



MANDATORY COVID-19 VACCINATION POLICY GUIDANCE FOR WASHINGTON EMPLOYERS

With the rapid release of several COVID-19 vaccines, employers everywhere likely see this as an escape route from the pandemic. Given that COVID-19 has dramatically impacted every workplace over the past year, these vaccines may be perceived as an attractive means to get private and public workplaces back to “business as usual.” Employers may also be concerned that employees who fail to get a COVID-19 vaccination pose a risk to others, frustrating the employer’s ability to provide a safe and healthy work environment, and thus overall employee confidence about returning to work.

Many employers are asking whether they can require their employees to get these vaccines through employer-imposed mandatory vaccine policies. To date, federal, state, and local authorities have not issued laws or regulations requiring employers to implement mandatory vaccine policies. Employers should look to existing laws and regulations that impact employer-based vaccination requirements, as summarized below.

Summary of EEOC Guidance on Disability Accommodations

Employers who are subject to the Americans with Disabilities Act (ADA) have a general obligation to accommodate disabilities. Washington’s Law Against Discrimination imposes similar obligations. An employer’s duty to accommodate under these laws may impact an employer’s enforcement of a vaccination requirement.

On December 16, 2020, the Equal Employment Opportunity Commission (EEOC) provided much-needed guidance on vaccination policies in response to COVID-19 pandemic.¹ According to the EEOC, an employee may “not pose a direct threat to the health or safety of individuals in the workplace,” but employers must be mindful not to implement policies or practices that screen out (or tend to screen out) an individual with a disability.² The employer must show that an unvaccinated employee poses a direct threat to the health or safety of themselves or others that cannot be eliminated or reduced by providing a reasonable accommodation.³ Whether or not an employee is a

¹ U.S. Equal Employment Opportunity Commission, What You Should Know about COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (Dec. 16, 2020), No. K.5, *available at* <https://www.eeoc.gov/wysk/what-you-should-know-about-COVID-19-and-ada-rehabilitation-act-and-other-eeo-laws> (hereinafter, “EEOC COVID-19 Guidance”).

² *Id.*

³ *Id.*

“direct threat” is an individualized assessment, and while CDC and state guidance on “risk” for particular occupations is helpful, a direct threat assessment should not be based solely on these risk categories. Generally, there are four factors for an employer to consider when deciding whether there is a “direct threat” in the workplace: (1) duration of risk; (2) nature and severity of potential harm; (3) likelihood of the harm occurring; and (4) the imminence of the potential harm.⁴ The EEOC makes it clear that a “direct threat” would include “a determination that an unvaccinated individual will expose others to the virus at the worksite.”⁵

Even if an unvaccinated employee poses a direct threat at the worksite, the inquiry does not stop there. The employer must evaluate whether a reasonable accommodation can be made without causing an “undue hardship” on the employer.⁶ For example, if an unvaccinated person poses a risk to themselves or others by entering the employer’s premises, then the employer should decide whether or not the employee can effectively work remotely.⁷ Since a remote work situation may be viable for some positions or employers, and not for others, employers can also explore whether it is feasible to have unvaccinated employees wear masks and maintain social distancing.

The definition of “undue hardship” is broad, and generally means that it would cause the employer “significant difficulty or expense.”⁸ However, when an accommodation is requested, employers should ensure that there is documentation from a medical provider confirming the employee’s need for an accommodation, and the specific limitation in place. This provides an opportunity for employers to get the information that is needed to undergo the interactive process, and work with the employee to identify the extent to which a reasonable accommodation may be granted.

Lastly, if no accommodation can be made that would mitigate the risk an unvaccinated employee poses in the workplace, then the EEOC recommends that the employer look to whether the employee qualifies for leave under the Families First Coronavirus Response Act (FFCRA), the Family Medical Leave Act (FMLA), or through employer policy.⁹ There are state leave laws that may also apply.

Employers need to keep in mind that employees who request an accommodation are protected from retaliation and discrimination, so it is critically important that employers avoid any acts that could be perceived as retaliatory or discriminatory. Moreover, in response to questions on mandating the H1N1 vaccine, the EEOC opined that there may be protections under the Occupational Safety and Health Act for any employee who refuses the vaccine based on a reasonable belief that the employee has a

⁴ *Id.* See also 29 C.F.R. § 1630.2(r).

