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An Employer Playbook For The Covid “Vaccine Wars”: Strategies And Considerations For Workplace Vaccination Policies (Updated) [1]

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On December 11, 2020 the FDA granted Emergency Use Authorization for the Pfizer/BioNTech COVID?19 vaccine candidate.[2] That vaccine, which appears to be more than 90% effective in preventing the virus’s spread,[3] was soon joined by a similarly effective vaccine developed by Moderna.[4]

With their blazing-fast production time and extraordinary efficacy, the COVID-19 vaccines are among our most impressive recent medical achievements. They may also be the most controversial. Despite near-universal healthcare consensus as to the vaccines’ overall safety and efficacy, early polling suggests deep skepticism, with many in the population indicating that, if offered the vaccine, they will refuse.[5] And in a time of endemic disinformation and controversy, this resistance may only deepen.

Given the choice, employers might prefer to stay on the sidelines in an effort to avoid the coming “vaccine wars.” Like it or not, however, America’s workplaces will be on the front lines and likely will find themselves caught between public health imperatives, liability fears, and a restive workforce. And while current guidance indicates that employers generally ***can*** mandate employee vaccination (subject to religious and medical exceptions), unless the Occupational Safety & Health Administration (OSHA) or other authority requires them to do so, employers will face strong and countervailing pressures in deciding whether or how to implement such policies.

This article offers a “Playbook” for employers to navigate these choppy waters. Below we set out key considerations, both for employers who want or ultimately may be required to pursue a mandatory vaccination program and for employers who wish to encourage voluntary compliance.

Each employment context, of course, will differ. A mandatory vaccination policy that works well for a close-quarters or contact-heavy workplace, such as a healthcare facility or even a meatpacking plant, might be too heavy handed for a low-contact team of remote computer coders. Likewise, different states, cities, and industries may adopt very different workplace vaccination rules, creating a thicket of regulation (this article limits its scope to nationally applicable federal regulation, but state and local rules may differ). Despite this variation, though, there are nevertheless strategies and insights that can offer guidance.

I. Deciding Who Decides: Should Employers Mandate Vaccination?

As a threshold question, employers will need to decide whether to require employees to be

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vaccinated or instead to make vaccination voluntary. Below are some key considerations in making this choice.

A. Why Require the Vaccine?

Protecting Workplace and Community Health: In the absence of a regulatory requirement, the single most important reason for a workplace vaccine mandate is that it will protect workers' health and lives. Both the Pfizer/BioNTech and the Moderna COVID-19 vaccines have been found by the FDA to be "safe and effective" and have been supported by the VRBPAC, an FDA advisory panel of outside scientific and public health experts that has independently reviewed the data.[6] The upshot is that, based on the best evidence available, the vaccines now being rolled out will protect the health and lives of employees, customers, and communities.

To be sure, vaccinations will not ensure everyone's safety: we do not yet have long-term data on the duration of immunity, even the most effective vaccine candidates will protect no more than 90 to 95% of patients, and bona fide medical or religious reasons mean that some individuals cannot be vaccinated. Accordingly, even in the best-case scenario, a significant minority of the population will still be exposed and dependent upon the development of herd immunity to protect them. But these caveats should not distract from this reality: **by an order of magnitude, COVID-19 vaccines will be our most effective medical strategy to prevent transmission of the virus and save lives.**

Ensuring Vaccines Become Vaccinations: These powerful health benefits, however, will only be realized if workers actually get the vaccine. In other words, as public health experts have noted, we must "turn vaccines into vaccinations."[7] Here, a mandatory approach may be important because voluntary vaccine programs have often had relatively low compliance, even in industries like healthcare,[8] and even for vaccines that have been the subject of massive "persuasion" campaigns (such as for the flu).[9] Given the amount of disinformation surrounding the coronavirus in general and vaccines in particular, such opt-in rates may, without a mandate, be even lower here. Put another way, a mandatory vaccine policy likely will be vastly more successful than a voluntary one at ensuring workers actually get protected.

