International Municipal Lawyers Association
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HOT TOPICS IN EMPLOYMENT LAW

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Vaccinations Do's and Don'ts

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AGENDA



- Legal landscape of vaccination mandates
- Policy considerations when instituting a vaccination mandate
- Alternatives to vaccination mandates

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Understanding EUA for Vaccines



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- "An Emergency Use Authorization (EUA) is a mechanism to facilitate the availability and use of medical countermeasures, including vaccines, during public health emergencies, such as the current COVID-19 pandemic."
- A EUA allows for the use of unapproved vaccines in an emergency to prevent serious or life-threatening diseases or conditions when certain statutory requirements have been met, including that there are no adequate, approved and available alternatives.
- For an EUA to be issued for a vaccine, the FDA must determine that the known and potential benefits outweigh the known and potential risks of the vaccine.

https://www.fda.gov/vaccines-blood-biologics/vaccines/emergency-use-authorization-vaccines-explained

Understanding EUA for Vaccines



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Patients who receive vaccines under an EUA **must be informed**, to the extent practicable given the circumstances, that the vaccine is under an EUA, of the known and potential benefits and risks, the extent to which such benefits and risks are unknown, **that they have the option to accept or refuse the vaccine**, and of any available alternatives to the product.

See "Food, Drug and Cosmetics Act" at 21 U.S.C.A. § 564(e)(1)(A)(ii)(III)

Should an employer mandate a vaccine under EUA?

ARGUMENT 1	ARGUMENT 2
An employer should not mandate a EUA vaccination because the employee, by law, must be informed of the option to and may choose to refuse the vaccination.	An employee's decision to refuse the vaccination after being duly informed of his/her option is not immune to the consequences that may be imposed by his/her employer for failure to obtain the mandated vaccination.

Legal Landscape of Vaccination Mandates

Americans with Disabilities Act (ADA)

Which of the following will trigger the ADA?

- Employer (or 3rd Party Contractor) administering a COVID-19 vaccine.
  - No
- Employer (or 3rd Party Contractor) asking pre-screening questions before administering a COVID-19 vaccine.
  - Yes
- Employer requests proof of receipt of a COVID-19 vaccine.
  - No
- Employer asks an employee why he/she did not receive a COVID-19 vaccine.
  - Yes

Americans with Disabilities Act (ADA)



What to do with employees who cannot receive the COVID-19 vaccine.

- Employer must be able to show that an unvaccinated employee would pose a direct threat. 29 C.F.R. 1630.2(r)
- Conduct an individualized assessment to determine if direct threat exists:
  - Duration of the risk
  - Nature and severity of the potential harm
  - Likelihood that the particular harm will occur
  - Imminence of the particular harm

https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

Americans with Disabilities Act (ADA)

Reasonable accommodations



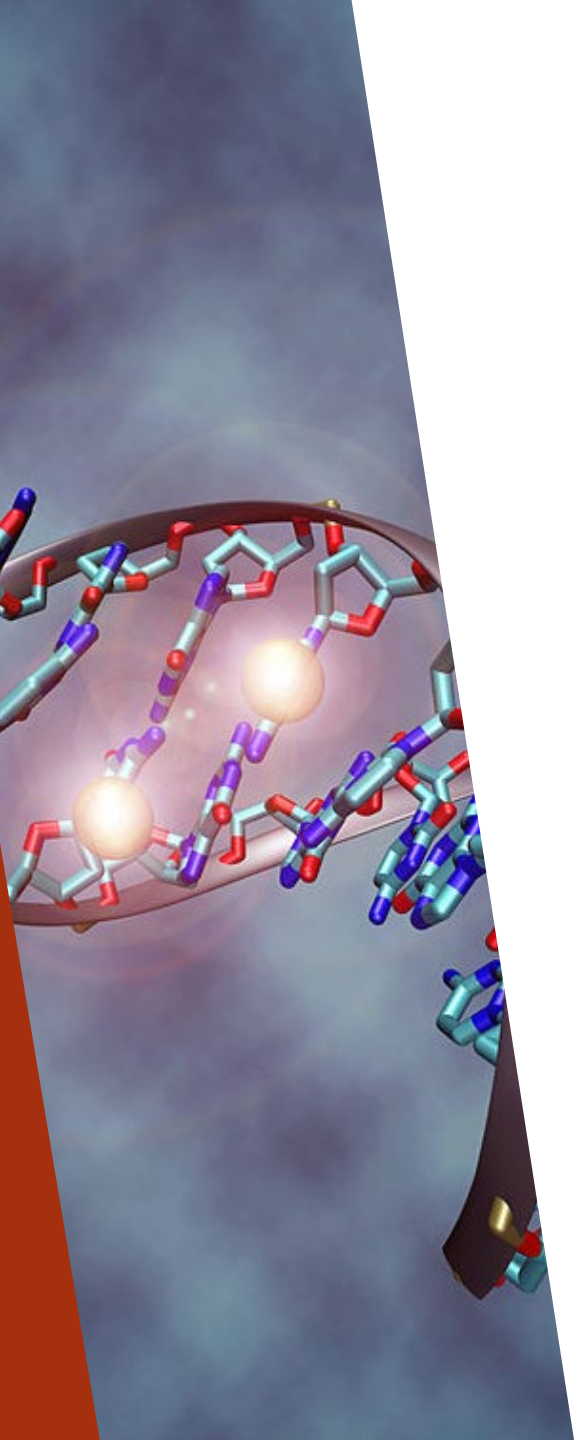
- Modified Duties or Workstation
- Modified Work Hours
- Teleworking
- Face Shields/Glass Surround
- Limited Access

