

COVID-19 Vaccinations Have Begun: What Every Employer Should Know at This Time

December 17, 2020 | by Andrew Berns

This week, Pfizer obtained Emergency Use Authorization from the U.S. Food & Drug Administration (FDA) for its COVID-19 vaccination, and distribution of the vaccine has begun throughout the country. While the first doses are for frontline healthcare workers and long-term care residents at skilled nursing and assisted living facilities, the next dose will become more widely available in 2021. Employers need to be prepared for the issues that will arise relative to their employees and the COVID-19 vaccine. The EEOC has also recently issued guidance, which may be found on their website entitled [“What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws”](#).

As an employer, can I require employees to be vaccinated?

In granting Emergency Use Authorization to Pfizer to distribute its vaccine, the FDA essentially labeled the vaccine as may be effective based on initial clinical research but of course the supply is not immediately going to meet the demand around the country. As such, Pfizer and other pharmaceutical companies will be developing more vaccinations for FDA approval. Throughout the pandemic, the Equal Employment Opportunity Commission (EEOC) has characterized COVID-19 as a “direct threat” which is defined as 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. If an individual with a disability poses a direct threat despite reasonable accommodation, he or she is not protected by the nondiscrimination provisions of the ADA. With the vaccine in distribution, it is possible for employers to require employees to be vaccinated in order to work or to return to work if the failure to vaccinate will result in a direct threat to other employees. As the Pfizer vaccine has only received Emergency Use Authorization, employers are advised to wait until the FDA expands authorization to its standard approval. The EEOC recently issued guidance indicating that employers may mandate the vaccine, subject to the exceptions below.

As an employer, if I do not mandate the COVID-19 vaccine, what is the risk of liability?

By not requiring a vaccination some might believe that the employer is failing to provide a safe working environment under the Occupational Safety and Health Act, however, there is no precedent for such a result. If your business is in healthcare or senior housing, there may be liability if the vaccination is not mandated.

Are there any exceptions where employees may not be required to vaccinate?

The Equal Employment Opportunity Commission has stated that employees may be exempt from a mandatory vaccine if the employee has a covered disability under the Americans with Disabilities Act (ADA) that prevents him or her from taking the vaccine. Under the ADA, employers must provide a reasonable accommodation to any employee with a covered disability that prevents them from receiving the vaccine. Employers are not required to provide a reasonable accommodation if none is available, if the reasonable accommodation would present an undue hardship to the employer, or if the employee would pose a direct threat to the health or safety of others.

In addition, an employee may be excused from the vaccine requirement under the religious accommodation provision of Title VII of the Civil Rights Act of 1964. Employees must notify employers of a sincerely held religious beliefs that prevent them from receiving the vaccine.

Even if I can mandate the COVID-19 vaccine, should we mandate it for employees to return to the office?

Although employers will likely be permitted to mandate the vaccine, that does not necessarily mean an employer should. As discussed above, the vaccine is in its early stages. Until the vaccine is more widely accepted by the FDA and by society at large, employers that try to mandate the vaccine for their employees may potentially face legal challenges. Another significant aspect of this issue involves the employment agreements and/or policies as those will need to be reviewed and amended to account for the vaccination so that enforcement is uniform.

Should the business cover the cost of vaccination?

The cost of the vaccine itself is covered by the federal government. However, there may be administrative fees or other costs to administer the vaccine. If there are costs that are not covered by insurance, employers should strongly consider covering any costs, particularly if mandated under the company's employment policies. Employers are also strongly recommended to pay employees for the time to travel to and from the vaccination location.

What are my options if an employee refuses to be vaccinated?

New Jersey is an at-will state, meaning that employers can terminate employees for any non-discriminatory and non-retaliatory reason. Employers may terminate an employee for his or her refusal to fulfill the requirements of his or her position and/or failure to be present at work.

However, if an employee has a recognized disability under the New Jersey Law Against Discrimination or ADA which would impact his or her ability to return to work in an environment with unvaccinated co-workers, reasonable accommodations shall be required to the employee. One of these accommodations may include remote work. Current applicable Executive Orders may require remote work, where practicable.

The COVID-19 vaccination is a starting point in stopping the pandemic, but it is uncharted territory for employers. Employers can expect further guidance from New Jersey and the EEOC. This is an evolving area of the law with many variables, and as such, prior to implementing any COVID-19 vaccination policies, employers should consult with counsel.