Reducing Costs of Absences, Lost Productivity, and Long-Run Medical Care: Because a mandatory vaccination program creates a more vaccinated workforce, it also can significantly reduce workplace costs. Vaccinated workers will be less likely to fall ill to COVID-19, impose fewer costs from absences or lost productivity, require fewer instances of acute medical care, and impose lower long-term health costs. This last point is an important one: COVID-19 might be best known for short-term (and often horrific) acute consequences, but its long-term health impacts are poorly understood, yet believed to be significant for some.[10] Therefore, the virus may lead to worker illness and impairment that can span for months or even years. A higher vaccination rate is likely to curb each of these costs.

Getting and Staying Open: A mandatory vaccination approach also makes it more likely that a business can open and stay open. Even if there are no medical consequences, a single positive COVID-19 test can lead an employer to fully stop operations, particularly in industries like dining and hospitality.[11] A highly vaccinated workplace reduces the likelihood of such stoppages. At the same time, high vaccination rates can accelerate a "return to normal" by making it safer for the workforce to return to the office or otherwise resume normal operations, and by creating a safer environment for customers.

Defend Against Civil Liability for COVID-19 Cases: Further, and especially as vaccination rates increase, an un- or under-vaccinated workforce may pose a liability risk, as individuals infected on premises look to pin the blame on employers.

Under tort law principles employers that fail to take reasonable care to protect employees (or, for that matter, vendors, visitors, customers, or others on premises) risk liability.

Applying this concept, individuals who become sick based on alleged on-premises exposure can argue (and in some cases have argued) that a business's negligent safety practices (whether related to personal protective equipment (PPE), vaccines, cleaning, or anything else) caused their illness.

For employees themselves, such COVID-19 suits are likely to be limited by workers' compensation statutes. Indeed, companies are already seeing lawsuits seeking relief from employee injuries ranging from wrongful workplace exposure to COVID-19 to wrongful death from COVID-19.[12] In many cases, damages related to on-the-job COVID-19 exposure (or subsequent illness) will be considered occupational injuries and so are very likely covered under the relevant state's workers' compensation statutes. But employees' lawyers will no doubt argue that this bar may not provide full protection, as evidenced by extensive (and, as of this writing, unsuccessful) efforts by federal lawmakers to provide businesses with greater immunity from employee COVID-19 claims,[13] as well as by a surge of interest in drafting (potentially unenforceable) employee COVID-19 liability waivers.[14]

More importantly, workers' compensation statutes do not account for other stakeholders who may claim COVID-19 damages from exposure to an unvaccinated workforce. This includes suits by contractors, vendors, visitors, or customers—particularly in contact-intensive industries like education, lodging, hospitality, healthcare, or fitness where PPE may not provide sufficient protection.

A mandatory vaccination policy reduces these risks. First, and most obviously, mandatory vaccination makes it less likely individuals get sick in the first place, and therefore less likely anyone suffers legally actionable damages. Separately, the adoption and implementation of a mandatory vaccine plan can itself be important evidence of the high standard of care a company provided for those on premises, which also may be important in beating back potential liability.

Unless a broad liability shield is enacted by Congress, civil suits for COVID-19 infection damages, whether by employees, contractors, visitors, or customers, will remain a threat for the foreseeable future, and mandatory vaccination could be a key tool to address it.

Potential Protection Against Enforcement Action: Apart from civil liability from private plaintiffs, businesses without vaccine mandates could confront regulatory risk as well. Under OSHA's "general duty" clause, for instance, employers are required to furnish each employee with a workplace free from recognized hazards that could cause serious harm.[15] While current OSHA guidance suggests this "general duty" can be satisfied by measures like PPE or distancing,[16] in the longer-run the agency might take the position that a robust vaccination program is required and that workplaces without such policies are not safe. This may be particularly true for healthcare and other industries where social distancing or similar measures may not be viable.

Further, even if OSHA does not enforce the "general duty" clause in this way, private litigants, unions, or others may seize on this language to argue that employers without mandatory vaccination policies are not providing a safe workplace.

