

CONSIDERATIONS REGARDING COVID-19 VACCINATIONS FOR LOCAL GOVERNMENT EMPLOYEES

This memorandum sets forth considerations for local government legal counsel regarding the ability to require COVID-19 vaccination of public employees. Some of the current vaccines becoming available are approved for emergency use by the Food and Drug Administration (“FDA”).¹ Localities, as employers, must make threshold decisions on vaccinating their employees as the pandemic continues.

A key question is whether employees may be required to receive a COVID-19 vaccine, i.e., be vaccinated.

In addition to the issues addressed herein, localities’ incident management teams, human resources staff (HR), and applicable staff will consider other factors in advising management on making the final decision (HR’s capacity to do the required work related to exemptions if vaccines are mandated, the history of the workforce participation in vaccine programs, politics, and so forth) and who would require vaccination.

STATUTORY AND OTHER AUTHORITY

Equal Employment Opportunity Commission (“EEOC”) Guidelines

Since the start of the pandemic, the EEOC has provided two major pieces of Commission guidance relevant to COVID-19 vaccine mandates. On December 16, 2020, the EEOC issued its latest guidance, “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws” (“December guidance”).² The December guidance provides much-needed insight into issues surrounding COVID-19 vaccines (including implications for Title VII of the Civil Rights Act (“Title VII”) and the Americans with Disabilities Act (“ADA”)) and the ability of employers to mandate the vaccine.³ This guidance followed the EEOC’s March 2020 update to its 2009 guidance on “Pandemic Preparedness in the Workplace and the Americans with Disabilities Act” (“March guidance”).⁴ While initially drafted in response to the H1N1 flu pandemic, the March guidance is somewhat instructive as to the COVID-19 vaccine in concert with the December guidance. Local governments are subject to both the ADA and Title VII, so these guidance documents are of significant importance to local governments as employers.⁵

1 42 U.S.C. § 360bbb-3(a)(1), <https://www.law.cornell.edu/uscode/text/21/360bbb-3>.

2 U.S. Equal Employment Opportunity Commission, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws (December 16, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

3 *Id.*

4 U.S. Equal Employment Opportunity Commission, Pandemic Preparedness in the Workplace and the Americans with Disabilities Act (March 21, 2020), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>.

5 Americans with Disabilities Act of 1990, As Amended § 12132, <https://www.ada.gov/pubs/adastatute08.pdf>; ADA.gov, Information and Technical Assistance on the Americans with Disabilities Act, https://www.ada.gov/ada_title_II.htm.

The December guidance provided clarity regarding the permissibility of employer vaccine mandates. It affirmed that employers are permitted to mandate employees to receive a COVID-19 vaccine.⁶

The guidance's endorsement of employer-mandated vaccines is not absolute. For instance, while the December guidance established that the administration of FDA approved or authorized vaccines are not considered "medical examinations" under the ADA,⁷ health screening questions asked before administration of a vaccine may be covered by ADA requirements for disability-related questions and would need to be job-related and consistent with business necessity.⁸ Further, if the employer requires third party administration, the employer would only need to ask employees for proof of their vaccination, which is not considered by the December guidance to be a disability-related inquiry.⁹ Additionally, the December guidance advises employers to warn employees to not provide medical information in conjunction with their proof of vaccine to employer.¹⁰ In this situation, employers should ask nothing more than requesting proof of the COVID vaccine, because these subsequent questions could be considered disability-related inquiries.¹¹ The December guidance provides good insight into medical privacy concerns surrounding employer-based vaccine mandates. It also provides insight into other potential minefields for employers.

The December guidance discusses in great detail reasons for which employees may exempt themselves from an employer-based vaccine mandate. For example, the guidance states that employees may be able to avoid submitting to an employer-based vaccine mandate for a disability-based (under the ADA) or religious reason (under Title VII).¹² If an employee invokes either of these reasons for refusing vaccination, the employer must seek to reasonably accommodate this employee.¹³ The December guidance's detail steps employers must take if their employees attempt to receive a disability-based or religious exemption is discussed later in the "Exemptions under the ADA and Title VII" section.

