

# Mandatory Vaccination Policies are Likely Legal in Some States, but Should Your Business Implement Them?

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COVID-19 continues to be a dominant issue for businesses. Employers that reopened or are endeavoring to reopen their workplaces, whether partially or fully, are forced to reassess or retract their plans. Taking these steps is particularly important in the construction industry, where a COVID-19 outbreak on a construction site can result in considerable project delays and, in some jurisdictions, mandatory worksite closures. As the Delta variant surge continues, more employers are mandating vaccinations for their employees. Employers looking to enact mandatory vaccination policies or who want to incentivize employee vaccinations should consider the following:

## Can You Require Vaccinations?

Some employers have already issued vaccination mandates for their employees. Are these mandatory vaccination policies legal? According to the Equal Employment Opportunity Commission (EEOC), the answer is yes, under federal law. [1](#)

In late December 2020, the EEOC issued guidance concerning the intersection of COVID-19 and federal equal employment opportunity laws, including the Americans with Disabilities Act (ADA) and the Rehabilitation Act. [2](#) One of the key takeaways from the EEOC guidelines is that asking employees if they have been vaccinated does not violate the ADA. Employers are generally barred from asking employees about medical examination information due to the Health Insurance Portability and Accountability Act (HIPAA) and various state privacy laws, but the EEOC determined that simply asking an employee if they have or have not been vaccinated does not fall within the definition of “medical examination information.”

Employers, however, should check state laws concerning mandatory vaccination policies. California’s Department of Fair Employment and Housing, for example, issued guidelines similar to those published by the EEOC allowing employers to implement mandatory vaccination policies. New Jersey published similar guidelines allowing employers to implement mandatory vaccination policies so long as those policies followed equal opportunity requirements. However, at least a dozen states—including Georgia, Illinois, Indiana, Iowa, Oklahoma, Pennsylvania, Texas, Utah, and Washington—have proposed legislation that would prohibit employers from implementing mandatory vaccination policies or prohibit such policies until vaccines receive full approval from the Food and Drug Administration (FDA). [3](#) Further, some states, such as New York, have taken a hybrid approach by proposing legislation that mandates COVID-19 vaccinations for persons residing in or working at residential healthcare facilities, but prohibiting mandatory vaccinations as a condition of employment in other industries.

The construction industry faces unique challenges, even in jurisdictions that allow mandatory vaccinations. For example, on any given day, a construction site may contain hundreds of people including the general contractor, owner, subcontractors, material suppliers, inspectors, etc. While employers can mandate vaccinations for employees in some jurisdictions, there is no indication they can mandate vaccinations of third parties. Even if contractors enacted policies limiting access to a worksite to persons who have been fully vaccinated, enforcing these policies would be a procedural nightmare and would likely lead to significant project delays. Thus, while a particular percentage of the individuals present on a construction site may be protected by vaccinations, practicing proper COVID-19 protocols defined by the CDC and local authorities remains of utmost importance to avoid COVID-19 outbreaks.

Mandatory vaccination policies would be beneficial to many employers as they would have greater assurances that their workforces would remain healthier. Construction employers could decrease the risk of a rapidly spreading outbreak on the worksite that could cause significant project delays, require mandatory reporting to government agencies, or even lead to temporary worksite closures. Of equal importance, construction employers would mitigate the risk of workers' compensation claims, as many jurisdictions presume employees contracted COVID-19 if they were not working remotely at the time they contracted the virus.

## Just Because You Can, Doesn't Mean You Should

Employers, however, should consider some of the drawbacks of implementing a mandatory vaccination policy. First, some employees may not be eligible to receive vaccinations because of underlying health conditions or may forgo vaccinations based on sincerely-held religious beliefs. Employers, therefore, would need to provide reasonable accommodations, which may include exempting employees from the mandatory policy, creating a work environment where contact with other employees is kept to a minimum, or allowing the employee to work from home, if possible. Keep in mind that it will be much more difficult to claim that having an employee work from home creates an undue hardship when so many employers permitted employees to work from home during the pandemic, whether employer-imposed or jurisdictionally mandated.

