

# To Mandate or Not to Mandate COVID-19 Vaccinations - What Employers Should Know

Presented by:

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*And Do You Still Have A Choice?*



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# Biden Administration's September 9 Announcement

- OSHA is developing a rule that will require all employers with 100 or more employees:
  - ensure their workforce is fully vaccinated or
  - require any workers who remain unvaccinated to produce a negative test result on at least a weekly basis before coming to work
- This will impact over 80 million private sector employees
- We expect the ETS in the next few weeks



# Open Questions on the General ETS

- How quickly will employers have to comply?
- How will the 100 employee threshold be calculated?
- Who will have to pay for testing? Will the time be compensable for non-exempt employees?
- Will injunction actions be successful?



# Current Status of COVID-19 Vaccination in U.S.

- One vaccine with full FDA approval
  - Pfizer/BioNTech (95% effective in preventing symptomatic infection)
- Two vaccines approved under an emergency use authorization
  - Moderna (94%)
  - Johnson and Johnson (72%)
- 380 million doses administered
- 167 million fully vaccinated
  - Only 54.4% of total population
  - Only 63% of those eligible
  - 75.4% of adults have received at least one shot
- Pfizer may receive EUA for the 5-11 age group by end of October



# Does Emergency Use Status Preclude Mandating Vaccination?

**U.S. Department of Justice Says **No****

## **Whether Section 564 of the Food, Drug, and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization**

Section 564(e)(1)(A)(ii)(III) of the Food, Drug, and Cosmetic Act concerns only the provision of information to potential vaccine recipients and does not prohibit public or private entities from imposing vaccination requirements for a vaccine that is subject to an emergency use authorization.

July 6, 2021

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# EEOC Position on Vaccination

Federal EEO laws do not prohibit policies requiring all employees who physically enter a workplace to receive a COVID-19 vaccination provided the policies comply with the reasonable accommodation provisions of the ADA and Title VII





# Proof of Vaccination? Federal Law Allows Employers to Ask About It

- Honor system
- Peek at card
- Copy and save card
- Attestation
- ~~“HIPAA” does not apply~~
- Confidentiality
- Enforcement
- Contact tracing

COVID-19 Vaccination Record Card

Please keep this record card, which includes medical information about the vaccines you have received.  
Por favor, guarde esta tarjeta de registro, que incluye información médica de las vacunas que ha recibido.

First Name: Joan MI

Patient number (medical record or IIS record number)

	Name/Manufacturer	Date	Healthcare Professional or Clinic Site
COVID-19	<u>PFIZER</u>	<u>1/21/21</u> mm dd yy	<u>NYU-AP</u>
2 <sup>nd</sup> Dose COVID-19	<u>PFIZER</u>	<u>2/12/21</u> mm dd yy	<u>NYU</u> <u>K9</u>
Other		mm dd yy	
Other		mm dd yy	

# Only Montana Prohibits Mandates for Employees

- Employers are prohibited from refusing employment to a person or discriminating based on the person's vaccination status
- Limited exception excuses healthcare facilities from compliance with the non-discrimination law if doing so would result in a violation of regulations or guidance issued by the CDC or Centers for Medicare and Medicaid Services

Will Federal Law Preempt?



# A Judge Has Thrown Out A Lawsuit Brought By Hospital Workers Over A Vaccine Mandate

June 13, 2021 · 3:15 PM ET

EMINE YÜCEL



Courts have upheld vaccine mandates when challenged

BREAKING | Jul 19, 2021, 03:38pm EDT | 5,179 views

## College Can Mandate Covid-19 Vaccinations, Federal Judge Rules



**Kimberlee Speakman** Forbes Staff

Business

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# NLRA Considerations

- Absent contract language, vaccination (or regular testing) would be mandatory subject of bargaining
- Even with OSHA ETS, it gives options (vaccination and/or testing) so employers would have to bargain over how to implement


# Incentivizing: Positive Reinforcement

- Encouragement and incentives
  - One-time cash payment or gift cards
  - Paid time off for vaccination (or other extra PTO)
  - Rides to vaccination sites



*Will incentives become moot for employers subject to the upcoming OSHA ETS or Federal Contractor rules?*

# Negative Reinforcement

- Penalties for remaining unvaccinated
  - Higher insurance premiums
    - Consult a benefits attorney
  - Regular testing  May be required under the new ETS
  - Unpaid sick days
  - Demotion, transfer, schedule change
  - Seclusion
  - Exclusion from large meetings and events



# Legally-Required Accommodations:

Title VII requires covered employers to make reasonable accommodations for the **sincerely held religious beliefs** of employees or applicants if an accommodation will not impose more than a *de minimis* cost or burden on business operations

The ADA requires covered employers to make reasonable accommodations for the **disabilities** of employees

# The Accommodation Requirement

- If an employee's accommodation request is denied, an employee can file an EEOC Charge of Discrimination and then a civil suit
- If the employee establishes an entitlement to an accommodation that was denied, the employee can recover damages resulting from the failure to grant the accommodation, including back pay, front pay, emotional distress, and attorneys' fees





# The Steps to the Process – Religion

Does the person  
have a belief that is  
religious?

Is the belief  
sincerely held?

Does the belief  
conflict with a job  
requirement?