As noted, the December guidance followed the EEOC's March guidance. Notably, the March guidance concluded that both the ADA and Title VII prohibited an employer from compelling all of its employees to be vaccinated against influenza without regard to their medical conditions or religious beliefs, even during a pandemic.¹⁴ In the March guidance, EEOC recommended that, in general, "ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it."¹⁵ It is clear from both EEOC guidances that a mandatory program is permissible if it

6 EEOC, *supra* note 2.

7 EEOC, *supra* note 2, at K.1.

8 EEOC, *supra* note 2, at K.1.

9 EEOC, *supra* note 2, at K.3.

10 EEOC, *supra* note 2, at K.3.

11 EEOC, *supra* note 2, at K.3.

12 EEOC, *supra* note 2.

13 EEOC, *supra* note 2, at D.

14 EEOC, *supra* note 4, at 13.

15 EEOC, *supra* note 4, at 13.

fits under the ADA and Title VII requirements. Still, while mandates are possible, all employees may not actually be vaccinated, even with a mandate in place, because of various exemptions.

Federal Occupational Safety and Health Act (“OSH Act”)

The EEOC is not the only recent source of insight regarding the permissibility of employer mandated vaccines. Under the OSH Act, employers are under a general duty to provide a workplace free from serious recognized hazards.¹⁶ Similar to the EEOC’s March guidance, the Occupational Safety and Health Administration (“OSHA”) released vaccine-related guidance (“OSHA guidance”) in 2009 as a response to the H1N1 pandemic.¹⁷ The OSHA guidance encourages employers to offer seasonal and H1N1 vaccines, but advises employers to inform employees of the benefits of vaccination.¹⁸ Notably, this guidance states that employers can require employees to be vaccinated.¹⁹ The OSHA guidance provides that an employee may refuse to be vaccinated upon the “reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death (such as serious reaction to the vaccine)...”²⁰ A person claiming this exemption may be protected under § 11(c) of the OSH Act, which deals with whistleblower protections.²¹

Additionally, employers should be aware that vaccine-related injuries caused by their vaccine mandate may need to be reported to OSHA.²² OSHA has never directly addressed requiring employers to report employer mandated COVID vaccine injuries, but OSHA guidance for other vaccines indicates that employers may need to report such injuries.²³ Employers should consider these potential reporting requirements before mandating vaccination. Thus, with these potential reporting requirements in mind, OSHA would not prevent employers from implementing a mandatory vaccine, provided that employees may refuse upon reasonable belief that vaccination would interfere with a medical condition leading to serious illness or death.

Furthermore, OSHA itself may in fact “force employers’ hands” to mandate vaccination. For example, once COVID vaccines become widely available, OSHA may consider employer-based COVID vaccination as part of an employer’s general duty to provide a workplace free from serious recognized hazards.²⁴ OSHA has issued no guidance indicating that it would

16 Occupational Safety and Health Act, § 5, <https://www.osha.gov/laws-regs/oshact/section5-duties>.

17 U.S. Occupational Safety and Health Administration, OSHA’s Position on Mandatory Flu Shots for Employees (Nov. 9, 2009), <https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09>.

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*; Americans with Disabilities Act of 1990, § 11(c), <https://www.ada.gov/pubs/adastatute08.pdf>.

22 29 C.F.R. § 1904, <https://www.osha.gov/laws-regs/regulations/standardnumber/1904>.

23 Occupational Safety and Health Administration, OSHA Recordkeeping Requirements for Smallpox Vaccinations Frequently Asked Questions, <https://www.osha.gov/smallpox/vaccination>; Occupational Safety and Health Administration, Standard Interpretations (Archived), Several OSHA injury and illness recordkeeping issues (June 21, 1993), <https://www.osha.gov/laws-regs/standardinterpretations/1993-06-21-6>.

24 Occupational Safety and Health Act, *supra* note 16.

require COVID vaccination as part of this general duty, but it is a possibility. Alternatively, OSHA could publish regulations requiring employers to offer COVID vaccines to employees. OSHA has done this in the past with hepatitis vaccines for those exposed to blood as part of their occupation.²⁵ In light of all of this, OSHA should not be an insurmountable obstacle for employers seeking to implement a vaccine mandate and may actually require vaccination in the future.

Virginia Code

The Virginia Code contains multiple statutory provisions related to vaccine mandates. For instance, the Virginia Code indicates that it is possible for the state to mandate vaccination for everyone.²⁶

For example, Virginia Code § 32.1-43 gives the State Health Commissioner the authority to require immunization of any individual or group of individuals when the Commissioner determines such to be necessary to control the spread of any disease of public health importance.²⁷ The only exemption listed for such a mandate is for a “person to whose health the administration of a vaccine would be detrimental as certified in writing by a physician licensed to practice medicine in this Commonwealth.”²⁸

Virginia allows the following persons to administer vaccines: (1) licensed pharmacists, (2) registered nurses, (3) licensed practical nurses under the supervision of a registered nurse, and (4) any “pharmacist, nurse, or designated emergency medical services provider who holds an advanced life support certificate issued by the Commissioner of Health under the direction of an operational medical director.”²⁹

