

COVID-19 Vaccines and the Workplace: Expectations and Next Steps for Municipal Employers

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Agenda

- What is the status of vaccination?
- What does emergency use authorization mean?
- Can employers mandate vaccination?
- Should employers mandate vaccination?
- What does the EEOC say?
- What if an employee refuses?
- Who should vaccinate employees?

Status

- Currently 2 vaccines available for use in the U.S.:
 - Pfizer/BioNTech
 - Moderna
- Both use mRNA technology
- Both are available under Emergency Use Authorization (“EUA”)



What is EUA?

- FDA mechanism to make available medical interventions that are not yet approved on an emergency basis during a public health crisis
- Must be no other available alternative
- Certain safety criteria as determined by statute and regulation that must be met
 - Adequate manufacturing information to ensure quality and consistency
 - Potential benefits outweigh known and potential risks
- Requires that anyone receiving the vaccine be provided informed consent

Laws Implicated by Vaccination

- Title VII (religion)
- ADA (disability)
- OSHA (workplace safety)
- GINA (genetic information)
- CFEPA (religion, disability)
- HIPAA (privacy of medical information)

Privacy?????

Can Employers Mandate Vaccination?

The simple answer is YES. However, the question is whether they should.

Factors to be considered:

- Employee morale
- Employee's position
- Who is administering the vaccine
- Supply availability
- Employees who refuse
- Providing accommodations

EEOC Weighs In – Medical Examination

- “Medical examination” includes only those examinations seeking medical information about an employee
- Vaccination itself is not a “medical examination”
- Asking employee for proof of vaccination is not a “medical examination”
 - Subsequent inquires may be, such as asking why employee was not vaccinated

EEOC Weighs In – Medical Examination

- Prescreening questions may qualify as a “medical examination”
 - Prescreening questions are required under EUA
- Must be “job related and consistent with business necessity”
 - Reasonable belief that employee who are not vaccinated pose a direct threat to the health and safety of him/herself and/or others
- Two scenarios where this does not apply:
 1. Vaccination is voluntary
 2. Vaccination is done by third party that does not have contract with employer

EEOC Weighs In – Reasonable Accommodations

- Must be made available on the basis of both disability and religion
- Is it an unvaccinated employee a “direct threat”?



EEOC Weighs In – Direct Threat

1. Duration of the risk
2. Nature and severity of the potential harm
3. Likelihood that the potential harm will occur
4. Imminence of the potential harm

EEOC Weighs In – Undue Hardship

- If an employee poses a direct threat, employer must engage in interactive process to determine if there is a reasonable accommodation.
 - May include WFH
 - May include leave of absence
- Only if it would be an undue hardship to provide an accommodation may an employer exclude an unvaccinated employee from the workplace.

EEOC Weighs In - Religion

Must have a sincerely held religious belief

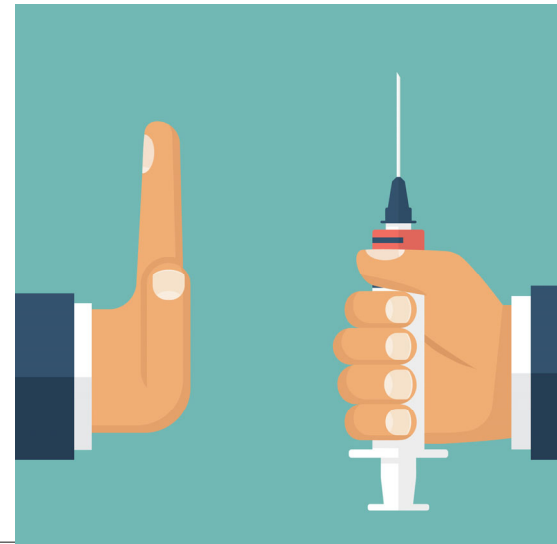


EEOC Weighs In – Genetic Information

- GINA prohibits an employer or healthcare provider employed by the employer from asking information about family medical history or other genetic-related inquires
- Prescreening inquiries asking about family medical history implicates GINA
- Employer who mandate vaccination by relying on employees to get it when available by his/her own healthcare provider will not implicate GINA

What If An employee Refuses?

- If voluntary: may not terminate employee or retaliate for failing to vaccinate.
- If mandatory: may terminate if refusal is not related to a disability/religious belief, or if related to a disability/religious belief and accommodation would be an undue hardship.



Who should administer a mandatory vaccine?

- Three options:
 1. Employer's own healthcare professionals
 2. Third party contracted by employer (such as occupational health)
 3. Employee's own healthcare provider or vaccination site

#3 is the lowest risk

What about a school nurse or other healthcare provider we employ?

- May have your own employee administer vaccine to employees.
- Triggers multiple laws:
 - Title VII
 - ADA
 - GINA
 - HIPAA
 - Privacy concerns

So, should we mandate vaccination?

- Consider employee morale.
- Consider having employees secure vaccine on their own.
- Consider ways of limiting health-related information in your possession.
- Consider whether having an unvaccinated employee in the workplace would be a direct threat.
- Consider what accommodations can be provided to employees who cannot be vaccinated.

What are alternatives?

- Education
- Access
- Time off
- Incentives?



QUESTIONS?

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