

Vaccine Mandates, Welfare Benefit Plans, and Incentives, Oh My!

A Discussion of Legal and Practical Considerations Surrounding Employer Vaccination Requirements and Voluntary Options for the Workforce



Presented by:
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Agenda

- Current Mandated Vaccination Requirements
- Voluntarily-Imposed Employer Vaccination Requirements
- Options to Encourage Employee Vaccinations
 - Voluntary Vaccination Programs
 - Employer Incentives
 - Voluntary Wellness Programs
- Questions

Current Mandates

Type of Employer	Federal	Private Employers with 100+ Employees	New York Healthcare Employers	New York School Districts*
Authority	Executive Order	Emergency Temporary Standard (ETS)	DOH Emergency Regulation	DOH Emergency Regulation & Determination
What Employees are Impacted	Any individual identified as an employee (5 USC § 2105) including employee paid from non-appropriated funds and federal contractors.	Employees working for an employer with 100 or more employees. OSHA may provide further details in its ETS.	Staff at hospitals and long-term care facilities (LTCF), including nursing homes, adult care, and other congregate care settings.	All teachers, administrators and other school employees.
Mandates and Timing	Employees must be fully vaccinated by 11/22/2021. Last shot must be no later than 11/8/2021.	Unknown. Various experts estimate between 30-60 days for OSHA to issue the ETS.	Employees must be vaccinated by 9/27/2021.	Employees must submit to weekly COVID-19 testing unless they show proof of vaccination. No explicit timing.

**New York City Department of Education employees were required to provide proof of their first dose of vaccination by September 27, 2021; they do not have a testing option.*



Current Mandates – Exemptions

- Exemptions
 - Most employers are subject to the reasonable accommodation provisions of Title VII (religion) and the ADA (disability).
 - Does the employee have a **disability or sincerely held religious belief**, practice, or observance that prevents them from getting the COVID-19 vaccination?
- Vaccination v. Testing
 - Are there viable bases to assert an exemption to the testing requirements?

Can an Employer Mandate the Vaccine?

- Yes, if ...
 - Vaccination is a qualification or safety-related standard applied to all employees.
 - The standard must be *job related and consistent with business necessity*.
 - The employer can require compliance by a noncompliant employee if the employee would post a *direct threat* to the health or safety of the employees or others in the workplace.

- Direct Threat
 - A “significant risk of substantial harm”
 - That cannot be eliminated or reduced by reasonable accommodation.

29 C.F.R. § 1630.2(r)



Can an Employer Mandate the Vaccine?

- Direct Threat Assessment

1. The duration of the risk;
2. The nature and severity of the potential harm;
3. The likelihood that the potential harm will occur; and
4. The imminence of the potential harm.

- Reasonable Accommodations

- Would providing a reasonable accommodation reduce or eliminate the direct threat?
- Would the reasonable accommodation impose an undue hardship?

29 C.F.R. § 1630.2(p)

Medical Exemptions

Medical (disability) Exemptions

- Interactive Process

- Does the employee have a disability?
- Is there a reasonable accommodation(s) that would permit the employee to perform their essential job functions?
- Does the reasonable accommodation impose an undue hardship?

Medical Exemptions

Undue Hardship

- An action requiring significant difficulty or expense when considered in light of factors such as:
 1. The nature and cost of the accommodation;
 2. The facility's financial resources;
 3. The employer's entire financial resources;
 4. The structure and main functions of the organization; and
 5. The impact of the accommodation upon the employer's operations and ability to conduct business
- 29 C.F.R. § 1630.2(p)

Religious Exemptions

- Religious Exemptions

- Employers should ordinarily assume the request is based on the employee's sincerely held religious belief.
- Is there an **objective basis** for questioning the religious nature or the sincerity of a belief/practice? If yes, there may be a basis to question the request or ask for supplemental information.

29 C.F.R. § 1605

- Factors

- Has the employee has behaved in a manner markedly inconsistent with the professed belief?
- Whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons;
- Whether the timing of the request renders it suspect; and
- Whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.



Religious Exemptions

- Religious Exemptions
 - Are there reasonable accommodations available to provide to the employee?
 - The employer must provide a reasonable accommodation unless it poses an undue hardship.
- Undue Hardship
 - The accommodation requires “more than a de minimis cost.”
29 C.F.R. § 1605.2(e)

Voluntary Vaccination Programs

- Employers can offer voluntary vaccination programs to its employees.
 - Employees can choose to get the COVID-19 vaccine.
 - Employers *cannot* take an adverse action against an employee for refusing to participate in such program.
 - All medical information must be kept confidential.
 - Pre-vaccination screening questions are permissible but the employee's decision to answer the questions must be voluntary.
- Be wary of limited voluntary vaccination programs.
 - Why not offer the program to all?
 - Is the decision nondiscriminatory?

Employer Incentives

- Can employers offer incentives?
 - Employers can offer incentives to employees to provide COVID-19 vaccination paperwork.
 - Requesting vaccination documentation is *not* a disability-related inquiry.
 - What is the incentive?
 - Reward
 - Penalty
 - It cannot be so substantial that it is coercive.
 - What does this mean? (water bottles, gift cards of nominal amounts?)
 - EEOC's January 2021 proposed rules have been withdrawn.
 - Where does that leave employers?