⁵ EEOC COVID-19 Guidance at K.5.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

condition creating a danger of serious illness or death.¹⁰ For this reason, employers should document all efforts they make to explore accommodations with an employee, and any undue hardships that explain why an accommodation could not be made, if applicable. These notes and records should be kept in a separate medical or accommodation file for the employee.

Similarly, an employer may require proof of vaccination, since proof of a vaccination in and of itself would not likely elicit information about a disability pursuant to the ADA, nor does it implicate Title II of the Genetic Information Nondiscrimination Act (GINA).¹¹ However, if an employer asks *why* the employee did not receive a vaccination, this may elicit information about a disability that would trigger the ADA's standard on disability-related inquiries; similarly, such questions may invoke GINA protections (if, for example, questions on family history are asked).¹²

Therefore, employers should not ask for information related to an individual's genetic information or family history of disease, and may only ask disability-related questions if the information is job related and consistent with business necessity.¹³ In this context, "consistent with business necessity" means that the employer needs to have "a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others."¹⁴ The EEOC suggests that employers warn employees not to provide medical or genetic information as part of any proof of vaccination to avoid implicating the ADA.¹⁵

Religious Accommodations

The EEOC also clarified its guidance on religious accommodations.¹⁶ Title VII of the Civil Rights Act requires employers to accommodate an employee's sincerely held religious beliefs, practices, or observances.¹⁷ It is important for employers to note that a religious accommodation does *not* necessarily mean that an employee is affiliated with a particular organized religion or church.

As with the ADA, an employer need not grant a religious accommodation if doing so causes an undue hardship, which, for purposes of a religious accommodation, means more than a *de minimis* cost to an employer's business operation.¹⁸ "Cost" does not

¹⁰ See U.S. Dep't. of Labor, Occupational Safety and Health Administration, OSHA's Position on Mandatory Flu Shots for Employees (Nov. 9, 2009), available at: <https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09>.

¹¹ *Id.* at No. K.3 and K.8.

¹² *Id.*

¹³ *Id.* Business necessity can exist if it is necessary to exclude employees who pose a direct threat to health or safety. *Id.* at G.1.

¹⁴ *Id.* at No. K.2.

¹⁵ *Id.* at K.3 and K.8.

¹⁶ See EEOC COVID-19 Guidance at No. K.6.

¹⁷ See *id.*

¹⁸ *Id.* Note that this is a different "undue hardship" standard than is imposed under the ADA.

necessarily always mean financial expense; it also includes the burden on the employer's business operations, which can include the "cost" to other employees' job rights, or workplace safety.¹⁹ Factors to consider when making an assessment of undue hardship for religious accommodation purposes include "the type of workplace, the nature of the employee's duties, the identifiable cost of the accommodation in relation to the size and operating costs of the employer, and the number of employees who will in fact need a particular accommodation."²⁰

Given the broad definition of religion, the EEOC recommends that employers generally assume that the employee's accommodation request is based on a sincerely held belief.²¹ However, if there is an objective basis for questioning the religious nature, or the sincerity, of the belief or practice, the EEOC permits an employer to request additional supporting information.²² Such documentation does not need to come from an official of an organized religion, and can in some instances be as simple as an additional explanation from the employee. As with a disability accommodation, employers should engage in the interactive process with employees to discuss any requested accommodations.

If no accommodations are possible, it is lawful to exclude the employee from the workplace, but this does not necessarily mean that the employer should terminate the employee, and should avoid termination if at all possible.²³ Employers should be cognizant that other EEO laws might apply, and terminating a worker on this basis could give rise to a claim of religious discrimination.

