

U.S. Department of Justice Gives Go-Ahead to Mandatory COVID-19 Vaccines in the Workplace

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Practice Area: Labor and Employment

As employers nationwide have begun to implement mandatory COVID-19 vaccine requirements in the workplace, legal questions have been presented as to whether these vaccine requirements are legally permissible under various laws. While the EEOC has issued guidance that generally permits mandatory vaccine requirements in the workplace so long as reasonable accommodations are offered for those with disabilities or sincerely held religious beliefs, questions still remained as to whether mandatory workplace vaccine requirements were permissible under other laws, such as the Food, Drug and Cosmetic Act (FDCA), given the Emergency Use Authorization (EUA) process.

DOJ's July 6, 2021, Memorandum Opinion now opines that mandatory workplace vaccine policies are permissible under the FDCA. Specifically, Section 564 of the FDCA permits employers to impose the COVID-19 vaccination as a condition of employment even when the vaccine is subject to EUA. This opinion applies to both public and private employers outside of the context of the armed forces.

The DOJ emphasized that vaccine mandates are not coercive: They do not strip employees of their rights to refuse a vaccine or not. Although Section 564 states that recipients must be informed of "the option to accept or refuse administration" of the vaccine, Section 564's mandates are merely informational. As with other conditions of employment, discipline up to termination can be an acceptable consequence for employee refusal to adhere to an otherwise valid employer vaccination policy. Employees can freely choose to accept or refuse a COVID-19 vaccine but will need to work elsewhere if they refuse vaccination against the employer's policy.

It is important to note that DOJ's opinion is narrow, only addressing the permissibility of the COVID-19 vaccine under one federal statute. Many other state and local laws may apply, such as state and local equal employment opportunity laws and regulations. In addition, there are a multitude of practical considerations in mandating vaccination.

Practical Considerations for Employers:

Employers must decide how to ensure a safe and compliant workplace while considering employee rights and concerns about COVID-19 vaccinations. The following are some considerations that are important for employers to address in light of the DOJ guidance:

1. Determine whether to mandate the COVID-19 vaccine or implement other avenues for increasing vaccination rates, such as incentivization;
 2. Consider instituting or updating company-wide COVID-19 vaccination policies;
 3. Review prior EEOC guidance to determine how to accommodate employees with disabilities or religious objections to the vaccine;
 4. Review current policies and procedures to ensure proper handling of any accommodation requests;
 5. Keep employee vaccination status as confidential medical information;
 6. Monitor CDC and OSHA websites to keep current with guidance;
 7. Update COVID-19 policies to determine which employees will be subject to masking and social distancing in light of the CDC Guidance;
 8. Keep informed of any local public health rules and regulations requiring masking;
 9. Employers maintaining workplaces with employees subject to collective bargaining agreements must consider any bargaining obligations with the Union prior to instituting or modifying vaccination policies;
 10. Train supervisors and managers on COVID-19 policies.
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