

Employers React to Workers Who Refuse Vaccination as COVID-19 Cases Rise

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August 4, 2021

[This article has been updated]

As mandatory COVID-19 vaccines become more widespread, many employers are asking what they can do if workers refuse. Some employers are firing workers who won't take the vaccine and others are requiring unvaccinated employees to submit to weekly testing and take other safety precautions.

The Equal Employment Opportunity Commission (EEOC) has weighed in with 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>). For example, the agency said that federal anti-discrimination laws don't prohibit employers from requiring all employees who physically enter the workplace to be vaccinated for COVID-19. Employers that encourage or require vaccinations, however, must comply with the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964 and other workplace laws, according to the EEOC.

"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.

A vaccination mandate should be job-related and consistent with business necessity. 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 such a threat. The EEOC defines a "direct threat" as a "significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation."

The agency 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.

FEATURED RESOURCE HUB PAGE



COVID-19 Vaccination Resources

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

Feedback

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. "However, if an employee requests a religious accommodation, and an employer is aware of facts that provide 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."

Terminations and Heightened Safety Measures

Many companies, including some large employers (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/Disney-Walmart-More-Companies-Require-COVID-19-Vaccination.aspx), are implementing vaccine mandates, since the vaccination rate has stalled, and COVID-19 cases have spiked due to the Delta variant. In mid-June, the U.S. Centers for Disease Control and Prevention (CDC) reported an average (https://covid.cdc.gov/covid-data-tracker/#trends_dailytrendscases) of about 12,000 new COVID-19 cases each day, but the rate recently surpassed 60,000 a day on average. "An increase in the number of cases will put more strain on health care resources, lead to more hospitalizations and potentially more deaths," according to the CDC. The agency said that vaccines are the best protection against variants.

In response to the uptick in cases, the federal government and some state and local governments also are requiring certain public employees (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/Worker-Vaccination-and-Testing.aspx), as well as those that work in health care and other high-risk settings, to get inoculated. Rules vary, but many directives ask employees to show vaccination proof or submit to weekly COVID-19 testing, wear masks, and keep physically distant from other workers and visitors.

[Does your organization have a vaccination strategy? Take the quiz. (<https://shrm.org/ResourcesAndTools/tools-and-samples/quiz/Pages/Quiz-Does-Your-Organization-Have-a-Vaccination-Strategy.aspx>)]

Some organizations are firing employees who don't comply with a vaccine mandate. A federal judge recently sided with a large hospital system that chose to fire employees (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/unvaccinated-workers-resignations-terminations.aspx) who refused the shot. The lead plaintiff who challenged the policy "is refusing to accept inoculation that, in the hospital's judgment, will make it safer for [workers and patients]," the judge said.

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 may 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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