B. Why Make the Vaccine Optional?

Employee Morale and Retention: Any "mandate," as opposed to an optional program, would need to be carefully messaged and framed to the workforce. If the purposes behind the requirement are not explained (and even if they are), it may become a source of employee discontent or dissatisfaction. Day-to-day, such a requirement may lead employees opposed to the vaccine to view the company more negatively, and to respond accordingly.

Even with excellent messaging and buy-in, it is likely that some portion of the workforce, out of "anti-vaccine" belief, political views, or other reasons, will refuse to get the vaccine,

and at the extreme may choose separation of employment rather than being vaccinated. And laws like the National Labor Relations Act (NLRA) could arguably protect various forms of employee protest as to the requirement, such as through social media campaigns.

Administrative Ease: Even for "mandatory" vaccines, by law those with medical conditions or sincerely held religious beliefs that preclude vaccination are entitled to make exemption requests and to seek appropriate reasonable accommodation (both possibilities discussed in detail below). Given the controversy around the vaccine, many workers may try to claim such exemptions. Without thoughtful processes, this could put Human Resources (HR) at risk of being overwhelmed by needing to decide, on a case-by-case basis, who qualifies for an exemption. In a voluntary program, by contrast, no (or much less) formal process is needed.

Less Liability Risk for Discrimination Claims: On this point, individuals who seek an exemption but are denied may pursue legal claims, such as on the grounds that they were unlawfully discriminated against under the Americans with Disabilities Act (ADA) based on a medical condition their employer did not treat with sufficient seriousness,[17] or under Title VII of the Civil Rights Act[18] for their religious beliefs. Careful applications of the exemption process will minimize this risk, but cannot eliminate it.

Potentially Less Necessary to Certain Industries: Finally, while in some industries, like healthcare or personal services, close contact is unavoidable, in others, it is less of a concern. For workplaces that do not require close contact, and so can more effectively avoid or mitigate the potential spread of the virus on-site, a vaccine mandate might be unnecessary.

II. Playbook For Employer Vaccine Policies

As the above shows, employers may have sound safety, business, and legal reasons to pick either a mandatory or a voluntary approach to a COVID-19 vaccine. But without attention to risk points, either approach can run into trouble. Here are ways to minimize the danger, no matter which approach employers take.

A. Assess the Right to Require Vaccinations

An employer's first step is to confirm its right to require vaccinations. For obvious reasons, this is important to workplaces that want to mandate vaccines. But even workplaces that want to pursue voluntary vaccination policies may want to confirm this information, both because conditions may change over time, and also because, even if employers do not make vaccination a condition of employment, they may want to make it a condition for certain employment activities.

For most private-sector U.S. employers, current guidance strongly suggests that vaccinations can be required as a condition of employment for at-will employees. In its December 16, 2020 guidance on vaccination policies, the EEOC discusses at length the possibility that employers could "require" the vaccine, including how to best to "communicat[e] with employees about compliance with [an] employer's vaccination requirement."[19] This is in line with earlier approaches to (far less severe) pandemics. In the context of the H1N1 flu, for example, OSHA guidance indicates that, so long as a private employer makes appropriate religious and medical exceptions, an employer may require vaccination as a condition of employment.[20] Accordingly, employers are on strong ground to assume that, as a general matter, vaccination requirements are permissible.

That said, a given workplace may be subject to special conditions, so it is important to assess, at the outset, whether a vaccination requirement would be permissible. One example is if a collective bargaining agreement (CBA) governs the terms of employment, in which case it may speak to vaccine requirements.[21] Further, if employees are not at-

will, but rather work under a contract, that contract may dictate whether a vaccine can be required.

Likewise, while to date no state or local law or regulation appears to impose any general bar to private employers requiring vaccination, the situation at the federal, state, and local level is evolving rapidly,[22] so employers should obtain legal advice and ensure no new rule (or relevant agency guidance or court decision) has changed the landscape before getting started.

B. Make a Plan to Process Exemption Requests

Even if employers choose to "mandate" a vaccine, they must still be prepared to provide legally required exceptions for employees who (1) cannot take the vaccine due to a medical disability or (2) seek an exemption from the vaccine based on sincerely held religious beliefs. Virtually all employers must comply with these important legal protections. But employers should also recognize that they can structure such requests, and the resulting accommodations, in a way that satisfies the law while ensuring that those who are not truly motivated by such concerns, but instead merely would prefer to be unvaccinated, do not take advantage of them.

