

# Considerations for Employers Contemplating a COVID-19 Vaccine Mandate

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Now that the vaccine for coronavirus disease 2019 (“COVID-19”) is being rolled out, and various politicians and dignitaries are being vaccinated publicly, everyone seems to be asking the same question: can employers require their employees to be vaccinated against COVID-19 as a condition of employment? On December 16, 2020, The U.S. Equal Employment Opportunity Commission (EEOC) updated its Technical Assistance Guide, [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#), to include some vaccine-related content. While it does not definitively answer the question for every employer (or employee), the EEOC suggests that federal discrimination laws do not prohibit a vaccine mandate.

However, to borrow from Dr. Ian Malcom’s iconic quote from Jurassic Park,<sup>1</sup> “They were so preoccupied with whether or not they *could*, they didn’t stop to think if they *should*.” Though a fictional dinosaur resurgence is not exactly equivalent to the worldwide COVID-19 pandemic, that question is no less applicable in this context.

Given a myriad of unknowns and competing considerations at play, many of which we have listed in the section to follow, many employers may opt to not require vaccination. Instead, they may find it preferable to strongly encourage, and perhaps even incentivize, employees to get the COVID-19 vaccine, at least until further guidance and information is available. If that is the desired approach, here are a few specific actions employers can take to do so:

- Develop and distribute accurate, reputable COVID-19 vaccine education materials, demonstrate good knowledge about the data, and clearly communicate how vaccination will make the workplace safer;
- Help make the COVID-19 vaccine accessible to employees, including offering free on-site COVID-19 vaccinations;<sup>2</sup>
- Explore and promote “perks” that may be available to vaccinated employees through voluntary and carefully designed wellness programs (for example, with the promise of gift cards or discounts on health insurance premiums);
- Provide *paid* time off for employees to get the vaccine and recover from any potential side effects; and/or
- Lead by example and ensure that management is vaccinated first, including public vaccinations by an organization’s leaders.

If, however, an employer decides to require some or all of its employees to get a COVID-19 vaccine, then it should develop a clear, nondiscriminatory, and legally compliant written policy or program, factoring in these important considerations along with any others that are applicable to their particular operations:

- **Employment Discrimination and Disability Protections.** As previously noted, the EEOC recently updated its COVID 19 Technical Assistance Guide and suggests that employers can generally require employees to receive a COVID-19 vaccine, at least without running afoul of federal discriminations law, provided that employers recognize the exceptions and additional protections that may need to be made in doing so. This includes:

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- » Providing reasonable accommodations for those with disabilities or sincerely held religious beliefs that may conflict with a vaccine requirement, where doing so is not an undue hardship. See [\*Questions and Answers: Religious Discrimination in the Workplace\*](#).
- » Ensuring that any prescreening vaccination questions are appropriately constrained to only what is “job-related and consistent with business necessity.” See U.S. EEOC, [\*Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA\*](#), July 26, 2000.
- » If asking for proof of vaccination, reminding employees not to provide any medical information when doing so, and adopting appropriate screening protections to ensure that any personal medical information volunteered or inadvertently provided is properly protected from disclosure and maintained separately from the employee’s personnel file. See *id.*

□ **Balancing Occupational Safety and Health Obligations.** We know airborne transmission of COVID-19 is a deadly or serious hazard. The federal Occupational Safety and Health Administration (OSHA) places a duty on employers to protect employees from workplace infections and has issued guidance related to personal protective equipment and other preventative efforts. But OSHA has not yet advised vaccine requirements specifically. See <https://www.osha.gov/coronavirus/standards>. It is, however, actively encouraging its own personnel to be vaccinated. See <https://www.osha.gov/memos/2020-05-19/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>.

Employers should be aware that the federal Occupational Safety and Health Act of 1970 may also afford whistleblower protections to employees who refuse a vaccine based on good-faith concerns that the vaccine may pose a real danger to their health, based on a medical condition and based on prior guidance related to vaccination generally. See <https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09>. It may well be that subsequent guidance from OSHA will offer additional clarity here, but for now this tension continues to require careful, thoughtful deliberation before proceeding.

□ **Labor-Related Limitations.** Employers with union-represented work forces should review their collective bargaining agreements to determine whether there are any terms that may directly or indirectly address a vaccine requirement. If a contract term were to restrict an employer from imposing a vaccine requirement, then that employer would need agreement from the union to require a vaccine.

More likely, however, a collective bargaining agreement will not address the subject of a vaccine requirement. In that event, we would expect that a vaccine requirement is a mandatory subject of bargaining or will have impacts that are mandatory for bargaining. In either case, an employer should give notice to the union (not just employees) that the employer is considering a vaccine requirement, and be prepared to bargain upon demand to bargain from the union. Before implementing a vaccine requirement, the employer must generally bargain to agreement or impasse.

If no agreement is reached, limited exceptions of business necessity or emergency might apply, but those are narrow and should not be invoked without a full legal and practical analysis. Finally, because labor laws protect certain concerted activities of employees, and if employees take joint action concerning employment-vaccination policies, employers must be careful before taking action because of potential unfair labor practice claims.

