

4 Commonly Asked Questions From Employers About the Coronavirus Vaccine



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As they consider how to retransition back to an in-office environment, employers want to keep [COVID-19](#) out of the workplace.

Below, you'll find four more questions employers are asking about COVID-19 vaccination. Before taking action, employers should consult with legal counsel.

1. Can employers request proof that employees have been vaccinated?

Yes. Employers can ask employees for proof of vaccination. This is not a disability-related inquiry. Employers should not ask follow-up questions regarding the reason an employee has not been vaccinated. This could elicit information about a disability, subject to the Americans with Disabilities Act (ADA).

Equal Employment Opportunity Commission (EEOC) guidance also made it clear that requesting proof of vaccination does not implicate the Genetic Information Nondiscrimination Act (GINA) because it does not involve the use of genetic information to make employment decisions, or the acquisition or disclosure of genetic information.

But, the [i4cp](#) survey showed that only 3.5% of employers have implemented that employees must provide proof of vaccination to return to the workplace according to a [Gartner survey of HR leaders](#).

2. How should employers address employee concerns about working with unvaccinated co-workers?

Employers have a duty to implement policies and practices that ensure workplace safety for employees. As part of this duty, EEOC guidance says if an employee raises a disability-related objection to mandatory vaccination, employers should first determine whether an unvaccinated employee poses a direct threat by considering four factors:

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.

An employer that concludes that an unvaccinated employee poses a direct threat of exposure to co-workers is required to then determine whether a reasonable accommodation can mitigate the direct threat.

Examples of accommodations include mask wearing, routine testing, social distancing, optional leave under the Families First Coronavirus Response Act (FFCRA) (though it is no longer required for employers), leave under the Family and Medical Leave Act (FMLA) or paid time off under the employer's policies.

Only when there is no reasonable accommodation can the employer remove the employee from the workplace. EEOC recommends against terminating employment.

3. What if an employee without a disability-related objection refuses the mandated COVID-19 vaccine?

Typically, a generalized fear that COVID-19 vaccines are not safe is insufficient to warrant an exemption under the law. However, employers must consider any underlying reasons for the refusal to assess any available protections under the law.

As discussed above, an employee's refusal may stem from a religious belief or a disability, which may require an accommodation. An employee who refuses vaccination due to a reasonable belief that it may result in serious injury or death may be protected by the Occupational Safety and Health Act (OSHA). Likewise, an employee or group of employees who refuse or protest a mandatory vaccination could claim to be engaged in concerted activity, which is protected under Section 7 of the National Labor Relations Act.

Employers could face messy situations if a significant portion of the workforce refuses to comply based on personal beliefs or fear of the vaccines' emergency status. Employers could adhere to the mandate and terminate all these employees or deviate from the mandate for certain employees bringing increased risk of discrimination claims.

[Related Reading: Employer COVID-19 Vaccine Considerations](#)

4. What collective bargaining issues arise when considering COVID-19 vaccine mandates?

Prior to mandating a COVID-19 vaccination, employers with unionized workforces should review collective bargaining agreements (CBAs) and consult with legal counsel. Unionized employers have a legal obligation under Section 8(d) of the National Labor Relations Act to bargain with the union representing their employees over terms and conditions of employment. Employers must:

- Determine whether the CBA permits/prohibits the employer from implementing a mandatory vaccination policy for its employees.

- Decide if they can implement the policy without discussing the issue with the union under a provision authorizing the employer to implement reasonable new work rules if the CBA does not explicitly permit/prohibit a mandatory vaccination policy.
- Bargain with the union over implementation of a mandatory vaccination policy in the absence of a grant of such authority above.

Under either circumstance, “effects bargaining” should be performed requiring an employer to negotiate with the union over how that decision might affect employees.

Employers should remain cautious and consult legal counsel before taking adverse action against employees who collectively discuss or protest a mandatory vaccination policy, as such adverse action could result in an unfair labor practice charge against the employer.

Conclusion

Employers have many factors to consider when deciding whether to mandate vaccination for their employees, encourage vaccination or leave the matter entirely up to individual choice.

For the moment, it seems that mandatory vaccination is only being implemented by a small percentage of employers, but time will tell with more widespread availability of the coronavirus vaccine and employees returning to the workplace in person.

Source: International Foundation of Employee Benefit Plans