



Should Employers Mandate a COVID-19 Vaccine For Their Employees?

By Liesel B. Stevens

Based on national surveys, many employers are encouraging their employees to get a COVID-19 vaccine when available. Employers' encouragement can take many forms, such as providing information about vaccine availability, giving employees time off to get vaccinated, and even offering financial incentives. However, so far, many employers remain reluctant to mandate a COVID-19 vaccine for employees. This caution is well-founded, despite the laudable goals of protecting employee health and eradicating COVID-19. There are potential legal risks associated with mandating vaccines, most of which have not yet been directly addressed by government agencies or the courts. Those risks include the following:

- **Challenges Under the ADA.** The U.S. Equal Employment Opportunity Commission (EEOC) has taken the position that employers may require vaccines so long as reasonable accommodations are made for employees who: (1) have disabilities that may prevent them from taking a vaccine; and (2) cannot take a vaccine for sincerely held religious beliefs or practices. Difficult



issues arise when determining the eligibility of employees for such exemptions and the reasonableness of accommodations, including the use of remote work as an accommodation. If no reasonable accommodations are available, the employer may be able to exclude that individual from the workplace under the Americans with Disabilities Act (ADA) by showing 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 problem, of course, is that proving that a non-vaccinated employee creates a direct threat may be both expensive and legally challenging, especially if the employer has had employees in the workplace during the pandemic and is complying with CDC guidance on COVID-19 safety. Ultimately, the “direct threat” analysis will depend on facts specific to the disabled person and the workplace.

- **Different Laws May Require Different Outcomes.** Just because EEOC guidance permits a vaccine mandate in some circumstances does not mean that other government agencies or courts will agree. Other federal and state laws may be implicated by a vaccine mandate, many of which are not under the EEOC’s jurisdiction. For example, employees who protest an employer’s vaccine requirement may be protected under the National Labor Relations Act (NLRA) for engaging in “concerted activities,” when two or more employees take action for their mutual aid or protection regarding terms and conditions of employment. If an employer fires that employee, he or she may have a claim under the NLRA or a whistleblower statute.
- **Full FDA Approval is Still Pending.** As of this date, the available vaccines in the US have only Emergency Use Authorization (EUA), not FDA approval. Under the FDA’s own guidance, recipients of the EUA vaccines must be advised of their option to accept or refuse the vaccine. An employer mandate may be viewed as inconsistent with FDA policy.



- **State Laws May Create Liability.** If an employee has an adverse reaction or subsequent medical complications to a required vaccine, an employer may face a worker's compensation claim or other state-law claims by that employee.

These potential legal risks and claims are largely untested and additional guidance is constantly emerging. In some states, there are ongoing legislative efforts to prevent employers from requiring the vaccine. Please contact any member of RQN's [Employment Section](#) if you would like to explore whether a vaccine mandate makes sense in your workplace.



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