If the answer is “**no**” to any question →  
**no accommodation** is legally required

Can a reasonable accommodation be made to how the job is  
done to enable the employee to perform an essential function  
of the job, without creating a direct threat or undue hardship?

If the answer is “**yes**” to all questions → an accommodation is required

# What Is Religion, Anyway?

## EEOC Position

- Employers should **ordinarily assume** that an employee's request ... is based on a sincerely held religious belief ...”
- However, if ... 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



# What *Isn't* Religious?

- Political beliefs
- Philosophical beliefs
- Social beliefs
- Medical beliefs
- Concerns about FDA's Emergency Use Authorization (EUA) status
- Conspiracy theories
- Limited and confined beliefs



## Step 2: Is the Religious Belief Sincerely Held?

- Whether someone “sincerely holds” the belief comes down to credibility
- They **say** they hold the belief
- Are they **telling the truth** about sincerely holding the belief, or **is it a lie?**



## Step 2: Is the Religious Belief Sincerely Held?

- Common Sense Questions

- Did the employee previously have anti-vaccine views, and then later decide to couch those views as religious?
- Did the employee make Facebook posts about vaccines that are not related to religion?
- Did the employee go looking for a religion online to fit the beliefs?
- Ask about prior vaccinations (Why did you receive those vaccines, but not this one?)
- Is the belief based on inaccurate information? (Do you have documentation of that?)



## Step 3: Does the Belief Conflict With Vaccination?

- If a belief is religious and sincerely held, does it conflict with the job requirement?
- Example: if the employee professes an objection to wearing a face covering, but not to vaccination





## Step 4: What Is an Undue Hardship?

- Different standards under ADA and Title VII
- An accommodation is an “undue hardship” if it would impose more than a *de minimis* cost to the employer based on both economic and non-economic costs.
- What if the accommodation is merely to be unvaccinated?
- Would an alternative accommodation (e.g., safety measures) **eliminate** undue hardship?



UNDUE HARDSHIP

# What Is an Undue Hardship Under Title VII?

## EEOC Position

- “Examples of burdens on business that are more than minimal (or an ‘undue hardship’) include: violating a seniority system; causing a lack of necessary staffing; **jeopardizing security or health**; or costing the employer more than a minimal amount.”



### **What You Should Know: Workplace Religious Accommodation**

<https://www.eeoc.gov/laws/guidance/what-you-should-know-workplace-religious-accommodation>

# Documentation

- Forms memorializing the request for accommodation
- Emails to/from employees about the request
- Notes from interviews related to the request
- Printouts of any webpages related to the religion
- Printouts of any social media pages related to the employee's statements about vaccines
- Printouts of webpages that you relied on to research the employee's statements (CDC, FDA, news articles, etc.) – these may be gone later on!
- Documentation of conclusion



# Overall Considerations – Religion

- Should you make it a part of the process to provide counseling to employees from medical professionals about vaccination?
- Do you want to scrutinize whether the belief is sincerely held and religious, and deny accommodations on that basis?
- If an employee is entitled to an accommodation because the employee has a sincerely held religious belief, are you assessing undue hardship for that employee's particular position on a case-by-case basis?
- Are you assessing undue hardship such that you will be able to present specific facts in defense of the decision to deny an accommodation on that basis?

# The Steps to the Process – Disabilities

Does the person have a disability?

Does the disability conflict with receiving the vaccine?

If the answer is “no” to any question → **no accommodation** is legally required.

Can a reasonable accommodation be made to how the job is done to enable the employee to perform an essential function of the job, without creating a direct threat or undue hardship?

If the answer is “yes” to all questions → an accommodation is required

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# NOT Contraindications

- Pregnancy – but tread carefully!
- Allergies to oral medications (including the oral equivalent of an injectable medication)
- History of food, pet, insect, venom, environmental, latex, etc., allergies
- Family history of allergies
- Active TB or illness being evaluated as an active TB disease
- NOTE: COVID-19 vaccines do not contain latex, eggs, or gelatin



# Undue Hardship/Direct Threat

- Employers do not have to provide an accommodation if it would be an undue hardship
- The definition of undue hardship is higher under the ADA than under Title VII
- Accommodations are not required if the employee would pose a direct threat to health and safety

A hand holding a red marker is shown crossing out the word "DISABILITY" in a large, bold, sans-serif font. The word is written in black, and the red marker is drawn over it, creating a large 'X' that obscures the letters. The background is a light gray world map.

# Final Considerations

- If your organization requires employees to receive a COVID-19 vaccine, consider the degree to which your organization wants to take on the risk associated with denying accommodations
  - Do you want to review religiousness, sincerity, conflicts, or undue hardship?
- Create non-privileged documentation of the decisional process
- Assess and document undue hardship on a case-by-case basis

# Takeaways

- More and more employers are rolling out policies that require mandatory vaccination – and Biden’s announcement may further incentivize vaccination
- It’s legal (subject to a couple of exceptions)
- Should you implement?
- Are you ready for the accommodation process?



Stay tuned ...

## OSHA ETS

Expected in a few weeks

Likely to be litigated

## Federal Contractor Rule

To be published by  
September 24, then  
approved by OMB

Not all federal  
contractors covered



# QUESTIONS?

# Thank you!



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