

## **Frequently Asked Questions about Vaccine Policies**

### **1. Is a company's vaccine policy a mandatory subject of bargaining?**

Yes. For at least ten years, the National Labor Relations Board has treated flu vaccine policies as mandatory subjects of bargaining. In addition to vaccine policies, other company policies meant to address risks associated with COVID-19 (like policies requiring workers and customers to wear masks in a grocery store) are also mandatory subjects of bargaining.

Companies must bargain over both the decision to create new policies, including vaccination or masking policies, and the effects of those decisions. Likely effects of a vaccination policy that a union might bargain include:

- payment for vaccines;
- transportation to get vaccines;
- the timeframe for getting vaccinated;
- time off to receive the vaccine;
- time off for adverse reactions (sickness) to vaccines; and
- consequences for employees who refuse vaccination.

### **2. Could a vaccine policy – or lack thereof – violate the collective bargaining agreement?**

Possibly. A union could argue that a mandatory vaccination policy is an unreasonable exercise of management rights. A union also could argue that a company's failure to require or track vaccinations violates its obligation to provide a healthy and safe workplace.

An arbitrator would likely consider the necessity of a vaccination policy, the presence or absence of a health and safety provision in the union's contract, past practice, and the company's attempts to accommodate workers who object.

Generally speaking, an arbitrator will consider a requirement to vaccinate under the threat of discipline, including termination, a significant change in employee working conditions. Arbitrators will likely view mandatory vaccination policies – or the lack thereof – with a high degree of skepticism and scrutiny.

### **3. Does the Americans with Disabilities Act allow a company to request proof of a worker's vaccination status?**

Yes, though the company must be careful. Requesting proof of a worker's vaccination status is not an unlawful disability-related inquiry within the meaning of the Americans with Disabilities Act. But the company should warn a worker not to provide medical information or information about family members when responding to a request for proof of vaccination status, as that may reveal information about a disability or about family genetic information. See *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (May 28, 2021).

The Americans with Disabilities Act does require that employers keep vaccination status and other employee medical information confidential, though employers may share that information with a limited number of others, including union representatives, for the purpose of ensuring workplace safety. For example, an employer may tell a union representative that someone who works in the deli is not vaccinated so the union can ensure that they or their coworkers receive proper protective equipment.

#### 4. Can a company require workers to receive a vaccine?

Generally, yes, subject to exceptions for workers who have certain religious or medical reasons for declining vaccination. See below for more information about those exceptions.

Currently, the COVID-19 vaccines are temporarily approved by the Food and Drug Administration (FDA) under an “emergency use authorization.” When someone receives a temporarily approved vaccine, that person has “the option to accept or refuse the vaccine” under the federal Food, Drug, and Cosmetic Act, but it is unclear under current law whether the right to refuse the vaccine applies in the workplace. There are two pending federal court lawsuits that may shed light on this issue. But because Pfizer and Moderna have applied for full FDA approval, this issue will likely soon be moot. See *Emergency Use Authorization for Vaccines Explained*, <https://www.fda.gov/vaccines-blood-biologics/vaccines/emergency-use-authorization-vaccines-explained> (Nov. 20, 2020).

The Occupational Safety and Health Administration (OSHA) has previously released guidance stating that workers can refuse flu vaccine if they believe they have a medical condition that creates a real danger of serious illness (like a serious reaction to the vaccine). See <https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09>. OSHA has not weighed in on the COVID-19 vaccine. While a worker may have the right under the Occupational Safety and Health Act to raise their belief that the vaccine might pose a serious danger, a company is legally permitted to ask the worker to justify that belief.

#### 5. What are the rules when a company requires workers to receive a vaccine?

It depends who is administering the vaccine, because the pre-vaccination screening questions are likely to reveal disability-related information.

