



# COVID-19 FAQ: CAN EMPLOYERS REQUIRE A VACCINE?

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**After almost a year of fighting COVID-19, relief is on the horizon. The FDA has given Pfizer's and Moderna's COVID-19 vaccines approval for emergency use and formally recommended the final authorization of the vaccines. This step now paves the way for final FDA approval. With publically available vaccines, employers will soon face a new COVID-19 question: should we require the vaccine for our employees?**

## **Can Employers Require the Vaccine?**

Generally, yes, an employer may require employees to be vaccinated. In fact, mandatory vaccine programs in the workplace are nothing new. The EEOC recently issued direct guidance that makes clear that employers are permitted to require vaccination. [\[1\]](#) However, the EEOC addresses two exceptions.

## **What are the Exceptions?**

In mandating vaccinations in the workplace, employers must consider and potentially make reasonable accommodations for: (1) an employee's covered disability; and (2) an employee's sincerely held religious belief.

*Disability under the Americans with Disabilities Act ("ADA"):* An employee with a covered disability may refuse to take a mandatory vaccine and request a reasonable accommodation. Upon request for an accommodation, the ADA requires an employer to engage in an "interactive process" to determine if a reasonable accommodation is achievable. Under the ADA, an employer can deny an employee's request for a reasonable accommodation if the accommodation poses "undue hardship."

Undue hardship under the ADA imposes a difficult burden for an employer to prove because the employer must show that the requested accommodation is unduly expensive, substantially disruptive of the employer's business or fundamentally alters the operation of the business.

*Religious beliefs under Title VII:* An employee with a sincerely held religious belief may refuse to take a mandatory vaccine and request a reasonable accommodation. It is important to note that personal, political or moral objections to a vaccine **are not** protected by Title VII. Similar to a request under the ADA, an employer must first open a dialogue with the employee to determine if a reasonable accommodation is feasible. Under Title VII, an employer can deny an employee's accommodation request if the accommodation poses an "undue hardship."

Unlike the analysis under the ADA, a religious accommodation constitutes an undue hardship even if it imposes a minimal cost or burden. Nonetheless, an employer must consider what a reasonable accommodation would be for an employee who refuses to be vaccinated for religious reasons.

### **What Should Employers do a When an Employee Refuses the Vaccine?**

#### *A. Refusal Based on Disability.*

The employer should determine whether the employee would be a *direct threat* to the health and safety of others in the workplace.

If a safety-based qualification standard, such as a vaccination requirement, screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee would pose a direct threat due to 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." 29 C.F.R. 1630.2(r). The assessment must be made for each individual refusing the vaccine on account of a disability and four factors should be considered:

1. the duration of the risk;
2. the nature and severity of the potential harm;
3. the likelihood that the potential harm will occur; and
4. the imminence of the potential harm.

A conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite.

There will not be a one-size-fits-all test for an employer to make a determination that an unvaccinated employee will pose a direct threat to the health or safety of others in the workplace. A lot will depend on the nature of the employer's business and the job duties of the employee. For instance, a hospital or assisted living facility will have an easier time proving that an unvaccinated employee in constant contact with patients or residents is a direct threat to others in the workplace than a construction

company would have proving that an unvaccinated tower crane operator is a direct threat to others at the construction site where the operator is working.

If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any adverse action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat. Potential accommodations could include wearing a mask and social distancing, modifications of job duties, alternative work areas or telework.

#### *B. Refusal Based on a Religious belief*

The employer must explore with employee what would be a reasonable accommodation. If the cost to the employer of providing an accommodation imposes more than a minimal cost or burden to the employer, the employer can enforce the vaccination requirement. In this circumstance, a reasonable accommodation may include the employee continuing to wear a mask, social distancing or continuing work from home (if possible.)

### **Next Steps for Employers**

Each business is different and will need to adopt its own requirement or plan for vaccinations. The pandemic has already taken a significant economic, physical and mental toll on businesses and their employees, and a business that goes forward with no plan or a poorly thought-out plan will likely continue that toll. The best employers are the ones who are willing to adapt to new circumstances that may be weeks or months away from reaching the average workforce. Bell Nunnally can help you devise and implement a plan that will allow you and your employees to smoothly return to pre-pandemic operations, profits and morale.

## Related Practices

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