Americans with Disabilities Act (ADA)

What to do with employees who cannot receive the COVID-19 vaccine.

- Engage in interactive process to determine if an accommodation is available.
- Seek and rely on medical documentation from the employee's personal physician to assist you in this process.
- Consider the number of employees in the workplace who have been vaccinated and/or the amount of contact with the unvaccinated
- REMEMBER: Information provided by the CDC, FDA and other governmental entities changes frequently.

https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws



Genetic Information Non-Discrimination Act (GINA)

- Under Title II of GINA, employers may not (1) use genetic information to make decisions related to the terms, conditions , and privileges of employment; (2) acquire genetic information except in certain specific circumstances; or (3) disclose genetic information except in certain specific circumstances.
- Pre-vaccination questions may elicit information about genetic information, such as questions regarding the employee's and/or a family member's immune system.
- If proof of vaccination is requested from the employee's health care provider, the employer should provide a warning to the employee/physician not to provide genetic information as part of the proof.
  - Model language can be found in 29 CFR 1635.8(b)(1)(i)

https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

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Title VII of the Civil Rights Act (Title VII)

Religious Exemptions

- An employee can seek an exemption for a sincerely held religious belief, practice or observance if it prevents them from receiving the vaccination.
- An employer must provide a reasonable accommodation unless it would pose an undue hardship (i.e. more than a *de minimis* cost or burden on the employer)
- Definition of religion is broad and may protect unfamiliar religious, beliefs or practices.
- An employer must have an objective basis for questioning if the sincerity of the belief, practice, etc. and/or the religious nature of the same.

https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws

Other applicable State and Local laws

State or local laws may regulate vaccinations for healthcare workers/emergency responders.



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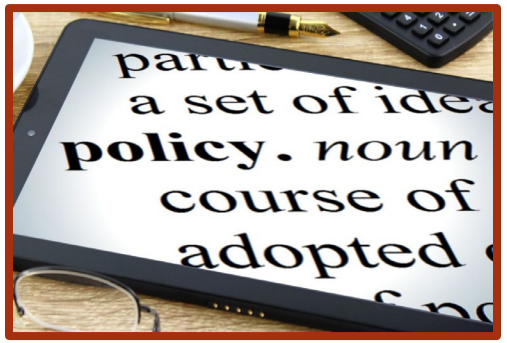
State or local laws may regulate vaccinations for schools and childcare facilities.



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POLICY CONSIDERATIONS

Policy Considerations



- Analysis of job-related and consistent with business necessity (firefighter vs. data entry clerks).
- Time required to obtain vaccination may be compensable under the FLSA.
- Adverse response to vaccination may be compensable under the Workers Compensation Act.
- Availability of paid leave if an employee has an adverse response to the vaccination.
- Refusal to vaccinate absent an exemption may require removal from the workplace, termination or other adverse employment actions.

Policy Considerations

- Union Agreements and mandatory subjects of bargaining.
- Training managers and supervisors responsible for communicating the vaccination requirement how to recognize an accommodation request from an employee with a disability or who is seeking a religious exemption.
- Maintenance and retention of employee vaccination records.
- Ensuring confidentiality.
- Scope of the vaccination requirement (i.e. boosters, annual vaccination requirement similar to influenza, etc.)



ALTERNATIVES TO MANDATES

Alternatives to Mandating Vaccinations

- Wellness engagement option for deduction on premiums
- Paid time off
- Cash/Gift Cards



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Alternatives to Mandating Vaccinations

Keep in mind…

- An employer may have to provide a reasonable accommodation (alternatives, adjustments or modifications) that allow employees with disabilities that prevent them from obtaining vaccinations.
- This would potentially also apply for religious exemptions.
- How much is too much for financial incentives?
- EEOC Final Rule on criteria for wellness programs under the ADA (which should address incentives) is being reviewed.



QUESTIONS