FLSA Considerations

Under the Fair Labor Standards Act, employers must reimburse nonexempt employees for any expenses that are incurred for the convenience of the employer or where the expense is incurred on the employer's behalf.²⁴ Additionally, nonexempt employees must be paid for any hours in which they are "suffered or permitted" to work for the employer.²⁵

The U.S. Department of Labor (DOL) has not yet opined on whether an employer must pay for an employee to get a COVID-19 vaccine if the employee is subject to a mandatory vaccine policy. However, it is likely the DOL would consider this paid time. For example, with respect to other types of mandatory requirements—such as physical

¹⁹ See U.S. Equal Employment Opportunity Commission, Questions and Answers: Religious Discrimination in the Workplace (July 22, 2008), No. 9, *available at*:

<https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace> (hereinafter "EEOC Religious Accommodation Guidance").

²⁰ *Id.* at No. 9.

²¹ EEOC COVID-19 Guidance at No. K.6.

²² *Id.*

²³ *Id.* at No. K.7.

²⁴ 29 C.F.R. § 778.217.

²⁵ 29 C.F.R. § 785.11.

exams, fingerprinting, and drug testing—the DOL states that when employers “impose special tests, requirements or conditions that your employee must meet,” then, “time he or she spends traveling to and from the tests, waiting for and undergoing these tests, or meeting the requirements is probably hours worked.”²⁶ Note that this guidance does not reference vaccinations, or the COVID-19 vaccine specifically.

Based on the foregoing, if an employee is required to get the COVID-19 vaccine pursuant to a mandatory vaccine policy, prudent employers should pay employees for the time spent getting the vaccine to avoid wage and hour related claims. However, if employers are not inclined to pay employees for the time spent getting the COVID-19 vaccine, there is no firm guidance or statute requiring them to do so.

Onsite Vaccine Administration

Some employers may want to consider having vaccines offered onsite for free, which may have the dual effect of facilitating compliance and minimizing the time an employee needs to spend to get vaccinated. Currently, the CDC is primarily managing distribution of the COVID-19 vaccine, and vaccine providers must enroll in a federal vaccine distribution program that is coordinated through the state’s immunization program. At this point, the Washington Department of Health has opened enrollment for clinics, pharmacies, and hospitals. We anticipate that there will be additional guidance in the upcoming weeks and months, as the vaccine becomes more widely available, that will clarify how an employer or organization can apply for authorization should it wish to have a program that will administer vaccines to employees.

The Public Readiness and Emergency Preparedness Act (PREP Act) generally grants liability immunity, absent any “willful misconduct,” to covered entities who administer vaccines or provide facilities for vaccine administration.²⁷ This liability extends to claims of loss that are caused by, arise out of, relate to, or result from the distribution, administration, or use of the COVID-19 vaccine.²⁸ Under the Act, the definition of “covered person” is broad, and includes “manufacturers, distributors, program planners,

²⁶ U.S. Dep’t. of Labor, FLSA Hours Worked Advisor, *Physical Exams, Fingerprinting and Drug Testing* (as of Dec. 17, 2020), available at: <https://webapps.dol.gov/elaws/whd/flsa/hoursworked/screenEr13.asp>.

²⁷ See 42 U.S.C. § 247d-6d (eff. March 27, 2020), as amended. This Act was amended by Declaration of the Secretary of the Department of Health and Human Services on April 15, 2020, June 8, 2020, August 24, 2020, and December 3, 2020. The Department of Health and Human Services have also put out advisory opinions on the PREP Act, with the most recent opinion being on October 23, 2020. See U.S. Dep’t. of Health & Human Services, Advisory Opinion 20-04 on the Public Readiness and Emergency Preparedness Act and the Secretary’s Declaration Under the Act (Oct. 23, 2020), available at <https://www.hhs.gov/sites/default/files/advisory-opinion-20-04-hhs-ogc-public-readiness-emergency-preparedness-act.pdf>.

