

## It's complicated: Lawyers weigh in on COVID-19 vaccination legalities in workplace

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*Chris Thrutchley*

Countless Americans have been fully vaccinated against COVID-19, and millions more are awaiting shots in the arm aimed at curbing the country's health crisis.

But as the doses become more accessible, companies are asking whether they can require employees to be immunized. The answer is yes, according to some Oklahoma attorneys.

But there are caveats.

The Equal Employment Opportunity Commission (EEOC) addressed those in

guidance published last month. Employers may encourage or possibly require 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.

Also, an employer can't take unilateral action impacting unionized workers without first bargaining in good faith.

The EEOC guidance confirmed that "employers can require vaccination before returning to work," said Chris Thrutchley, co-chair of the Labor and Employment Law Practice Group at the GableGotwals law firm in Tulsa. "But there are two potential exceptions. One is under the ADA, which would be an accommodation for anybody who believes they have a disability that prevents them from being able to take the vaccine.

"So, an employer then would have an obligation to one, confirm whether the person does have a disability covered by the ADA that would obligate them to explore reasonable accommodations. And then, two, to determine whether there are reasonable accommodations."

Some business sectors have required immunizations for other diseases in the past, he said.

“Historically, health care providers regularly required their employees to get flu vaccines, for instance,” he said. “That’s really nothing new in the health care space. They would recognize exceptions for a disability or religious accommodation. Then, if you wouldn’t get the vaccine you would have to wear a mask. That was the primary accommodation.”

A wrinkle in the EEOC instruction, Thrutchley said, is an exception to the exception. 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.”

And the EEOC guidance states that COVID-19 does pose a direct threat.

“So, basically what that does for the employer is that it adds another step to the analysis,” Thrutchley said.

On whether a direct threat exists, the employer should consider four factors: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm.

“One possible option would be just allow them to continue to work remotely if it’s somebody who’s in a position that’s able to remote work,” Thrutchley said.

Employers also should consider, another attorney said, that the COVID-19 vaccinations are being administered pursuant to an Emergency Use Authorization, a mechanism to facilitate the availability and use of medical countermeasures, including vaccines, during public health emergencies.

According to Oklahoma lawyer Adam Childers, a section of the federal Food, Drug and Cosmetic Act spells out rules for medical products used under an EUA.

“One of the requirements, as long as the EUA is in place, is that anyone who wants to require that the product be administered, whoever you give it to has to be informed of the option that they can accept or refuse the product and what the consequences are of refusing administration of the product and other alternatives to the product that is available,” said Childers, a shareholder at Crowe & Dunlevy and co-chair of the firm’s labor and employment section.

“What that really means, I believe, and a lot of folks are coming around to this view, is that the (U.S.) Secretary of HHS (Health and Human Services) can require that as long as these drugs are under the EUA, individuals have to be told in writing that they can refuse to take the product. That effectively would mean that you really can’t have a mandatory vaccination program because you would have to at least advise them that while this is under the EUA, they can refuse to take it.”

The Virginia-based Society for Human Resource Management conducted a study in December about companies and COVID-19 vaccinations.

In it, 66% of employers said that workers’ being vaccination is very or somewhat necessary for business continuity and 61% intend to encourage but not require the vaccine.

“Until there is enough supply to meet demand and until we know that the EUA is removed, I don’t know if you can mandate that program at an employer level,” Childers said.

Thrutchley believes companies should keep their pulse on the latest developments, update practices to meet their organization's specific needs and learn how to balance the risks, "the risk on one hand of not requiring employees to get the vaccine. What if they don't require it (a vaccination), somebody contracts (COVID-19), maybe even dies?"

"Are we going to face a wrongful death suit because it's encouraged by authorities but not required, so that sets a standard of care now that we should have followed but didn't? Is that going to be used against us to say we negligently failed to protect our workers."

"While you hear a lot of talk about COVID-related litigation, we haven't really seen it reach the shores of Oklahoma from the East and the West, yet ... At the end of the day, you are going to have some percentage of dispute that is just a natural cost of doing business, frankly."

[https://tulsaworld.com/business/local/its-complicated-lawyers-weigh-in-on-covid-19-vaccination-legalities-in-workplace/article\\_986b6c5c-51c2-11eb-8d36-6753d59663c9.html](https://tulsaworld.com/business/local/its-complicated-lawyers-weigh-in-on-covid-19-vaccination-legalities-in-workplace/article_986b6c5c-51c2-11eb-8d36-6753d59663c9.html)