

A person wearing a white lab coat, a blue hairnet, and a clear face shield with a white surgical mask underneath. They are holding a small white vial in their gloved hand. The background is a blurred laboratory setting.

## Ready for the Vaccine?

The Next Step in  
the COVID-19  
Journey is Here

Today, we watched and cheered the first people who were vaccinated with the Pfizer COVID-19 vaccine in the U.S. With its approval and the promise of additional vaccines seemingly inevitable, the possibility of a return to “normalcy”—work, school, and social events - has once again come into focus.

For employers, this possibility means thinking about if, when, and how to return some (or more) of the workforce to the workplace, while continuing to ensure the health and safety of all. Specifically, the question looming for employers is “can employees be required to receive the COVID-19 vaccine?”

As with many employment law matters, the answer is “it depends.” Let’s start with the general premise that yes, in compliance with its obligation to maintain a safe workplace, an employer can require that employees receive the COVID-19 vaccine in order to return to the workplace. However, the possible exceptions are numerous and complex, including medical exceptions, religious exceptions, and practical considerations.

The EEOC has stated that COVID-19 poses a direct threat to the workplace; therefore, it is easy to think that an employer could view those who refuse to be vaccinated against the virus as presenting a “direct threat” to others. In reality, that analysis could be subject to considerable challenges since the clinical trials for this virus reveal that we cannot know with any reasonable certainty whether employees who do not receive a vaccine will contract COVID-19.

Because of this complexity, unless and until the EEOC provides clear and unambiguous guidance on this topic, our recommendation is that employers strongly encourage employees to get the COVID-19 vaccine, but not mandate it.

(Note that different guidelines may apply in the healthcare sector where courts have previously upheld that an employer can require the flu and other vaccinations. COVID-19 would likely be viewed in a similar manner for healthcare workers, as well as other related industries.

That said, if you do decide to require the vaccine at your workplace, there are several legal and practical considerations to keep in mind.

### Should employers require the vaccine?

- No current guidance
- Permitted if job-related
- guidance permits mandatory vaccinations
- Existing policies adequately inform employees of the requirements
- Afford employees the opportunity to seek an exception or accommodation

### Medical Exception

Employees with certain medical conditions are eligible for a [reasonable accommodation](#) that could exempt them from any workplace vaccine mandate. Employers must continue to follow all American with Disabilities (ADA)<sup>1</sup> guidelines when receiving and deciding on such requests, including ensuring all medical records are properly maintained. Currently, Pfizer has indicated that certain groups should not take its vaccine, including pregnant or breastfeeding women, autoimmune compromised individuals, and those with prior allergic reactions to vaccines. Employers should be prepared to follow their standard “interactive process” to determine whether a reasonable accommodation is available for employees who request them.

<sup>1</sup>Applies to employers with 15 or more employees.

## Religious Exception

Religious exemptions to a vaccine mandate also will be permitted under Title VII of the Civil Rights Act of 1964. Companies should have an approach for considering options when it comes to an employee refusing vaccination for religious reasons and what does or does not constitute a potential “[undue hardship](#)” to the company.

Employers should also remember that the “[undue hardship](#)” standard for the ADA is different and considerably harder to meet.

## Pregnancy Exception

There are two federal employment discrimination laws that may trigger [accommodation for employees based on pregnancy](#).

First, pregnancy-related medical conditions may themselves be disabilities under the ADA, even though pregnancy itself is not an ADA disability. If an employee makes a request for reasonable accommodation due to a pregnancy-related medical condition, the employer must consider it under the usual ADA rules.

Second, Title VII as amended by the Pregnancy Discrimination Act specifically requires that women affected by pregnancy, childbirth, and related medical conditions be treated the same as others who are similar in their ability or inability to work. This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent provided for other employees who

are similar in their ability or inability to work. Employers should ensure that supervisors, managers, and human resources personnel know how to handle such requests to avoid disparate treatment.

### Consider the ADA

- See the EEOC [Pandemic Flu Preparedness Guide](#).
- Keep documentation/record of decision-making factors considered for any accommodations.
- Consider work from home.

### Consider complications to vaccine mandates:

- Who pays if an employee is not covered under the plan?
- Understand timing issue with privacy concerns.
- Where mandatory to vaccinate and at a certain time only those with certain health conditions may be vaccinated, if other employees know that this employee has a serious medical condition, by nature of timing of receiving the vaccine, consider installing privacy mechanisms to ensure this medical status is not known to others.

### Have

- Coordinated education campaigns
- Stipend or PTO for vaccinations
- Onsite vaccinations
- Early engagement with labor unions
- Allocation of administration resources in advance of policy to mandate vaccination

## Practical Considerations

Finally, there are practical considerations that impact employers. The most obvious are the logistics of obtaining access to a COVID-19 vaccine. The CDC has outlined a priority schedule of who should receive them first, and most medical professionals agree that it will be well into spring or summer before the vaccine is readily available to all Americans.

Employees also could have an adverse reaction to the COVID-19 vaccine, which could create backlash or even yield workers compensation claims.

Finally, once the vaccine is available, we know that some employees will feel relieved. Others will be skeptical, and some may outright refuse to receive the vaccine. According to research from [Pew](#), the number of adult Americans who will get the vaccine has dropped by 12% since May. Employers will have to address this fear, discomfort, skepticism, and defiance with clear, concise, and compassionate communication.

## Union and Labor

In addition to EEOC compliance, employers will need to ensure that their decisions regarding mandated vaccines comply with the National Labor Relations Act.

Employees who raise participation in a vaccine mandate may be viewed as raising workplace safety concerns that constitute [protected concerted activity](#) under the NLRA and employers will have to ensure that such concerns are handled appropriately.

## Privacy and Genetic Information

The Guidance talks extensively about the Genetic Information Nondiscrimination Act (GINA), noting that employers should also be aware that pre-screening questions could reveal information protected by GINA. The Guidance recommends that the employer ask the employee to not “provide genetic information as part of the proof” of vaccination and in the event that it is provided, that the employer omit such information to maintain compliance with Title II of GINA.

While the Guidance does not directly address this question, employers should not disclose which employees are or are not vaccinated to other employees. Such information should remain in separate and confidential medical records as the [ADA](#) requires employers to treat any medical information. In limited circumstances, employers can disclose medical records with “supervisors, managers, first aid and safety personnel, and government officials investigating compliance with the ADA.”

## Consider State Laws

Always consult federal Occupational Safety and Health Administration (OSHA) guidelines for appropriate measures. But it is the state that will likely control what an employer can and can't do in the workplace related to ensuring employee safety and to prevent illness and injury.

Utah law is less fulsome than some. See the vaccination website. Utah Labor Commission Occupational Safety & Health outlines the UtahOSH Emergency COVID-19 Workplace Rules. Health and safety resources for employers are available from the state.

## Keep Doing What You Are Doing

Regardless of your company's decision in this regard, it is important to keep doing what you've been doing to maintain a safe working environment. All prior precautionary measures remain critical to ensuring both safety and a level of comfort with a return to work.

These measures include preparing the workplace for appropriate social distancing, providing appropriate PPE and enforcing its use, continuing medical screening for COVID-19 related symptoms, requiring testing where appropriate, and the other measures detailed in prior communications on this topic.

The policy is king. If the company does not have a policy for employee safety in times of sickness, whether a pandemic plan or infectious disease plan, it is not too late to develop one. Talk with your GBS Consultant for a sample.

Employers should consult their own employment attorney to ensure compliance with all laws applicable to your business. Nevertheless, this article provides the starting point for the next discussion on COVID-19 and its effect on your business and employees in the United States.

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