Employer Incentives

Can employers offer to vaccinate their employees?

- Yes, employers can offer incentives to employees to voluntarily receive a vaccine offered by the employer or an agent.
- But..
 - If the employer offers a vaccine, the pre-vaccination inquiries may be disability-related medical inquiries and the incentive offered must comply with the voluntary wellness program regulations.

Voluntary Wellness Programs

- Can the employer offer an employee health program that includes disability-related inquiries or medical exams?
 - Is the program voluntary?
 - Yes, if the employer...
 1. Does not require employees to participate;
 2. Does not deny coverage under any of its group health plans or particular benefits packages within a group health plan for non-participation, or limit the extent of benefits for employees who do not participate;
 3. Does not take any adverse employment action or retaliate against, interfere with, coerce, intimidate, or threaten employees within the meaning of Section 503 of the ADA, codified at 42 U.S.C. 12203; and
 4. Provides employees with an appropriate notice.
29 C.F.R. § 1630.14(d)(2)

Voluntary Wellness Programs

- Notice

- A. Is written so that the employee from whom medical information is being obtained is reasonably likely to understand it;
- B. Describes the type of medical information that will be obtained and the specific purposes for which the medical information will be used; and
- C. Describes the restrictions on the disclosure of the employee's medical information, the employer representatives or other parties with whom the information will be shared, and the methods that the covered entity will use to ensure that medical information is not improperly disclosed (including whether it complies with the measures set forth in the HIPAA regulations codified at 45 CFR parts 160 and 164).

29 C.F.R. § 1630.14(d)(2)

Employer Incentives for Family Members

- Can employers offer incentives to the employee for employee's family member(s) to be vaccinated?
 - No.
 - Title II of GINA prohibit employers from providing incentives in exchange for genetic information.
 - The arrangement requires the employer (or agent) to ask the family member the pre-vaccination medical screening questions, including medical questions about the family member.
 - Asking medical questions would result in the employer's receipt of genetic information (family medical history) of the employee.

Vaccinations for Family Members

- Can employers offer vaccinations to the employee's family member(s) without offering an incentive?
 - Yes. If the employer...
 - Does not require employees to have their family members get vaccinated; and
 - Does not penalize employees if their family members decide not to get vaccinated.
 - Employers must ensure that all medical information obtained from family members during the screening process is only used for the purpose of providing the vaccination, is kept confidential.
 - Such information cannot be provided to managers, supervisors, or others who make employment decisions for the employee.

Vaccinations for Family Members

- Can employers offer an incentive for employees to provide proof of family members' vaccinations?
 - Yes.
 - Requesting documentation that a family member has been vaccinated is not an unlawful request for genetic information and does not violate GINA.

Group Health Plans

- Is the incentive a HIPAA health-contingent wellness program?
- If yes, the program must:
 1. Allow participants at least an annual opportunity to qualify for the reward;
 2. Have a maximum reward/penalty that does not exceed 30% of the total cost of coverage (the COBRA rate without adding the additional 2% administrative fee);
 3. Be reasonably designed to promote health or prevent disease;
 4. Make the reward available to all similarly situated individuals and to individuals who qualify by satisfying a reasonable alternative standard (if it is unreasonably difficult due to a medical condition to get the vaccination or it is medically inadvisable to get the vaccination); and
 5. Disclose the availability of a reasonable alternative standard in all plan materials describing the details of the wellness plan.

See 29 CFR § 2590

Questions?

References and Resources

1. Executive Order on Requiring Coronavirus Disease Vaccination for Federal Employees, *available at* <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-requiring-coronavirus-disease-2019-vaccination-for-federal-employees/>.
2. Executive Order on Ensuring Adequate COVID Safety Protocols for Federal Contractors *available at* <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/09/09/executive-order-on-ensuring-adequate-covid-safety-protocols-for-federal-contractors/>.
3. New York Public Health and Health Planning Council Emergency Regulation *available at* https://www.health.ny.gov/facilities/public_health_and_health_planning_council/meetings/2021-08-26/docs/revised_proposed_regulation.pdf.
4. New York Department of Health Rules and Regulations for COVID Reporting and Testing for Public Schools *available at* https://regs.health.ny.gov/sites/default/files/pdf/emergency_regulations/COVID-19%20Reporting%20and%20Testing.pdf.
5. *Maniscalco v. New York City Dept. of Education*, 21-cv-5055, Memorandum Decision and Order of Hon. Brian M. Cogan, E.D.N.Y. dated September 23, 2021 *available at* <https://www.courthousenews.com/wp-content/uploads/2021/09/vaccines-new-york.pdf>.
6. *Maniscalco v. New York City Dept. of Education*, Case No. 22343, Application (21A50) for injunctive relief, submitted to Justice Sotomayor *available at* <https://www.scotusblog.com/wp-content/uploads/2021/09/21A50.pdf>.
7. EEOC Guidance, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, *available at* <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.
8. EEOC Questions and Answers: Religious Discrimination in the Workplace *available at* <https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace>.



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