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□ **Additional State and Local Laws Constraints.** As of publication, Alaska, California, Oregon, and Washington are all indicating that there will be no state-mandated vaccine requirement. However, most states have equivalents of the federal discrimination laws, occupational health and safety laws, and wage and hour laws discussed generally above, and often with different or heightened protections that must be considered before proceeding with a mandate.

For example, under Oregon law, certain health care workers, firefighters, and law enforcement, corrections, or probation officers may not be subject to a vaccine mandate as a condition of employment, unless immunization is required by law, rule, or regulation. See ORS 433.416(3).

And in Washington State, there are already indications that what is being characterized as “vaccine discrimination” bills that could limit or potentially prevent such mandates may be proposed in the 2021 legislative session. Of course, whether that occurs and whether it gets any traction if it does, remains to be seen.

□ **Wage and Hour Compliance.** If the vaccine is not administered on site during regular working hours, employers need to consider whether they are obligated to compensate employees for: (a) the employees’ time spent getting the vaccine (which can include a post-vaccination observation period), and (b) the costs associated with the COVID-19 vaccine, if any (if not fully health-insurance funded). Given that wage and hour considerations center primarily on whether the task at issue was “work related” and not voluntary, it would be equally important to ensure that any workplace policy related to vaccination is abundantly clear as to whether the expectation is mandatory and therefore compensable, or merely encouraged and entirely voluntary, to help ensure compliance and avoid disputes.

□ **Workers’ Compensation/Insurance Coverage.** Employers should review their workers’ compensation and other applicable insurance policies to confirm coverage and identify any relevant limitations. For example, would adverse reactions to vaccines be covered? If so, would the vaccine need be administered at the employment site, during work hours, or satisfy any other requirements in order to preserve coverage?

□ **Reputational and Employee-Relations Concerns.** Certainly, customer preference and community perceptions may weigh heavily on the side of ensuring that the entire workforce is vaccinated as soon as possible. However, adverse reaction(s) to a mandatory COVID-19 vaccine or employee opposition to such a mandate, even in the absence of any adverse reactions, can easily spread outside the organization’s walls, onto social media, and into the court of public opinion.<sup>3</sup> Moreover, if a significant portion of a workforce refuses to comply with the mandatory vaccine policy, then an employer may find itself between the proverbial “rock and a hard place”—sticking to its stated policy and excluding employees who refuse to be vaccinated for non-legally-protected reasons or deviating from the policy for certain employees who object, which can both undermine the legitimacy of the policy itself and open the door to possible claims. Perhaps worse yet, the business may find itself unable to operate without significant additional recruitment and onboarding efforts.

At the same time, an employer with a successful and safe mandatory COVID-19 vaccine program could receive positive feedback and praise from its workforce and (potentially) the public for its efforts to eradicate the virus and end the COVID-19 pandemic. Employers should carefully weigh potential impacts and employee-relations considerations applicable to their operations, and be prepared with messaging accordingly.

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Of course, regardless of which approach is taken now, it is important that all employers stay informed and remain equipped to quickly adjust, based on continuing and evolving guidance and data on this issue.

We hope that this snapshot of the key considerations and potential takeaways that we have outlined above is helpful to employers as they navigate these challenging issues. As always, employers should call on us if they have questions or need assistance with evaluating their approach to vaccination and implementing related policies and practices.

*The content of this alert is provided for general information purposes only. It should not be considered legal advice or used as a substitute for consulting an attorney for legal advice. Readers are encouraged to check out the Miller Nash Graham & Dunn LLP [COVID-19 landing page](#) in particular for additional resources.*

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<sup>1</sup> The most recent film in the Jurassic Park franchise, “Jurassic World: Dominion,” shows what it takes to resume operations during the COVID-19 pandemic. In an interview with Deadline, the filmmakers revealed just what it took to pull off the long-delayed completion to the first studio movie to resume production during the COVID-19 pandemic: **40,000 COVID-19 tests, \$6 \$8 million spent on protocols alone, and a cast and crew creating a “bubble” in a United Kingdom hotel.** Andreas Wiseman, ‘Jurassic World: Dominion’ Wraps Unprecedented Shoot After 18 Months, 40,000 COVID Tests & Millions On Protocols; Colin Trevorrow & Donna Langley On The “Emotional” Journey, Deadline, Nov. 7, 2020, 6:53 a.m., <https://deadline.com/2020/11/jurassic-world-chris-pratt-bryce-dallas-howard-universal-covid-tests-wrap-1234610291/>.

<sup>2</sup> See Centers for Disease Control and Prevention, *Promoting Vaccination in the Workplace*, <https://www.cdc.gov/flu/business/promoting-vaccines-workplace.htm>.

<sup>3</sup> See Jacqueline Howard, *2 Alaska health care workers suffer reactions to Covid-19 vaccine*, CNN Health (Dec. 17, 2020), <https://edition.cnn.com/2020/12/16/health/alaska-allergic-reaction-coronavirus-pfizer-vaccine/index.html> (“Two workers at an Alaska hospital suffered allergic reactions after receiving Pfizer’s Covid-19 vaccine this week, and one was kept for observation for at least two nights, hospital representatives said.”).

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