Second, just because the EEOC issued guidelines that mandatory vaccination policies do not violate federal equal employment opportunity laws does not mean that these guidelines are controlling or that employers will not challenge these policies via the judicial system. An employee in a New Mexico detention center has already filed a lawsuit challenging a mandatory vaccination policy, arguing that he should not be a "human guinea pig" for vaccinations approved through Emergency Use Authorizations <sup>(4)</sup>. Several class action lawsuits have also been filed, including one in California where educators were allegedly told they faced termination if they did not receive the COVID-19 vaccination. <sup>(5)</sup>

Third, mandatory vaccination policies open the door to potential litigation if employees develop illnesses or experience negative reactions to the vaccinations. Mandatory vaccination policies may expose employers to workers compensation claims or civil lawsuits if the employees suffer more serious harms.

Fourth, employers are usually required to compensate employees for all reasonable business expenses. Employees, therefore, could be entitled to reimbursement for the mileage and any related costs associated with the vaccination, wages for the time it takes to get the vaccination, as well as any time off for illnesses resulting from the vaccination. A few states and local governments, including California, New York, and Philadelphia, have already passed laws requiring employers to provide employees with sick leave to receive vaccinations, regardless of whether the vaccinations are employer mandated.

Finally, mandatory vaccination policies may disproportionately impact certain types of employees and expose employers to discrimination claims. A recent survey by the Public Policy Institute of California, for example, found a wide discrepancy by ethnicity as to who planned on skipping vaccination. Sixty-nine percent (69%) of black adults who responded said they planned to skip the vaccine compared to forty-three percent (43%) of Latinos, thirty-five percent (35%) of whites, and thirty percent (30%) of Asian Americans. <sup>(6)</sup> Other polling suggests that the number of minorities willing to be vaccinated is much higher but that there are still significant gaps among racial groups. <sup>(7)</sup> There have also been reports evidencing a significant racial disparity in who is receiving COVID-19 vaccinations. <sup>(8)</sup> Given this data, even if a mandatory vaccination policy appears facially neutral, it could disproportionately impact persons of color and could serve as a basis for litigation.

## Should You Consider Administering Vaccinations for Employees?

One option employers may consider is hiring a third-party vendor to administer vaccinations to unvaccinated employees. According to the EEOC's guidelines, administering vaccinations for employees would likely not violate the ADA, but prescreening questions may. For example, medical personnel administering vaccinations may require employees to fill out documents about the employees' prior medical history or may simply ask employees if they are allergic to any medications. These types of inquiries would likely be

considered “medical examination,” which employers are prohibited from inquiring about under the ADA and other equal employment opportunity laws.

## How to Keep Employees Safe if Vaccinations Are Not Mandatory

While most employers will likely avoid mandatory vaccination policies due to the uncertain repercussions, there are steps that employers can take to encourage employees to be vaccinated. One option is to provide employees with personal time off to receive the vaccination and to recover from any side effects. Employers may also launch education campaigns regarding vaccination, including how to sign up, where to go, and how to quickly recover from possible symptoms. Employers may also consider programs that reward vaccinated employees with bonuses, gift cards, or other incentives. Just keep in mind that these incentives should be equally available to employees who cannot receive vaccinations due to underlying health issues or sincerely-held religious beliefs. Employers may also consider altruistic programs, such as donating to worthwhile COVID-19 related charities for each employee who is vaccinated.

Employers should also continue to follow all CDC guidelines and local mandates, even if most or all of their employees have been vaccinated, including following social distancing guidelines and mask requirements, where applicable.

Whether you are in a jurisdiction that permits or prohibits mandatory vaccinations, one recurring theme we have all become accustomed to over the past year and a half is this: change is inevitable, and we will adapt. Federal, state, and local jurisdictions continue to rapidly enact COVID-19 related employment laws and regulations. As with all new laws, we will gain perspective as courts and governmental entities provide clarification. As a best practice, continue to monitor CDC, state, and local guidelines to ensure compliance and the safety of your employees.

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