²⁸ 42 U.S.C. § 247d-6d(a)(1). Bear in mind that immunity is not absolute, and the PREP Act cannot protect against federal enforcement actions—either civil, criminal, or administrative. See U.S. Dep’t. of Health & Human Services, Advisory Opinion (May 19, 2020), available at: <https://www.hhs.gov/guidance/sites/default/files/hhs-guidance-documents/prep-act-advisory-opinion-hhs-ogc.pdf>.

and qualified persons and their officials, agents, and employees.”²⁹ A “program planner” includes a state or local government, Indian tribe, a person employed by the State or local government, or another person who carries out the functions of the Act.³⁰ The definition of “program planner” further includes private sector employers or community groups.³¹ The “functions” that must be carried out to receive the Act’s protections for a program planner include “supervis[ing] or administer[ing] a program with respect to the administration, dispensing, distribution, provision, or use of a security countermeasure or a qualified pandemic or epidemic product.”³² Additionally, the PREP Act sets up a fund to compensate individuals who suffer an injury as a result of an approved COVID-19 vaccine.³³

To date, there are only a handful of decisions interpreting the PREP Act, but its broad language suggests that it is in place to protect entities who administer the COVID-19 vaccine—and at this point, the Act does not exclude employers who administer vaccine programs.³⁴ Bear in mind that there may be an authorization process that will develop as the vaccine becomes more widely distributed, as indicated above, which employers should go through before seeking coverage under the PREP Act.

Further, the EEOC confirmed in its recent guidance that administration of the COVID-19 vaccine, in and of itself, is not considered a “medical examination,” though any *pre-screening* questions are likely to elicit information about an employee’s disability, as discussed in more detail above.³⁵ Employers should remain mindful of this for any on-site vaccine administrations.

Labor Considerations

The Public Employment Relations Commission (PERC) and the National Labor Relations Board (NLRB) have not yet analyzed bargaining obligations related to a COVID-19 vaccine specifically.

However, mandatory vaccine policies should generally be considered a mandatory subject of bargaining under NLRB case law.³⁶ With that said, a management rights

²⁹ 42 U.S.C. § 247d-6d(i)(2).

³⁰ 42 U.S.C. § 247d-6d(i)(6); *See also*, Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 FR 15198-01 (March 17, 2020).

³¹ Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19, 85 FR 15198-01 (March 17, 2020). Note that the effective date of this Act, currently, is through August 1, 2025, or until the final day the emergency Declaration is in effect, whichever occurs first. 42 U.S.C. 247d-6d(b)(2)(B).

³² 42 U.S.C. § 247d-6d(i)(6).

³³ U.S. Dep’t. of Health & Human Services, PREP Act Q&As (last checked Dec. 21, 2020), *available at* <https://www.phe.gov/Preparedness/legal/prepact/Pages/prepqa.aspx>; *See also*, 42 C.F.R., part 110, *et seq.*

³⁴ More information on the PREP Act can be found at: <https://www.hhs.gov/sites/default/files/advisory-opinion-20-04-hhs-ogc-public-readiness-emergency-preparedness-act.pdf>.

³⁵ EEOC COVID-19 Vaccine Guidance at No. K1.

³⁶ *Virginia Mason Hosp.*, 358 NLRB 531 (N.L.R.B. 2012).

clause could provide a contractual waiver to the right to demand bargaining.³⁷ For example, in the NLRB's decision in *Virginia Mason Hospital*, the hospital unilaterally implemented a flu-prevention policy that required nonimmunized nurses not taking antiviral medication to wear facemasks.³⁸ The management rights clause read that it "recognizes the right of the Hospital to operate and manage the Hospital, including but not limited to the right to require standards of performance and...to direct the nurses...to determine the materials and equipment to be used; to implement improved operational methods and procedures...to discipline, demote or discharge nurses for just cause...and to promulgate rules, regulations and personnel policies."³⁹ This language was considered "sufficiently clear and unmistakable" in concluding that the union waived its right to negotiate over the flu prevention policy that was in place.⁴⁰

Employers should similarly assume that PERC would consider a mandatory vaccine policy to be a mandatory subject of bargaining. While the public's safety is one element that PERC would consider, PERC generally considers rules on safety and health of employees to be mandatory subjects of bargaining.⁴¹ Additionally, PERC has generally considered certain conditions of employment, such as the implementation of physical fitness standards and substance abuse testing, to also be mandatory subjects of bargaining.⁴² A management rights clause may effectively waive an employer's obligation to bargain certain issues under PERC case law; however, "[i]n order to show a waiver, the employer would have to demonstrate that the union also understood, or could reasonably have been presumed to have known, what was intended when it accepted the language relied upon by the employer."⁴³ Additionally, when there is a business necessity or emergency warranting immediate action, there may be a defense to unilateral implementation of a policy the employer would otherwise need to bargain.⁴⁴ The employer "may then be relieved of its bargaining obligation, to the extent necessary to deal with the emergency."⁴⁵ An emergency, or business necessity, does not, however, relieve employers from the obligation to bargain any *effects* such a decision has on affected employees.⁴⁶