EXEMPTIONS UNDER THE ADA AND TITLE VII

While a mandatory vaccination program is permissible, any such program must allow an employee to “opt out” if the employee has a qualifying disability under the ADA which prevents the employee from safely receiving the vaccine, or under Title VII if the employee has a sincerely held religious belief against the vaccine.³⁰

An employer who mandates vaccinations must provide exemptions and/or

²⁵ U.S. Occupational Safety and Health Administration, Occupational Safety and Health Standards 1910.1030, Bloodborne Pathogens, <https://www.osha.gov/laws-regs/regulations/standardnumber/1910/1910.1030>.

²⁶ Va. Code § 32.1-48, <https://law.lis.virginia.gov/vacode/title32.1/chapter2/section32.1-48/>.

²⁷ Va. Code § 32.1-43, [https://law.lis.virginia.gov/vacode/title32.1/chapter2/section32.1-43/#:~:text=Authority%20of%20State%20Health%20Commissioner%20to%20require%20quarantine%2C%20etc.&text=of%20this%20chapter%20and%20orders.32.1%2D48.05%20et%20seq.\)](https://law.lis.virginia.gov/vacode/title32.1/chapter2/section32.1-43/#:~:text=Authority%20of%20State%20Health%20Commissioner%20to%20require%20quarantine%2C%20etc.&text=of%20this%20chapter%20and%20orders.32.1%2D48.05%20et%20seq.)).

²⁸ Va. Code § 32.1-48, <https://law.lis.virginia.gov/vacode/title32.1/chapter2/section32.1-48/>.

²⁹ Va. Code § 54.1-3408(l), <https://law.lis.virginia.gov/vacode/title54.1/chapter34/section54.1-3408/>.

³⁰ *United States v. Seeger*, 380 U.S. 163, 185 (1969), <https://supreme.justia.com/cases/federal/us/380/163/>; EEOC, *supra* note 2, at K.6; EEOC, *supra* note 4, at 13.

accommodations for employees under both of these federal laws.³¹ Should an employee desire to opt out of a mandatory vaccination, HR staff would need to engage that employee in the interactive process to establish whether there is a reasonable accommodation that may be provided to the employee.³² During this interactive process, HR would be permitted to make reasonable inquiries into the disability or religious beliefs.³³

ADA exemptions

If the employer's vaccination requirement tends to screen-out people with disabilities, the employer must then find that an unvaccinated employee would pose a direct threat to others in order to move further in the process of excluding such an employee from the workplace.³⁴ This "direct threat" standard is met when the employer has a "reasonable belief, based on objective evidence, then an employee who does not answer the questions, and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others."³⁵ Four factors are used to discern whether a direct threat exists:

- (1) duration of the risk;
- (2) nature and severity of the potential harm;
- (3) likelihood that the potential harm will occur; and
- (4) the imminence of the potential harm.³⁶

The December guidance specifically states that the current pandemic meets the ADA's "direct threat" standard.³⁷ An employee with COVID-19 or COVID-19 symptoms, therefore, poses a significant risk of substantial harm to others in the workplace, which means that employers may use certain medical testing procedures and measures not typically permitted under the ADA.³⁸ If a direct threat is found to exist, the employer cannot exclude the employee from the workplace unless a reasonable accommodation that does not cause undue hardship is impossible.³⁹

The December guidance elaborates on what may be considered a "reasonable accommodation" in the COVID-19 vaccine mandate context. This guidance indicates that

31 EEOC, *supra* note 2.

32 EEOC, *supra* note 2, at D.

33 *Id.* at D.5, K.6.

34 *Id.* at K.5.

35 *Id.* at K.2 (the December guidance specifically states that having COVID-19 is a direct threat under this standard); see *Id.* at A.6; see also U.S. Equal Employment Opportunity Commission, Transcript of March, 27, 2020, Outreach Webinar (March 27, 2020), <https://www.eeoc.gov/transcript-march-27-2020-outreach-webinar#q1> ("An employer may exclude those with COVID-19, or symptoms associated with COVID-19, from the workplace because, as EEOC has stated, their presence would pose a direct threat to health or safety").

