implications of the Americans with Disabilities Act (ADA); (3) potential implications of Title II of the Genetic Information Nondiscrimination Act (GINA); and (4) potential implications of Title VII of the Civil Rights Act of 1964.

Is the vaccine available to my workforce?

As of January 19, 2021, states are charged with distribution of the vaccine. Most states are relying on CDC guidelines to decide who has access to the limited vaccines and when. You should consult your state public health information to determine the availability of the vaccine for your workforce.

Part of deciding when to mandate vaccination is logistical. For example, the employer can decide to mandate vaccination within a certain time period after an employee becomes eligible or can wait to mandate vaccination until after it is widely available to the employee population. If an employer does decide to mandate the vaccine within a certain time period after an employee becomes eligible, (e.g., 60 days after eligibility), the employer should also consider the actual availability of the vaccine as some communities continue to experience long wait times for appointments. Employers should also avoid requiring only certain groups of persons to receive the vaccine (e.g., older persons or persons with a disability which makes them more susceptible to COVID) as that could potentially have an unlawful disparate impact by treating persons in a protected class different than others.

For more information about state vaccine roll-out plans, please visit your state's department of health website or contact nhelou@burr.com.

What concerns should I have under the ADA?

The ADA makes it unlawful for employers to discriminate in employment against a qualified individual with a disability. Pursuant to the ADA, an employer must be prepared to evaluate and make reasonable accommodations for employees who cannot be vaccinated due to a serious health condition and/or disability.

The ADA also makes it unlawful for an employer to require a "medical examination" or ask an employee questions about a disability unless the employer can show that these requirements are job-related and necessary to conduct business.

Is employer administration of the vaccine a "medical examination" under the law?

Yes and no. The EEOC has taken the position that the vaccine is not a medical examination. Thus, if the employer administers the vaccine or contracts with a third party to administer the vaccine, the act of injecting the vaccine is not a medical examination.

However, pre-screening questions may uncover information about pre-existing conditions, genetic information, or disabilities, which would be considered a medical examination. For that reason, if the employer administers the vaccine or contracts with a third party to administer the vaccine, it must show that any such pre-screening questions are job-related and consistent with business necessity. However, there are exceptions, which are discussed in greater detail below.

To meet this standard, the employer must reasonably believe that based on objective evidence, any employee who refuses to answer the pre-screening questions and cannot receive the vaccine, as a result, will pose a direct threat to the health and safety of him/herself or others.

Similarly, if a vaccination requirement screens out or tends to screen out employees with a disability, we must also show that the employee poses a direct threat to the health and safety of him/herself or others.

What constitutes a "direct threat"?

A direct threat is something that would cause significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. Direct threats are determined based on an individual analysis of four factors: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm. At this time, the EEOC has determined that COVID-19 meets these standards. In other words, there is "a significant risk of substantial harm posed by having someone with COVID-19, or symptoms of it, present in the workplace at the current time."

Are there any exceptions to having to show that an employee's refusal to answer pre-screening questions poses a direct threat?

Yes. There are two scenarios where pre-screening questions do not require an employer to show that refusal poses a direct threat. First, if the vaccine is administered on a voluntary basis and the employee's decision to answer the pre-screening questions is voluntary. Second, if the employee receives an employer-required vaccine from a third-party provider (such as a pharmacy, vaccination station, or provider) that does not contract with the employer.

How should I respond to an employee who states that they are unable to receive the vaccine because of a disability?

First, work with your legal counsel to request supporting medical documentation and to determine if there is a direct threat to the workplace as a result of the employee not receiving the vaccine. Even if an employee poses a direct threat, employers must provide reasonable, effective accommodation, unless such causes an undue hardship. You should work with legal counsel to determine if an undue hardship exists and what types of accommodations are reasonable under the circumstances.

What concerns should I have under GINA?

GINA makes it unlawful for employers to make employment decisions on the basis of genetic information. Pre-screening questions that ask about genetic information may violate GINA. If the pre-vaccination questions do not include any inquiries into genetic information (including family medical history), then asking them does not implicate GINA. However, if the pre-vaccination questions do include questions about genetic information, then employers who want to ensure that employees have been vaccinated may want to request proof of vaccination instead of administering the vaccine themselves or contracting with a third party for the administration of the vaccine.