Therefore, the first step for employers would be to check any applicable collective bargaining agreements to determine if there is any language that would be on point with respect to a mandatory vaccine policy (for example, this may include an emergency

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at 535.

⁴⁰ *Id.* at 536.

⁴¹ See *City of Everett v. Pub. Employment Relations Comm'n*, 11 Wn. App. 2d 1, 21, 451 P.3d 347, review denied sub nom. *City of Everett v. Washington Pub. Employment Relations Comm'n*, 195 Wn.2d 1005, 458 P.3d 779 (2020).

⁴² See *City of Olympia*, Dec. 3194 (1989).

⁴³ *City of Yakima*, Decision 3564-A (PECB, 1991).

⁴⁴ *Cowlitz County*, Decision 7007 (PECB, 2000), *aff'd*, Decision 7007-A (PECB, 2000).

⁴⁵ *Id.*

⁴⁶ *Id.*

clause, public health and safety powers clause, or a vaccine clause). If there is no specific clause on point, the employer should look to the management rights clause to determine if there is any language that could be interpreted as a waiver of the right to bargain a vaccine policy. The more direct and on-point the waiver, the more likely it is to withstand scrutiny from PERC or the NLRB.

Employers of unionized work forces should be prepared to meet with union representatives early, before implementing a vaccine policy. However, if bargaining is not a possibility, employers who take the risk of unilaterally implementing a mandatory vaccine policy should clearly communicate to the union that it is willing to bargain any effects the policy may have on affected employees.⁴⁷

COVID-19 and Workers' Compensation

Some employers may be concerned about liability under state workers' compensation laws should an employer choose *not* to implement a mandatory vaccine policy. While Washington's Department of Labor & Industries (L&I) has not addressed that issue outright, it is likely that L&I will take the position that COVID-19 will qualify as a work-related condition subject to workers' compensation coverage if it is probable that the employee's exposure to the virus occurred through a work-related activity. L&I's current position is as follows:

Under certain conditions, claims from health care providers and first responders involving COVID-19 may be allowed. Other claims that meet certain criteria for exposure will be considered on a case-by-case basis. For allowed claims, time-loss payments for lost wages during a quarantine period may be available for up to 14 days. The CDC indicates that COVID-19 symptoms may appear anywhere from 2 to 14 days after exposure. Appropriate, medically required testing/surveillance would also be covered. This is a time-limited benefit, and no benefits would be paid after the worker tests negative for COVID-19 or the quarantine period has ended, unless the worker develops the disease. As with all wage replacement benefits under the Industrial Insurance Act, the first 3 days are not paid unless the worker is medically required to remain off work on the 14th day following exposure.

⁴⁷ We are aware of IAFF's position statement on COVID-19 vaccinations, yet employers are cautioned against assuming that this eliminates the need for bargaining.

Once a claim is allowed, the insurer will pay for treatment of COVID-19. Currently, the only treatment for this new coronavirus is supportive care to help relieve symptoms.⁴⁸

However, L&I has instructed that the worker's occupation "must have a greater likelihood of contracting the disease because of the job (examples include first responders or health care workers)."⁴⁹ Further, "there must also be documented or probable work-related exposure, and an employee/employer relationship."⁵⁰ When contracting the virus is only incidental to the workplace, or "common to all employment (such as an office worker who contracts the condition from a fellow employee)," the claim would be denied.⁵¹

Unfortunately, a mandatory vaccine policy in and of itself will not insulate an employer from workers' compensation liability, and employers will still be expected to abide by all current guidelines under state law that require employers to provide proper protective equipment for employees. A vaccine policy may also not protect employers of healthcare workers or first responders, who are specifically identified by L&I as employees who may have viable workers' compensation claims. However, a mandatory vaccine policy may nonetheless mitigate some risk of workers' compensation claims in that vaccinated employees are far less likely to contract the virus in the first place, and will be especially less likely to contract it from co-workers.