36 EEOC, *supra* note 2, at K.5

37 EEOC, *supra* note 2, at A.6; EEOC, *supra* note 4, at II(B).

38 EEOC, *supra* note 4, at II(A)(1).

39 EEOC, *supra* note 2, at K.5.

undue hardship involves “significant difficulty or expense.”⁴⁰ The EEOC noted that under the ADA’s undue hardship analysis, “the circumstances of the pandemic [are] relevant to whether a requested accommodation can be denied because it poses an undue hardship.”⁴¹ Notably, the December guidance singles out pregnant women and advises employers to accommodate their requests not to be vaccinated.⁴² For purposes of a mandatory vaccination program, employers may rely on this guidance in addressing accommodation requests based on an employee’s disability, especially in industries such as health care, where infection control is a necessity, or where employees must be physically present at a worksite.⁴³

The March guidance defines “undue hardship” as an accommodation that causes

significant difficulty or expense for the employer, considering the nature and cost of the accommodation, the resources available to the employer, and the operation of the employer’s business.⁴⁴

If a particular accommodation would result in an undue hardship, an employer is not required to provide it but still must consider other accommodations that do not pose an undue hardship.⁴⁵ The December guidance clarified that the “significant expense” element of what constitutes an “undue hardship” does not mean that an employer can disregard any proposed accommodation that costs money.⁴⁶ Employers must balance the cost of accommodation with its current budget and pandemic-related constraints.⁴⁷ Other factors that may be considered include: sudden loss in income, amount of discretionary funds, and any foreseeable increase or decrease of pandemic restrictions.⁴⁸ It may be difficult for localities to assert undue hardship with respect to most requested accommodations. If no reasonable accommodation is possible, the employer may finally exclude the employee seeking the disability-based exemption from the workplace.⁴⁹

Religious exemptions

The other clear avenue in which an employee may obtain an exemption from an employer-based vaccine mandate is on the basis of a “sincerely held religious belief”.

If a locality were to adopt a mandatory vaccination policy, receiving a vaccine would be considered a job requirement. If an employee’s sincerely held religious belief conflicts with

40 *Id.* at D.

41 *Id.* at D.9

42 *Id.* at J.2;

43 *Id.*

44 EEOC, *supra* note 4, at II(C) *citing* 42 U.S.C. § 12111(10),

<https://www.law.cornell.edu/uscode/text/42/12111>.

45 EEOC, *supra* note 2, at D.

46 *Id.* at D.11.

47 *Id.*

48 *Id.*

49 *Id.* at K.7.

that job requirement, the County must provide a reasonable accommodation to the employee unless doing so would result in an undue hardship to the locality.⁵⁰ EEOC regulations promulgated under Title VII define “undue hardship” as “more than a de minimis cost” to the operation of the employer’s business.⁵¹ This is a lower standard than under the ADA.⁵² The EEOC also advises the employer to assume that an employee’s request for religious accommodation is sincere, but if there is some objective reason to question the sincerity of the belief, the employer can request additional information from the employee.⁵³ If an employer cannot exempt or provide an employee asserting the religious exemption with a reasonable accommodation, the employer may exclude the employee from the workplace as long as no other rights apply under EEO laws or other federal, state, and local laws apply.⁵⁴

WORKERS’ COMPENSATION ISSUES

If the employee suffers an injury from a reaction to the vaccination that their employer mandated, the employee may have a workers’ compensation claim against the employer.⁵⁵ In fact, a claimant may recover under Workers’ Compensation if the “vaccination or inoculation arose out of and in the course of employment and resulted in an ‘obvious sudden mechanical or structural change in the body.’”⁵⁶

However, simple encouragement by employer may not entitle an employee to recovery in the event of a vaccine injury.⁵⁷ Additionally, once a COVID-19 vaccine becomes commonly available, injuries even from an employer-mandated COVID-19 vaccination may not be compensable.⁵⁸ In the event of a state-wide COVID-19 vaccination mandate, it is unknown

50 Title VII of the Civil Rights Act of 1964, <https://www.eeoc.gov/statutes/title-vii-civil-rights-act-1964>.

51 29 C.F.R. § 1605.2(e)(1), <https://www.law.cornell.edu/cfr/text/29/1605.2>; see U.S. Equal Employment Opportunity Commission, Questions and Answers: Religious Discrimination in the Workplace, <https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace> (cost may include effect on other employees’ rights or workplace safety).

