

Can Employers Require Workers to Take a COVID-19 Vaccine?

The largest vaccination campaign in U.S. history recently got underway when Pfizer's COVID-19 Vaccine received emergency use authorization from the Food and Drug Administration. As of December 14, frontline healthcare workers began being inoculated against the coronavirus. And on December 18, the FDA issued an emergency use authorization for Moderna's COVID-19 Vaccine. Though not entirely clear how long the vaccination process will take, the tension appears appreciable between those that want to take a COVID-19 vaccine as soon as possible versus those that for a variety of reasons do not want to take the vaccine.

This tension leads employers to wonder if they can or should implement a mandatory vaccination policy. Compulsory vaccination has a long history in the United States. For example, state and local vaccination requirements for students are important tools for maintaining high vaccination coverage rates, and in turn, lower rates of vaccine-preventable diseases, according to the Centers for Disease Control and Prevention. And in 1905, the United States Supreme Court upheld a local ordinance that required all adults to get vaccinated against small pox. See *Jacobson v. Massachusetts*, 197 U. S. 11 (1905).

But can employers follow suit by requiring that their employees take a vaccine? The general rule in the United States is that employment is "at will", which means that your employer can set the working conditions and require vaccinations of its staff. The most significant exceptions are provided by Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act. These federal laws require an employer to provide accommodations for individuals with disabilities and for those with religious objections to vaccinations.

Notably, employers also have a responsibility to provide a workplace free from serious recognized hazards and the Occupational Safety and Health Administration encourages employers to adopt a safety and health program that includes interventions that can substantially reduce the number and severity of workplace injuries and illnesses. <https://www.osha.gov/workers/employer-responsibilities>.

In light of this guidance, even if an employer can mandate that its workforce get vaccinated, should it? Aside from certain essential workers, like those in the healthcare industry, factories or food production plants, most employers will likely opt to encourage their employees to get vaccinated, rather than making it a workplace mandate.

General Tips for Employers

- Employers should review the EEOC's December 16, 2020 update to its publication, "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," which includes a new section providing information to employers and employees about how a COVID-19 vaccination interacts with the legal requirements of the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964, and the Genetic Information Nondiscrimination Act (GINA). Read more at: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term.
- Employers should evaluate whether a voluntary versus mandatory vaccination program would be sufficient to protect its employees and its customers.
- Employers should keep abreast of guidance from the CDC, OSHA, the EEOC and other federal, state and local authorities regarding the COVID-19 pandemic and vaccinations.
- If an employer chooses to mandate vaccination as a job requirement, it should document the factors that went into the decision.
- If a mandatory vaccination policy is implemented, then it must include exceptions for employees with medical or religious objections to the vaccination.
- Human resources personnel and supervisors required to enforce the mandate should be trained to respond to and document all requests for accommodations and on how to engage in an interactive dialogue with employees who seek accommodations.
- Even where vaccination is mandated, employers should strongly consider continuing remote work or physical distancing, hand sanitation and facial coverings as effective added measures for maintaining a safe work environment with consideration of the public health climate.

This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Galloway and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions.

Doris Bobadilla, Esq.

Offices: Mandeville, LA; New Orleans, LA; Gulfport, MS, Ft. Lauderdale, FL
dbobadilla@gallowaylawfirm.com | 985-674-6680

Autumn George, Esq., CPP

Office: Tampa, FL
ageorge@gallowaylawfirm.com | 813-977-1200

Wendell Hall, Esq.

Office: Mandeville, LA
whall@gallowaylawfirm.com | 985-674-6680

David Burr, Esq.

Office: Tampa, FL
dburr@gallowaylawfirm.com | 813-977-1200