

What Employers Can Do If Workers Refuse a COVID-19 Vaccination

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December 18, 2020

As COVID-19 vaccines become available, many employers are asking if they can require employees to get vaccinated, and what they can do if workers refuse. The Equal Employment Opportunity Commission (EEOC) weighed in Dec. 16 with new guidance that answers some workplace vaccination questions (<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>).

Employers may encourage or possibly require (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/pages/coronavirus-mandatory-vaccinations.aspx) COVID-19 vaccinations, but policies must comply with the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964 (Title VII) and other workplace laws, according to the EEOC.

SHRM RESOURCE SPOTLIGHT

COVID-19 Vaccination Resources (www.shrm.org/hr-today/news/hr-news/Pages/COVID-19-Vaccination-Resources.aspx)

"An employee with a religious objection or a disability may need to be excused from the mandate or otherwise accommodated," noted John Lomax, an attorney with Snell & Wilmer in Phoenix. "Additionally, if an objecting employee is a union-represented employee, the employer may need to bargain and reach an agreement with the union before mandating vaccines."

Disability Accommodation

"If an employee refuses to obtain a vaccine, an employer needs to evaluate the risk that objection poses, particularly if an employer is mandating that employees receive a COVID-19 vaccine," Lomax said.

Under the ADA, an employer can have a workplace policy that includes "a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace."

If a vaccination requirement screens out a worker with a disability, however, the employer must show that unvaccinated employees would pose a "direct threat" due to a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."

The EEOC said employers should evaluate four factors to determine whether a direct threat exists:

- The duration of the risk.
- The nature and severity of the potential harm.
- The likelihood that the potential harm will occur.
- The imminence of the potential harm.

If an employee who cannot be vaccinated poses a direct threat to the workplace, the employer must consider whether a reasonable accommodation can be made, such as allowing the employee to work remotely or take a leave of absence.

"Managers and supervisors responsible for communicating with employees about compliance with the employer's vaccination requirement should know how to recognize an accommodation request from an employee with a disability and know to whom the request should be referred for consideration," the EEOC said.

Employers and employees should work together to determine whether a reasonable accommodation can be made. Helene Hechtkopf, an attorney with Hoguet Newman Regal & Kenney in New York City, said employers should evaluate:

- The employee's job functions.
- Whether there is an alternative job that the employee could do that would make vaccination less critical.
- How important it is to the employer's operations that the employee be vaccinated.

Religious Accommodation

Title VII requires an employer to accommodate an employee's sincerely held religious belief, practice or observance, unless it would cause an undue hardship on the business. Courts have said that an "undue hardship" is created by an accommodation that has more than a "de minimis," or very small, cost or burden on the employer.

The definition of religion is broad and protects religious beliefs and practices that may be unfamiliar to the employer. Therefore, the employer "should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief," according to the EEOC. "If, however, an employee requests a religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice or observance, the employer would be justified in requesting additional supporting information."

"If an employee cannot get vaccinated because of a disability or sincerely held religious belief, and there is no reasonable accommodation possible, an employer could exclude the employee from physically entering the workplace," said Johnny C. Taylor, Jr., SHRM-SCP, the Society for Human Resource Management's president and chief executive officer. "But this doesn't mean an individual can be automatically terminated. Employers will need to determine if any other rights apply under the EEO laws or other federal, state and local authorities."

Encouraging Vaccinations

"If an employer plans to require its employees to get a COVID-19 vaccine, it should develop a written policy," Hechtkopf recommended. For employees who refuse to be vaccinated, she said, the employer needs to find out why.

In addition to legally protected reasons, employees may have general objections to receiving a COVID-19 vaccination that do not require a reasonable accommodation. "Employers considering mandating vaccines should give very serious consideration to this issue," said Brett Coburn, an attorney with Alston & Bird in Atlanta. If a significant portion of the workforce refuses to comply, the employer will be put in the very difficult position of either adhering to the mandate and terminating all of these employees, or deviating from the mandate for certain employees, which Coburn said can increase the risk of discrimination claims.

"Rather than implementing mandates that could lead to such difficult decisions, employers may wish to focus on steps they can take to encourage and incentivize employees to get vaccinated," he said. For example, employers may want to:

- Develop vaccination education campaigns.
- Make obtaining the vaccine as easy as possible for employees.
- Cover any costs that might be associated with getting the vaccine.

- Provide incentives to employees who get vaccinated.
- Provide paid time off for employees to get the vaccine and recover from any potential side effects.

Kevin Troutman, an attorney with Fisher Phillips in Houston, also suggested offering incentives before adopting a hardline mandatory vaccination policy.

"Communicate clearly and often with employees and help them understand how vaccinations will make for a safer workplace," he said.

"Lead by example and ensure that management takes the vaccines first."

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