52 See previous discussion regarding “undue hardship” analysis in the context of ADA disability-based exemptions.

53 EEOC, *supra* note 2, at K.6

54 *Id.*

55 See *Overton v. Virginia*, VWC File No. 161-10-26 (Va. Workers’ Comp. Comm’n July 1, 1994) (police officer was found to have compensable injury when he was injured by Hepatitis vaccine required by employer), <http://wvc.state.va.us/Opinions/Reviews/REV1994/1611026.REV.pdf>; see also *Lovinger v. Children’s Hospital*, 2002 WL 149373, VWC File No. 186-90-44 (Va. Workers’ Comp. Comm’n Jan. 7, 2002), <http://wvc.state.va.us/Opinions/Reviews/Rev2002/1869044.rev.pdf>; see also; *Jackson v. Virginia Department of Health*, VWC File No. 223-17-91 (Va. Workers’ Comp. Comm’n March 16, 2007) (plaintiff was allowed to recover Workers’ Compensation because her employer told her to receive smallpox vaccine that was being offered to exclusively to military members and healthcare workers on a voluntary basis at the time), <http://wvc.state.va.us/Opinions/Reviews/REV2007/2231791-06.rev.pdf>.

56 *Lovinger*, *supra* note 55.

57 *Yambling v. Sentara Healthcare, Inc.*, VWC File No. 211-49-86 <http://wvc.state.va.us/Opinions/Reviews/Rev2004/2114986.rev.pdf> (Va. Workers’ Comp. Comm’n May 3, 2004 (despite the fact that vaccine was recommended in the context of a mandatory health screening, recovery denied because vaccine itself was optional).

58 *Douglas v. INOVA Health Systems*, (Va. Workers’ Comp. Comm’n Dec. 5, 2013),

what the effect of a simultaneous employer-based mandate would be with regard to recovery under Workers' Compensation. Ultimately, employers should be cautious to implement a vaccine mandate and keep in mind potential Workers' Compensation issues.

SOME OPTIONS

Encourage and Make Available

The safest legal option may be for the locality to encourage employees to receive the vaccination, but not mandate it. Encouragement, supported by a strong information campaign about the virus, the vaccine, and its effects and effectiveness is a process used regularly by some localities with respect to other vaccines, such as influenza vaccines. The locality could and should continue to utilize all other precautions currently implemented in the workplace.⁵⁹ Other examples of types of "encouragement" are:⁶⁰

- Provide information about the vaccine to employees,
- Arrange to have vaccinations performed in the public offices during the workday,
- Create incentives (e.g., paid leave time to recover from effects of vaccine) but be careful not to make it seem like the unvaccinated are being discriminated against, i.e., "de minimus,"
- Require unvaccinated employees to continue to work remotely and limit their attendance at office functions that would involve physical interactions

Mandate in Part

The locality could mandate vaccines for all first responders and those who work closely with vulnerable populations (such as residential counselors working in mental health/developmental services group homes) and simply encourage the rest of the workforce to become vaccinated.⁶¹

In order to require inoculations for employees, the locality would need to ensure that the vaccine is job-related, essential and applied non-discriminarily.

While many employees may want to receive the vaccination, the locality should consider whether a mandatory vaccination program is necessary for most of the workforce given protective alternatives which are already in use (telework, social distancing, mask wearing, etc.), and will likely need to remain in use for some time notwithstanding workforce

<http://vwc.state.va.us/Opinions/Reviews/REV2013/VA00000709803-64.rev.pdf> (citing the common availability of vaccine as a reason for denying recovery).

⁵⁹ These include wearing face coverings/masks; requiring social distancing; more frequent cleaning, etc.

⁶⁰ Essentials of Vaccination and Immunization Laws: In the Time of COVID-19 Seminar, presented by Brian Dean Abramson, Esq., LL.M. on January 12, 2021.

⁶¹ With new collective bargaining legislation becoming effective in May 2021, the locality will want to consider the implications if the locality elects to enable collective bargaining for its employees. See H.B. 582, Va. Gen. Assem. (2020), <https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+HB582&201+sum+HB582>.

(Employers with collective bargaining agreements should be aware that mandating employees to receive a vaccine may be considered a material change to the conditions of their employment).

vaccination.

Mandatory Vaccinations

Other considerations if a mandatory vaccination program is implemented include:

- Make sure there are sufficient staff or resources to provide the vaccine and process exemption requests.
- Establish procedures for standardizing requests for exemptions or reasonable accommodations. This should be handled by HR or other staff who have experience in this and can take steps to process requests in a confidential and non-discriminatory manner.
- Obtain a waiver and release from those who refuse to take the vaccine from a locality-sponsored program.
- Have funding for the costs for those not covered by insurance if employees are required to get the vaccine.
- If a vaccination is a mandated and is, therefore, a job requirement, the locality, as the employer, may require the employee to furnish proof of having received the vaccine. (If the locality simply encourages the workforce to become vaccinated, there would be no job-related basis for requiring such proof.)

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