

What Can Employers Do About Employees Who Refuse a Vaccine?

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After a seemingly endless wait, news of COVID vaccine distribution has business owners, government offices and school district administrators faced with a legal question they could not have foreseen at the beginning of 2020. Can we require employees to get a vaccine? The short answer is yes, but there are some exceptions to note, and potential pitfalls to avoid in dealing with employees who refuse a vaccine.

An employer can require employees get a vaccine, subject to religious exemptions (Title VII), and disability exemptions (ADA). At-will employees, who do not fit within Title VII or disability exemptions, can be fired for refusing to get a vaccine. The EEOC provides some guidance for employers to properly address exempt employees. Addressing the issue of flu shots, the EEOC has said:

An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him/her from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee sincerely held belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII (“more than de minimis cost” to the operation of the employer’s business, which is a lower standard than under the ADA).

<https://www.eeoc.gov/foia/eeoc-informal-discussion-letter-250>. An updated review of the EEOC’s stance on vaccines, specific to COVID, indicates that employers should “encourage” rather than “mandate” a vaccine. Of course, the use of the word “encourage” would apply to those employees who are refusing a vaccine based upon religious beliefs or practices – and not due to a disability or pre-existing medical condition.

Recently, the Centers for Disease Control (CDC) issued guidance recommending vaccination for critical industries, including health care. The CDC likely preferred to avoid using the word mandate or require, simply because vaccines are not yet available in the U.S., and the “enforcement” responsibility of a vaccine mandate would lie with employers. See “Roadmap to Implementing Pandemic Influenza Vaccination of Critical Workforce,” U.S. Department of Health and Human Services Centers for Disease Control. https://www.cdc.gov/flu/pandemic-resources/pdf/roadmap_panflu.pdf

In the healthcare industry, mandating vaccines is nothing new. For decades, hospitals, nursing homes and other healthcare provider employers have mandated flu shots for employees. These sorts of vaccine mandates have been challenged in Federal Court, and upheld as valid. Recently, the Eighth Circuit in *Hustvet v. Allina Health Sys.*, 910 F.3d 399 (8th Cir. 2018), upheld a healthcare system’s requirement that its employees immunize against rubella as a condition of employment.

The takeaway for employers is simply this: it is entirely permissible, and encouraged, to mandate a COVID vaccine for employees. Any employee who refuses can be fired unless the employee fits within an ADA exemption which the employer can reasonably accommodate, or the employee can provide proof of a belief, practice or religious observance that serves to excuse the refusal. This proof of a belief or practice must go beyond a generalized belief or unsubstantiated opinion that the vaccine will be harmful or will not be effective.

Does refusing a vaccine protect an employer from Workers’ Comp liability?

The short answer to this question is – likely, yes. But employers must bear in mind that Workers' Comp in PA is a bit tricky when it comes to liability waivers. The Workers' Comp Act does not allow an employer and employee to agree to terms of a claim waiver associated with any injury that occurs in the workplace. But an employer does have a valid basis for denial of an employee's Workers' Comp claim if/when the employer has proof that the employee's injury occurred as a result of "violation of a positive work order." If an employer directs an employee to do something, or not do something – i.e., operate a specific piece of machinery, perform a physical task that is beyond the scope of duties, etc. – and the employee is injured while performing that specific task – in "violation of the order" – the employee's Workers' Comp claim will be denied, and the denial will more than likely be upheld by a Workers' Comp Judge. There are dozens of appellate opinions (long before COVID) that support this principle; the application of the principle for a COVID claim will be the same.

"Positive work orders," for PA employers, can be in writing or verbal. For situations involving a COVID vaccine, we recommend the employer require the vaccine (barring ADA/religious exemption as explained above), and communicate the requirement clearly to the workforce. This is the first critical step in issuing the positive work order. If the vaccine is required by the employer, and an employee refuses the vaccine (is permitted to continue working) and gets COVID – and tries to blame a workplace exposure – the employee's WC claim for COVID would be denied, and the denial upheld by a Judge. In order to add an extra layer of protection, for the work order – the "vaccine requirement" can be restated by an employer representative – something simple such as, "You understand that refusing this vaccine makes you much more susceptible to contracting COVID, and if you contract COVID after refusing the vaccine, and file a claim for recovery of Workers' Comp benefits, the claim will be denied."

If the employer wishes to have a written record of the refusal, a simple statement, for the employee to sign, would be sufficient to protect the employer from Workers' Comp liability. We recommend something such as: *I understand my employer's requirement for all employees to get a COVID vaccine. I further understand that my refusal to get a COVID vaccine substantially increases the risk and likelihood that I may contract COVID. I understand that my refusal to get a COVID vaccine, as required by my employer, will result in a denial of Workers' Compensation Benefits associated with contracting COVID, and any claim related thereto.*

Final note: outside the limitations of Workers' Comp, it is important to note that any employer who allows a non-vaccinated employee to come to work, will have liability exposure for the spread of COVID to customers/visitors and vendors/contractors who may have contact with the employee and can prove the contact/exposure resulted in contracting the virus.

If you have any questions regarding vaccines for employees, or employer liability related to COVID, please contact us via email.

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