1. Medical Exemptions

For medical reasons, some individuals may be unable to safely take the vaccine. We know, for example, that the vaccine should not be administered to individuals with a known history of a severe allergic reaction to any component of the vaccine. Under the ADA, if an employee claims to require an exemption based on a "disability," [23] a workplace must engage in an "interactive process" with that individual to arrive, if possible, at a "reasonable accommodation" (which, potentially, would relieve the employee from having to get the vaccine).

Employee requests for medical exemptions should be treated like any other ADA request for accommodation.[24] However, if employers are concerned that vaccine qualms will lead to insincere accommodation requests, there are steps they can take. First, the ADA permits requests for reasonable documentation of the disability, which an employer can enforce.[25]

Second, workers with disabilities do not have the right to the accommodation of their choice, but rather to a "reasonable accommodation," *viz*, one that "reasonably" accommodates their disability, and that does not impose an "undue hardship" on an employer.[26] For example, employees who cannot be vaccinated do not necessarily need to be offered the "accommodation" of simply not receiving the vaccine but then otherwise resuming work as normal, nor must they be offered the accommodation of continuing to work from home after their colleagues have returned to work. Rather, under appropriate circumstances, an employer might instead require unvaccinated employees to attend work, but continue to distance and wear masks and PPE, even after vaccinated employees may in the future be permitted to halt such measures.[27]

Other possible accommodations may include shifting unvaccinated workers to other workplace roles or positions, relocating work sites within a building, or requiring that employees work remotely even if they want to return.[28] This process will typically require a case-by-case assessment of the relevant facts.

In sum, employers should recognize that the ADA does not create an automatic right for anyone to "opt-out" of the vaccine, but only a right to a fair interactive process that leads to a reasonable accommodation.[29]

2. Religious Exemptions

The second major category for possible exemptions are accommodation requests based

on sincerely held religious beliefs or religion-like philosophical systems.[30] Under Title VII, such beliefs must be taken into account, and if it would not pose "undue hardship," a reasonable accommodation must be granted.

Compared to medical exemption requests, Title VII religious accommodation requests are (1) easier to establish, with employees permitted to substantiate the "sincerity" of their beliefs with little documentation; but (2) less demanding on employers, in that the accommodations granted need only be provided if they would impose "de minimis" burdens on the employer. Both of these distinctions are relevant to any COVID-19 vaccination mandate.

On the "sincerity" of the religious belief at issue, the EEOC has noted that an employer is entitled to "make a limited inquiry into the facts and circumstances of the employee's claim that the belief or practice at issue is religious and sincerely held, and gives rise to the need for the accommodation."[31] That said, an employee can provide sufficient proof of sincerity by a wide variety of means, including "written materials or the employee's own first-hand explanation," or verification of "others who are aware of the employee's religious practice or belief."[32] Beyond that, probing the "sincerity" of a religious belief is risky business. So to the extent employees provide such substantiation, and even if their interpretation of a religious tenet differs from that religion's mainstream, employers would be wise, at that point, to accept it.

However, the EEOC has further made clear that employers are only obligated to accommodate "religious" beliefs or comprehensive religious-type philosophical systems, as opposed to other strongly held types of beliefs. For instance, there is no legal requirement to accommodate political, scientific, or medical views, or isolated ideas (such as "vaccines are dangerous").[33]

Given these principles, workplaces with vaccine mandates may want to create standardized Title VII exemption-request forms that (1) expressly state and remind employees that political, social, scientific, or other non-religious views are not sufficient justification and that it is not appropriate to request a Title VII exemption on those grounds, but that (2) otherwise permit employees to explain, in their own words, their religious or religious-type beliefs and why those beliefs prevent vaccination. As noted, however, to the extent an employee then completes the form and provides such an explanation, the explanation generally should be credited.