- If a health care provider or pharmacy will administer the vaccine, there are no additional rules for the company to follow.
- If a company or a contractor the company hires will administer the vaccine, the company must show that screening questions are “job-related and consistent with business necessity.”
  - To prove this, the company must show that workers who do not answer the questions (and therefore do not receive a vaccine) will pose a direct threat to their own health and safety or the health and safety of others. To determine if there is a direct threat, a company should assess 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.
  - To conclude that there is a direct threat, the company must also determine that an unvaccinated individual will expose others to the virus at the worksite.
- If the company obtains a worker's medical information while offering a vaccination program, the company must keep the information confidential.

#### 6. What are the rules when a company offers workers a vaccine on a voluntary basis?

If the vaccine is offered on a voluntary basis, a worker's decision to answer pre-screening questions before receiving a vaccine must also be voluntary.

- If the worker decides not to answer the questions, the company can refuse to administer the vaccine but may not retaliate against, intimidate, or threaten the worker.
- If the company obtains a worker's medical information while offering a vaccination program, the company must keep the information confidential.

A company must also make all voluntary vaccine programs available to all workers (and may not discriminate by, for example, refusing to offer the vaccine to workers who are members of protected categories).

#### 7. What are the rules when a company incentivizes vaccines?

Employers may offer incentives to employees to provide documentation of their or their family members' vaccination status as long as the incentive is not so substantial as to be coercive.

Employers who vaccinate or provide vaccinations for their own employees and/or employees' family members may only offer incentives to their employees, and NOT to employees' family members.

#### 8. What should a company or union do if a worker has a religious or medical basis for refusing a vaccine?

If a worker has a disability or religious belief or practice that prevents the worker from being vaccinated, the company and the union must generally provide that worker a reasonable accommodation. Pregnant workers may also have a right to a reasonable accommodation if non-pregnant workers also receive such accommodations.

Some examples of reasonable accommodations include schedule and location changes, such as remote work or work assignments in areas of a facility where the worker will not be in close contact with others. If making a reasonable accommodation would involve more than a minimal cost or disruption, the company or the union can argue that accommodating the worker is an undue hardship.

Companies and unions may not disclose that a worker is receiving a reasonable accommodation or retaliate against a worker for requesting an accommodation.

#### 9. Can workers refuse to work with co-workers who are not vaccinated?

The OSH Act and NLRA protect workers who refuse to work in abnormally unsafe conditions and engage in collective action. However, workers have the burden to prove that conditions are abnormally unsafe.

Under the OSH Act, workers first have to report abnormally unsafe conditions to the company and give them a chance to correct it.

Under the NLRA, workers must engage in some collective action that is designed to improve conditions in the workplace, such as making a complaint, or talking to their coworkers about their refusal to work.

Collective bargaining agreements also obligate companies to consider a number of factors before deciding to discipline employees for refusing to work. If a union can show objective evidence that an employer mandates work in a location that is abnormally unsafe, or is not acting fairly, they may prevail at arbitration.

#### 10. Can a company fire a worker for not getting a vaccine?

Probably not. If a worker cannot receive a COVID-19 vaccine because of a disability or for religious reasons, the company must attempt to make a reasonable accommodation, as explained above. If no reasonable accommodation is possible, or if the worker simply refuses to get a vaccine because they are generally afraid, or they have a political objection, it is lawful for a company to exclude the worker from the workplace, but this does not mean the company can fire the worker. Instead, the company should offer the worker remote work or allow the worker to use FMLA or other forms of leave. In these circumstances, workers will still have to show that they qualify for leave. For example, if an unvaccinated worker has no serious health condition or their family member has no serious health condition, they may be ineligible for FMLA leave.

#### 11. What if a worker gets sick as the result of a mandatory vaccination?

If an employee suffers an adverse reaction to a mandatory vaccination, they may be able to successfully claim workers' compensation.

The company should allow workers paid time off to recover from the side effects of vaccinations. This is true even if the worker has run out of all other available leave.

Under the Americans with Disabilities Act, the company must hold open an employee's position while the employee is on leave unless it can show that doing so causes undue hardship. When the employee is ready to return to work, the employer must allow the individual to return to the same position (assuming that there was no undue hardship in holding it open) if the employee is still

qualified (i.e., the employee can perform the essential functions of the position with or without reasonable accommodation).