

Can an Employer Require its Employees to Get the Covid-19 Vaccine?



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Yes, but there is a right and wrong way to go about it. And of course, there are exceptions. But more importantly, while an employer can institute such a requirement, the better question to ask might be—*should* they? More on that below.

The Rule: The Equal Employment Opportunity Commission (EEOC) recently issued guidance on this question, and acknowledged that an employer can lawfully require its employees to be vaccinated against Covid-19 *as long as* federal anti-discrimination laws are followed.

How to Mandate the Vaccine and Comply with Federal Anti-Discrimination Laws: Generally, employers should have a third party administer the vaccine because then the employer does not put itself in the position of asking pre-screening questions that elicit private health information. However, the inevitable question will become “what do I do when someone refuses?” Employers must evaluate accommodations for employees who refuse the vaccine because of medical disability or sincerely held religious beliefs. An employer should go through the same accommodation process it already has in place to address employee requests for accommodation based on medical disability or religious beliefs.

Medical Disability. For disabilities, this means complying with the Americans with Disabilities Act (ADA) and engaging with the employee in the required interactive process. The employer must show that an unvaccinated employee would pose 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 EEOC guidance provides further clarity on factors to consider when making this inquiry.

Religious Beliefs. For employees refusing the vaccine on religious grounds, employers must first remember that the definition of religion is broad and protects a wide variety of “beliefs, practices, and observances” including those with which the employer may be unfamiliar. The EEOC guidance urges employers to “ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief.” There may be an exception if the employer has an “objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance.” An employer should only go down that road with close adherence to the EEOC guidance, and likely with consulting an employment attorney. Similar to an employee with a medical disability as described above, with a religious objection the employer should provide a reasonable accommodation unless doing so would cause an undue hardship.

What Happens if the Employer Cannot Exempt the Employee or Provide a Reasonable Accommodation?
If there is a direct threat that cannot be reduced to an acceptable level, then the employer can exclude

the employee from physically entering the workplace, *but this does not mean the employer may automatically terminate the employee*. The EEOC explained that “Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities” prior to terminating an employee. Although the law has not fully caught up on what a “reasonable accommodation” means in 2021, given the transition *en masse* to remote working last year, employers should be cautious about automatically concluding that remote work would create an undue hardship. Employers should lean on their written job descriptions and consult with an HR professional before making any undue hardship determination.

State Law Exception: This entire post is written about the application of federal law. Individual states may have separate laws that limit an employer’s ability to institute a Covid-19 vaccine mandate. In Arkansas, there are currently no such state laws, however the General Assembly is poised to enter its lawmaking session so that could change in the coming weeks.

So Just Because an Employer Can Mandate the Covid-19 Vaccine, Should They? If an employer mandates the Covid-19 vaccine, they must be prepared administratively to handle employee objections due to medical disability or religious belief. As the steps outlined above imply, adequately and legally handling objections can be a burdensome process for employers. Implementing the right policies and procedures upfront, and ensuring that decision makers are properly trained, can prevent disputes and lawsuits later. Also, there is a fair amount of uncertainty about how these brand new EEOC guidelines will be interpreted when challenged, so there is a greater risk of litigation for employers who mandate the Covid-19 vaccine. Ultimately, the decision is up to each employer, and no two employers are exactly alike. Seeking the counsel of an employment attorney prior to implementing such a policy is highly recommended.

Are There Alternative Options to a Vaccine Mandate? Given the risks and potential drawbacks outlined above, some employers may instead wish to consider alternative policies to a vaccine mandate. This could include an education campaign about the benefits of vaccines, and the losses incurred by employee sickness. Employers could offer paid time off to enable employees to become vaccinated and to recover if the vaccine results in sluggishness or mild sickness. Ultimately, there are some employees who will not be persuaded, but there may well be many on the margin who would respond to such alternative efforts and incentives.

Here, you can [read the EEOC Guidance](#).

The Mitchell Williams Employment and Labor team of lawyers advises employers on legal compliance and litigation avoidance related to Covid-19 as well as other employment matters. Contact Attorney Nate Read at nread@mwlaw.com or Attorney Devin Bates at dbates@mwlaw.com for more information.