Logistics in Implementation

Employers should also consider the logistics in implementing a mandatory COVID-19 vaccination policy. For example, employers will need to decide on a timeline for compliance, considering any vaccine shortages and booster requirements, and what type of "proof" it will accept. If an employer requires documentation of the vaccination from a medical provider, that information should go in a file that is separate from the employee's personnel records. If an employee fails to get the vaccine and/or fails to abide by any vaccination policies, employers need to think through what the consequences will be, and be cognizant that enforcement should be applied as evenhandedly and consistently as possible.

Additional considerations are outlined below:

- Employers should be aware that the COVID-19 vaccine could cause adverse side effects, especially immediately after administration, which may require that an employee take sick leave should an adverse reaction occur.

⁴⁸ Washington State Dep't. of Labor & Industries, Workers' Compensation Coverage and Coronavirus (COVID-19) Common Questions (as of Dec. 17, 2020), *available at*: <https://www.lni.wa.gov/agency/outreach/workers-compensation-coverage-and-coronavirus-COVID-19-common-questions>.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

- Another factor to wrestle is the implication on employee morale—either in implementing a policy or not. A percentage of the population continues to oppose or fear the COVID-19 vaccine, so in implementing a mandatory vaccination policy, employers should prepare for the potential that some employees may be upset, and may even quit, if they are required to get vaccinated.
- Employers should provide educational materials to employees about the benefits of the COVID-19 vaccine, and clearly communicate the employer’s expectations about vaccination against COVID-19.
- Other employees may be reluctant to come to a worksite with unvaccinated employees. However, employers need to be cognizant of employee privacy concerns, especially if there are others at the worksite who want to know whether there are any unvaccinated employees present. For privacy reasons, employers should not disclose the names or identifying information of specific unvaccinated employees, or reveal any information that could be used to easily identify such an individual, unless the person seeking the information has a need to know (such as, for example, an HR representative who is handling an accommodation request).
- Lastly, even if an employee were to get the COVID-19 vaccine, mask and social distancing protocols should continue to be implemented consistent with state mandates, unless and until those requirements are lifted.

Alternatives to a Mandatory Vaccine Policy

The scope of this client bulletin is to address employers who wish to implement a mandatory vaccine policy. However, employers are not *required* to implement a mandatory vaccine policy, and may elect to simply “wait and see” how the vaccine roll out occurs, encouraging vaccinations in the meantime. Employers may also choose to instead offer incentives, such as time off or a bonus, if an employee gets vaccinated.⁵²

Encouraging or incentivizing employees to get vaccinated may alleviate many of the logistical challenges of implementing a COVID-19 mandatory vaccine policy. Additionally, employees who choose to get the vaccine (as opposed to having it be a mandated requirement) would not be eligible to claim that time as compensable work time, nor would there be a requirement to consider disability or religious accommodations. However, allowing employees to choose whether or not they want to be vaccinated leaves much of the workforce exposed, could increase the chances of a

⁵² For a unionized workforce, to the extent that any incentive affects wages, hours, or working conditions, such a policy would need to be bargained with the union.

worker contracting the virus, and may increase the risk of a workers' compensation claim.⁵³

We anticipate that there will be additional guidance on this topic from federal, state, and local authorities in the coming weeks. In the meantime, if you need any advice about COVID-19 employment issues, please contact Summit Law Group's COVID-19 Employment Issues Team at COVID19-employment@summitlaw.com.

Important Notification

This summary is intended to provide an overview of recent legal developments. This summary is not intended to be, and should not be interpreted as, legal advice. Employers are encouraged to contact a Summit Law Group attorney or other legal counsel for guidance regarding particular situations.

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⁵³ Additionally, the Supreme Court has long held that statutes may be enacted—such as those requiring vaccines—to protect the public health. See *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905).