

Employers Navigating COVID-19 Vaccinations in the Workplace

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COVID-19 vaccines are proving safe and effective, holding promise as a key to ending the pandemic. As the pace of COVID-19 vaccinations ramps up nationwide, employers want to know whether and how to ensure their employees timely receive the vaccine. This desire is complicated by a shifting vaccine landscape: public health guidance, vaccine availability, and state and local policies are changing rapidly. For example, in an emergency rule published Thursday, Governor Mike Parson authorized businesses to seek approval to have their workers moved to a higher priority tier for vaccinations. (.)

Employers have an interest both in protecting their workforce from COVID-19 exposure and in bringing workers back to work safely and swiftly. Vaccines can assist in meeting those interests. However, employees' rights under nondiscrimination laws must be considered when designing a vaccination policy.

Employers should also consider whether they'll administer vaccines on site or encourage their employees to be vaccinated off site.

Vaccine Requirements and Nondiscrimination Law

When vaccines are available, employers may legally require that employees be vaccinated, subject to certain exceptions. EEOC guidance holds that employers must accommodate employees who are exempt for disability, medical, or religious reasons.

An employer may still take steps to protect its workforce from unvaccinated, exempt employees. Four factors should be assessed in determining whether an exempt employee poses a "direct threat" to other employees: (1) duration of the risk, (2) nature and severity of the potential harm, (3) likelihood the potential harm will occur, and (4) imminence of the potential harm. In the event the direct threat cannot be reduced to an acceptable level, an employer can exclude the employee from entering the workplace. In lieu of terminating the employee, the employer should make efforts to find a reasonable accommodation, such as allowing the employee to work from home or offering leave under the FMLA or

employer time-off policies. Employers may also mandate personal protective measures such as face masks and social distancing.

Employers seeking to administer medical procedures such as vaccinations should bear in mind that medical examinations are subject to the Genetic Information Nondiscrimination Act (GINA), which prohibits genetic discrimination in employment. The EEOC has stated that administering a vaccine is not itself a medical examination, but prescreening questions may require disclosure of genetic information (such as family medical history) that would raise issues under GINA. Such questions may also implicate the Americans with Disabilities Act.

The Missouri Commission on Human Rights (MCHR) has not yet offered specific vaccine-related guidance to Missouri employers. However, the MCHR is likely to follow EEOC guidance.

On-Site vs. Off-Site Vaccinations

COVID-19 guidance will continue to change often as the vaccine distribution landscape evolves. Employers should regularly check federal, state, and local guidance for the latest updates. Those planning on-site vaccinations should prioritize the employees who receive the vaccine according to those guidelines. Those employers face the additional hurdle of securing vaccine doses, which are currently in high demand. If the employer is unable to procure enough doses to cover all its employees, it must navigate legal issues implicating age, disability, and genetic information.

Employers should also consider: (1) whether their planned COVID-19 vaccination program would be subject to collective bargaining agreements and (2) potential liability under workers' compensation statutes if an employee suffers an adverse event or injury from a vaccination.

Non-health care industry employers should carefully weigh whether they're equipped to overcome these logistical hurdles and legal issues before attempting to vaccinate employees on site. Ultimately, employers may find administering the vaccine themselves to be more challenging than it's worth. Employers may instead choose to contract out their vaccination programs to experienced, reputable third parties who will give the vaccine on site and relieve the employer from shouldering the burden of planning or directing the process.

Employers could also encourage employees to seek vaccines off site. For example, Dollar General offers employees four hours of paid leave to be vaccinated off site. In addition to providing paid time off, employers could provide vaccination education campaigns, cover costs associated with the vaccination, and provide other incentives to employees.

If you are seeking to navigate a workplace vaccination issue in Missouri or Illinois, please contact our Employment & Labor team of attorneys for advice about your specific needs.

Sources

1. "Missouri to Consider Requests from Companies Seeking Quicker Coronavirus Vaccinations," *STL Today* (Feb 12, 2021). (This article is available [here](#).)
2. "What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws," E.S. Equal Employment Opportunity Commission. (This article is available [here](#).)
3. "Should Employers Administer COVID-19 Vaccines?" The Society for Human Resource Management. (This article is available [here](#).)
4. "What Employers Can Do If Workers Refuse a COVID-19 Vaccination," The Society for Human Resource Management. (This article is available [here](#).)

Tags: COVID-19 Vaccinations, EEOC, Equal Employment Opportunity Commission, Genetic Information Nondiscrimination Act, GINA, MCHR, Missouri Commission on Human Rights