



## **To Vaccinate or Not to Vaccinate?!** answering the vaccination question

by  
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### **Can An Employer Require a Flu or COVID-19 Vaccine for its Employees?**

Short Answer: Yes, in certain circumstances.

As the flu season approaches and the COVID-19 pandemic continues, employers' mandatory vaccination policies may soon become more important than ever. In the absence of a state or local law to the contrary, and with some important caveats, employers may require employees to get vaccinations to protect them from contracting and spreading influenza (the flu). Where applicable, however, collective bargaining agreements may limit an employer's right to require vaccines. On the other hand, some jurisdictions require flu shots for employees in certain positions, such as healthcare workers with patient contact.

#### **EEOC and the ADA Considerations**

Where otherwise permitted, however, your right as an employer to require flu shots is not unlimited. Specifically, the Equal Employment Opportunity Commission (EEOC) has repeatedly emphasized that, even during a pandemic, an employee may be entitled to an exemption from mandatory flu shot requirements based on an ADA-covered disability. Likewise, an employee may be exempted from the requirement if taking the shot would violate their sincerely held religious beliefs, practices or observances.

In either case, you must engage in (and document) an interactive exchange with the employee to determine whether a reasonable accommodation would enable them to perform essential job functions without compromising workplace safety. Accommodations may take many forms, including but not limited to use of additional personal protective equipment (PPE); moving the employee's workstation; a temporary reassignment; teleworking; or a leave of absence, to name a few. You are not required to provide an accommodation that would pose an undue hardship (and the evaluation of the "undue hardship" standard varies depending upon whether the requested accommodation is based upon a disability or sincerely held religious beliefs).

In order to create and enforce a policy requiring a flu or COVID-19 vaccine, you should ensure that your rationale for requiring flu shots is based upon objective facts, tied to

employees' job descriptions, and that your practices are administered consistently. You must develop and publish a policy explaining your expectations and clearly explaining how an employee may request an exception or accommodation. You must also ensure that employees who request an accommodation suffer no negative repercussions. In all cases, you must also safeguard the privacy of employees' medical information, including but not limited to keeping it separate from your general personnel files.

## **May Employers Require A COVID-19 Vaccination When One Becomes Available?**

Unless and until the EEOC publishes more specific guidance, its commentary concerning mandatory flu shots, including the need to consider employees' reasonable accommodation requests, provides a good roadmap for evaluating the question of whether you will be able to require your employees to obtain a COVID-19 vaccination. Although the EEOC has advised employers to encourage flu shots rather than requiring them, it has not prohibited employers from requiring the shots, especially when the flu is severe.

Considering the scope and severity of the COVID-19 pandemic and the EEOC's guidance regarding workplace screening for COVID-19, you will probably have the right to require workers to be inoculated when a reliable COVID-19 vaccine is available, subject to the same caveats described above for mandatory flu shots. In other words, you should be able to require approved COVID-19 vaccinations if the requirement is job-related, your policies adequately inform employees of the requirement, and you allow them to seek an exception (or accommodation) on the basis of a disability or sincerely held religious belief.

## **Employers' Rights To Make Medical Inquiries Or Conduct Screenings Remain Far More Limited Than The Right to Require Vaccinations**

In considering the above questions regarding mandatory vaccinations, you must be cautious not to conflate the concept of inoculation with the current widespread practices of daily employee screenings (i.e., medical examinations). The current permissible practices of temperature checks, symptom screening, and COVID-19 testing are very unusual and unique to this current severe pandemic. For reference, an epidemic affects a large number of people, often rapidly. A pandemic is an "epidemic that travels," occurring worldwide or over an extremely wide area. Even if very significant, however, seasonal or pandemic flu will not necessarily justify screening or testing in the workplace.

## **Should An Employer Require Mandatory Vaccinations?**

Considering the current CDC guidance regarding the importance of flu shots, you should review and formalize your inoculation policies now. Historically, when employers

require flu shots, the proportion of workers who get them tends to increase from less than half to well over 80%. Many employers outside of the healthcare industry have encouraged but not required flu shots. That choice has primarily been an employee relations issue.

No one knows when a reliable COVID-19 vaccine may be available, but you should be prepared to respond when that happens. Keep in mind while that mandatory vaccinations may not be appropriate for every setting, encouraging vaccinations will help bolster participation and protect your workplace, while also helping reduce demands on the nation's healthcare system. Recognize that although it may not be feasible to offer on-site flu shots on-site this year, you may still be able to facilitate their employees' access to inoculations.

If you do decide to make any vaccines mandatory, ensure that your policies are clear and that they inform employees of how to seek exceptions or accommodations. Additionally, keep in mind that flu shots and COVID-19 vaccines (if and when available) are distinct inoculations for two different health threats. Finally, you should ensure that your policies encourage sick workers to stay home without fear of reprisal.

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