Some employees may present concerns about the mRNA technology that forms the basis of the two currently available vaccines. There has been some discussion about whether such vaccines could potentially modify an individual's genetic makeup, and whether mandating such vaccine would constitute an unlawful use of genetic information. The CDC has stated that the mRNA vaccines do not impact the individual's DNA. For that reason, requiring employees to get these vaccines does not violate GINA. For more information about current EEOC and CDC guidance related to mRNA vaccines and their interaction with GINA, please contact nhelou@burr.com.

What concerns should I have under Title VII of the Civil Rights Act of 1964?

Title VII of the Civil Rights Act prohibits discrimination on the basis of several protected categories, including religion. Vaccines in general may violate some religious beliefs or practices. For example, some religious beliefs oppose vaccines that are developed from genetic strains derived from aborted fetuses.

For more information on how vaccines may violate some religious beliefs or practices, please contact nhelou@burr.com.

How should I respond to an employee who states that they are unable to receive the vaccine because of a sincerely held religious practice or belief?

Much like the ADA analysis, under Title VII, once an employer is on notice that an employee's sincerely held religious practice or belief prevents them from receiving the COVID-19 vaccine, the employer may be required to make a reasonable accommodation unless such would cause an undue hardship.

If you receive such a request, work with your legal counsel to determine what supporting documentation you can request and to determine if there is a sincerely held religious belief preventing a vaccine. If so, employers generally must provide reasonable accommodations, unless it would cause an undue hardship. You should work with legal counsel to determine if an undue hardship exists and what types of accommodations are reasonable under the circumstances.

Can I require an employee to show proof of vaccination?

Yes. However, the employer should warn employees who refuse to receive the vaccine not to provide any medical or genetic information. For example, if an employee refuses the vaccine due to concerns associated with a disability, requesting proof of that disability is a "disability-related inquiry" which triggers the Americans with Disabilities Act (ADA).

Who covers the costs of vaccination?

Vaccine doses purchased by the US Government are administered at no cost. There may be a small administration fee charged by the provider who administers the vaccine, which should be covered by any applicable insurance policy. If none, and if the employer is administering the vaccine or contracting with a third party for mandatory vaccinations, then the employer should cover the administration fee. We recommend that the employer also compensate hourly employees for any time spent waiting for or receiving the vaccine.

Does the employer have any legal exposure associated with adverse effects from the COVID vaccine?

Potentially. Due to the current Emergency Use Authorization status of these vaccines, anyone receiving the vaccine must be informed of potential risks and side-effects and accept those risks and side-effects of their own free will. However, this is an issue that has not been directly addressed.

The new Public Readiness and Emergency Preparedness Act (PREP) will apply to companies who administer vaccines or who have administration occur onsite through a third party and will offer immunity for any adverse effects associated with the vaccine. Under the PREP Act, an employer would

arguably have immunity if the vaccine was administered onsite. However, you should seek the guidance of your legal counsel to address the fact-specific nature of immunity.

There may exist arguments for legal exposure under Workers' Compensation for any ill-effects associated with mandatory vaccinations. We recommend that employers consult with their Workers' Compensation carrier to determine how it intends to handle such situations, and also be prepared for handling such time off issues (e.g., supervisor training, ensuring first report of injury documentation, etc.).

Can I require the vaccine even if an employee believes the vaccine is unsafe?

If the employee's concern is not related to a disability, religious concern, or genetic condition, but something unrelated (e.g., chip implantation or the speediness of vaccine development), then, generally, yes.

Can I still mandate the vaccination if a group of employees presents a joint objection to the policy?

Yes. However, you should not fire or discipline employees who oppose or argue against a mandatory vaccination policy, as such may be protected conduct under the National Labor Relations Act.

If an employee has tested positive for COVID-19 then recovered, can we still require the vaccine?

Yes.

TAKE ACTION

With vaccines now available, discuss how they may help you protect your workforce.

Stay up to date by monitoring the latest COVID-19 resources on our [CORONAVIRUS RESOURCE CENTER](#).

DISCUSS FURTHER

[Nafela Hojeij Helou](#) at nhelou@burr.com or (404) 685-4326
or the Burr & Forman attorney with whom you regularly work.

FOLLOW US



Burr & Forman publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information purposes only and may not be quoted or referred to in any other publication or proceeding without the prior written consent of the Firm, to be given or withheld at our discretion. The mailing of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship. The views set forth herein are the personal views of the authors and do not necessarily reflect those of the Firm. If legal advice is sought, no representation is made about the quality of the legal services to be performed or the expertise of the lawyers performing such service.