


**COVID-19 Vaccinations in the Workplace:  
Considerations &  
Best Practices for Employers**



*Presented by Natalie Pattison,  
Barran Liebman LLP  
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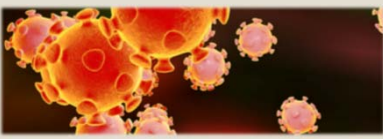
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**COVID-19**



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**Can Employers Require COVID-19 Vaccination?**



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### Can Employers Require COVID-19 Vaccination?

- Generally, yes. But it's complicated.
- The EEOC and BOLI say yes, with exceptions.

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### Administration of COVID-19 Vaccine is Not a Medical Examination.

- “Medical examination”
  - Must be job-related and consistent with business necessity
  - Information treated as confidential medical records
- Be careful with pre-screening vaccination questions
  - Disability-related inquiry must be job-related and consistent with business necessity
  - Does not apply to disability-related questions that are asked by either (1) an employer who offers the vaccine on a voluntary basis, or (2) an administering third party (that does not have a contract with the employer), such as a pharmacy or other healthcare provider.

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### Asking for Proof of Vaccination is Not a Disability-Related Inquiry

- Employers may ask for proof of receipt of a COVID-19 vaccination
- Not likely to elicit information about disability
- Tell employees not to provide medical information as part of their proof
- Yes or No
  - Don't ask follow-up questions



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### Employers May Require COVID-19 Vaccination, with Exceptions

- Employers may require vaccination
- Exceptions:
  - Disability accommodations
  - Religious accommodations
  - Healthcare workers in Oregon



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### Disability Exemptions - ADA

- Employers must provide reasonable accommodations for employees with an ADA-covered disability that prevents them from receiving COVID-19 vaccine, unless it would impose **“undue hardship”**
- Undue hardship
  - An action requiring significant difficulty or expense



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### Religious Exemptions – Title VII

- Employers must provide reasonable accommodations for employees with a sincerely held religious belief, practice, or observance that prevents them from receiving a COVID-19 vaccine, unless it would cause an **“undue hardship”**
- Undue hardship
  - More than a “de minimis” cost or burden on the employer



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### Sincerely Held Religious Belief

- Employee must notify employer and show that the COVID-19 vaccination conflicts with their “sincerely held religious belief”
- “Sincerely held religious belief”
  - “Religion” is construed broadly
    - Employee’s religion may not be traditionally recognized
    - Includes firmly and sincerely held moral or ethical beliefs
    - Does NOT include social, political, or economic philosophies, or personal preferences
- Employer should ordinarily assume employee’s request is based on a sincerely held religious belief
  - Justified in requesting supporting information if ER has an objective basis for questioning either the religious nature or sincerity of belief

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### “Direct Threat”

- Employers can require that employees not pose “a direct threat to the health or safety of individuals in the workplace”
- Direct threat:
  - “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation”

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### “Direct Threat”

- Does the employee pose a direct threat?
  - Individualized assessment of four factors:
    1. Duration of the risk;
    2. Nature and severity of the potential harm;
    3. Likelihood that the potential harm will occur; and
    4. Imminence of the potential harm
  - Finding of direct threat includes determination that unvaccinated individual will expose others to the virus at work
- Can direct threat be eliminated or reduced?
  - Engage in interactive process and attempt reasonable accommodation
  - Can employee work from home?
  - Determine if employee is entitled to leave before terminating

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### Additional Considerations

- Oregon Law Restrictions on Mandatory Vaccination
- FDA Emergency Use Authorization (EUA)
- Wrongful Discharge
- Workers' Compensation
- Unionized Workplaces
- Incentive Programs
- Employee Relations



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### Oregon Law Restricts Certain Employers

- ORS 433.416
- 1989 law forbids healthcare and public safety employers from requiring vaccinations
  - Unless immunization is otherwise required by federal or state law, rule, or regulation
- “Worker”
  - A person who is licensed or certified to provide healthcare, an employee of a healthcare facility, of a licensed healthcare provider or of a clinical laboratory, a firefighter, a law enforcement officer, a corrections officer or a parole and probation officer

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### Emergency Use Authorization (EUA)

- COVID-19 vaccines approved by FDA under its Emergency Use Authorization (EUA) protocols
- Requirement that any recipient of EUA vaccine is notified that they have the option to accept or refuse the vaccine.
- Not yet clear how this public right-to-refuse might limit employer’s ability to require vaccine.

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### Wrongful Discharge

- Wrongful discharge in violation of public policy
  - Employer terminates an employee for pursuing statutory rights directly related to employment
  - Public policy exception to at-will employment
- Public policy wrongful termination theory might be asserted by an employee who refuses to be vaccinated based on EUA “right-to-refuse”

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### Workers' Compensation Claims

- An employee who has negative reaction to mandatory vaccine may have a compensable injury resulting in WC claim
- Consideration when deciding whether to offer vaccination through third party not within the employer's control.

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### Unionized Workplaces

- Vaccine policies are typically mandatory subjects of bargaining under the National Labor Relations Act (NLRA)
- Check your collective bargaining agreement
  - Managements rights clause
  - Zipper provision
  - Effects bargaining
- Watch out for protected concerted activity under NLRA
  - Applies to unionized and nonunionized employers
  - EEs who collectively discuss, object to, or protest vaccine policy

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### Wage & Hour Considerations

- Do employers have to pay employees for time spent getting vaccinated?
  - Employee receives mandatory vaccine on-site or off-site when they would otherwise be working—treat time as hours worked.
  - Employee receives mandatory vaccine off-site and outside working hours—employer not required to pay.

\*Pending OR OSHA standards may require employers cover cost of vaccination, including travel.

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### What about Incentive Programs?

- Limits on type of incentive
- Could violate pay equity laws
  - Even as a one-time bonus
  - Retaliation for disability or religion
- Incentive programs that don't result in a pay differential
- Wellness programs – ADA, HIPAA, or GINA.
  - EEOC proposed guidance on wellness programs – offer no more than “*de minimis incentives*”



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### Employee Relations Considerations

- Weigh employee relations concerns
- Vaccine mandate may negatively affect employee relations or morale
- Administrative burden associated with tracking compliance
- EEOC generally advises encouraging vaccinations rather than requiring it

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**OR OSHA New Temporary Rules**

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**Oregon OSHA Temporary Rules**

- **General Requirements**
  - Physical Distancing, Masks, Face Shields, and Face Coverings
  - COVID-19 Infection Notification Process and
  - Medical Removal of Employees
  - Workplace Cleaning Requirements
  - Poster Requirement
- **Deadline Specific Requirements**
  - COVID-19 Exposure Risk Assessment – 12/7/2020
  - Infection Control Plan – 12/7/2020
  - Ventilation Requirements – 1/6/2021
  - Employee Information and Training – 12/21/2021

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**Permanent OSHA Rules on the Horizon**

- Temporary rules expire May 4
- Proposed permanent rules
  - Maintains requirements from temporary rule
  - Added measures
    - Limit transporting multiple people in a single vehicle
    - Employers with more than 10 employees must certify in writing that they are running their systems in line with current requirements
    - Provide written notice of rights to return to work when employee must quarantine
    - Requiring employers to cooperate with public health authorities that ask to arrange for vaccination in the workplace
    - Requiring health care employers provide respirators to employees working with known or suspected COVID-19-positive patients
    - Strengthens the language discouraging the use of face shields

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Questions?



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Thank You!



Natalie Pattison  
(503) 276-2104  
npattison@barran.com

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