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Vaccine Mandates – Legal Issues

Q: Can an employer require vaccines as a condition of employment?

A: Yes. Federal law does not prohibit employers from mandating vaccines as a condition of employment. The Equal Employment Opportunity Commission (EEOC) has stated that mandates do not violate either the Americans with Disabilities Act or Title VII of the Civil Rights Act, although both of those laws require employers to provide certain exceptions.

A few states bar vaccine mandates, so check your state law. However, with respect to federal contractors, those laws may be preempted by the President’s Executive Orders discussed below.

Q: What are the exceptions?

A: Employees who cannot get the vaccine for medical reasons or who have sincerely held religious objections to the vaccine may seek an accommodation from the mandate. Employers are to evaluate each request for an exemption and, working with the employee, determine whether there is an accommodation that would permit the employee to continue to perform the job in a manner that does not impose an undue hardship on the employer or pose a “direct threat” to the health of the employee or others in the workplace.

Q: Doesn’t the employer have to bargain with the union?

A: As a general matter, requiring vaccines as a condition of employment is a mandatory subject of bargaining. However, whether your employer can implement a mandate without bargaining depends on the language in your collective bargaining agreement and whether the mandate is required by law (for example, under the Executive Orders described below).

Even if the union cannot bargain over the *decision* to require vaccines, it can bargain over the *effects* of that decision – that is, how the mandate will be implemented.

Q: If the union can’t bargain over the mandate, what can it bargain over?

A: There are many issues about *how* the mandate will be implemented, including:

- How the exceptions will be determined
- The status of employees who refuse the vaccine
- Compensation for time spent getting the vaccine
- Paid leave for employees who react to the vaccine
- How the employer will verify vaccination
- Testing as an alternative (and if so, who pays for time/expense)

Even the Executive Orders requiring vaccines leave many implementation issues unanswered and therefore open to bargaining.

Q: What is in President Biden’s Executive Orders?

A: The President issued three Executive Orders regarding workplace vaccinations:





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- **Federal employees:**
 - All Federal employees must be fully vaccinated by November 22, 2021.
 - There are medical/religious exceptions for employees who can be accommodated.
- **Federal contractors and their subcontractors:**
 - Applies to contracts entered into, extended, or revised after November 14, 2021.
 - All employees working on or in connection with a covered contract must be vaccinated by December 8, 2021. (“In connection” with a contract means performing work necessary for the performance of the contract.)
 - With some exceptions, the Executive Order also applies to a covered contractor’s employees who are not working on the covered contract but are in the contractor’s workplace.
 - There are medical/religious exceptions for employees who can be accommodated.
- **OSHA Emergency Temporary Standard (ETS)**
 - Directed OSHA to issue an ETS covering employers with 100 or more employees, requiring vaccines *or* testing for employers.

Q: Isn’t it unconstitutional for the government to mandate vaccines?

A: No, as early as 1905, the Supreme Court held in *Jacobson v. Massachusetts* that the government may mandate vaccines. In that case, the Court rejected a challenge to a law requiring all residents to be vaccinated against smallpox. The Court held that although individuals have a constitutionally-protected liberty interest in personal autonomy, that right is outweighed by the state’s interest protecting the public.

Q: Doesn’t it violate HIPAA to ask me about my vaccination status?

A: No. First, HIPAA does not apply to how your employer handles medical information. It only prevents medical providers from disclosing patient information. The ADA does, however, limit and impose confidentiality requirements on the medical information your employer can obtain. According to the EEOC, the ADA permits your employer to ask your vaccine status. However, the employer cannot ask *why* you are not vaccinated, and the employer must treat any documentation confidentially.

Some states, however, have prohibited inquiring about vaccine status, so check your state law.

Q: Is it legal to require employees to get vaccines that only have Emergency Use Authorization (EUA)?

A: Yes. The vaccines’ EUA status does not bar public or private entities from requiring vaccines as a condition of employment. Language in the statute





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authorizing EUA suggested that the people getting the vaccines must be told it is optional, but the courts have made clear this refers to information the healthcare providers must give when administering the vaccines. And, the courts have said, even under a mandate, the vaccines are optional since employees always have the choice to decline the vaccine and seek employment elsewhere.

In any event, one of the three vaccines available in the United States is now fully licensed, and it is expected the Food and Drug Administration (FDA) will soon fully license the other two as well.

Q: Don't I get greater legal protections with the fully-licensed vaccines?

A: No. In announcing its approval of the Pfizer vaccine, the FDA stated that the vaccine with EUA and the full-licensed vaccine were identical in their composition, safety and effectiveness, but that they were "legally distinct." The FDA has since made clear this meant that the EUA was approved for individuals ages 12 and up, while the licensed vaccine had been approved for individuals 16 and older, and that the vaccines may have been manufactured in different approved facilities.

Q: If I am terminated for refusing to get vaccinated, can I collect unemployment insurance?

A: That's a question of state law. Many states either deny or delay benefits to employees terminated "for cause."

Q: If I have an adverse reaction to the vaccine, can I collect workers comp?

A: Again, this is a question of state law. However, if you suffer an injury as a result of an employer-mandated vaccination, this would be covered as a work-related injury. Some states have issued guidelines addressing covid-related coverage. Additionally, as stated above, compensation for time off for anyone who suffers an adverse reaction to the vaccine is something the union can negotiate through effects bargaining.

Q: What can the union do about all this?

A: So far, every court that has considered employer mandates has found them lawful, although in a few cases, individuals have successfully pursued their rights to exceptions. However, as explained above, the union can demand bargaining. If the employer is not legally required to mandate vaccines, it may be possible to bargain over the decision to require them, depending on the language of your collective bargaining agreement. But if the agreement, for example, allows the employer to implement reasonable safety rules or otherwise grants the employer the right to implement new rules, current NLRB law makes it unlikely that the union will be able to bargain over the decision to require the vaccine. Even if it cannot bargain over the decision, the union can bargain over its effects, *i.e.*, its implementation.