However, for the accommodation itself, as in the ADA context, even a sincere religious exception does not guarantee the right to be accommodated, but only the right to a process that may, if legally required, lead to an accommodation. And unlike the medical context, where the "undue hardship" an employer must show to deny accommodation is a "significant difficulty or expense,"[34] in the Title VII context "undue burden" is defined to require only a showing of more than a "de minimis" cost on the business.[35]

Accordingly, in addition to requiring unvaccinated employees to keep using PPE and other measures even after the rest of the workforce returns to normal, an employer likely has much more latitude to indicate that, where the risk of non-vaccination imposes burdens on the company, non-vaccination will not be allowed.[36]

C. Build Buy-In and Plan for Conflict Diffusion

Even with the legal authority to impose a mandate, employers that go this route still must be sure to build employee buy-in for compliance. This is particularly important in light of concerns regarding how a vaccine requirement might impact employee morale or office culture.

The more a workforce understands why the employer chose a mandate, and the more they have the chance to feel "heard" on the subject, the less friction there will be (and the fewer workers will attempt to claim potentially unneeded exemptions). Best practices for

building buy-in include:

- Informing employees of the policy change in advance, so that they can meaningfully share their views.
- Clear communication as to the purpose of the requirement: employee safety and allowing a return to normal.
- Tying the vaccine mandate to concrete and visible changes (e.g., once the vaccine is in place, re-open formerly closed off recreation areas or office space).
- Providing accurate and reader-friendly information on the vaccine. Given the amount of mis- or disinformation available, employers and HR in particular will play a key educational role.

On this point, given the incendiary rhetoric around vaccines and strong beliefs held by individuals on many topics related to vaccination, it is possible that the accommodation process, if not carefully handled, could lead to workplace tension. Workplaces should be aware of this risk and ensure that at no time does it rise to the level of impermissible discrimination or a hostile workplace.[37]

D. Minimize (and if Possible, Eliminate) Vaccination Costs to Employees

As a further way to ensure buy-in, whether for a mandatory or a voluntary program, employers should consider as many steps as possible to reduce the cost to employees of getting the vaccine. The vaccine itself will be provided, free of charge, by the federal government.[38] But unless already covered by employee insurance, employees may still be charged an "administrative fee."[39] Employers should consider covering those or other incidental costs, even if otherwise "out of plan" for workers.

Another "cost" to employees is that of time—such as the time to travel off-site to get a vaccine. Accordingly, contracting with a third-party provider to conduct on-site vaccination can help reduce this cost, as it brings vaccines on-site. That said, the EEOC has recently clarified that, to the extent an employer either directly administers a vaccine or contracts with a third-party to do so on its behalf, it incurs special medical-privacy obligations that may pose additional record-keeping and compliance burdens.[40] Employers considering requiring or encouraging vaccines should carefully consider these tradeoffs in deciding whether or not to bring vaccination "in-house."

Finally, for the small minority of workers who experience symptoms or bad reactions to the vaccine, employers should consider adopting a permissive approach to allowing (or extending further) paid sick leave to the extent necessary, even if a worker might otherwise not be entitled to it.

As shown above, such measures, while they may not be legally required in certain circumstances (depending on wage-hour and sick leave laws, among other things), are likely to be critical to increase and encourage buy-in.

E. Take a Thoughtful Approach to Continued PPE and Distancing Requirements

One common question will be whether a vaccination policy can or should supplant mask requirements, distancing, and other measures. Because the vaccines are not one-hundred percent effective, there is no guarantee that even a vaccinated employee will be fully protected. And because no one yet knows whether vaccinated individuals can still spread the virus, employers should be mindful of the safety of individuals who, for medical or religious reasons, are unable to be vaccinated. Finally, even the most optimistic projections indicate that, for at least some period of time, there will not be enough vaccines to cover everyone in the workforce.[41] Each of these considerations suggests that, at least in the short term, policies like masks and social distancing will still be necessary.

In the long run, however, providing the prospect of a return to relative normal for those who are vaccinated could be a powerful force toward boosting morale and commitment to a vaccination program, and toward getting greater employee buy-in.

F. Be Aware of Labor Law Issues

One further area to be aware of in rolling out a vaccine policy is the possibility of concerted labor action. Section 7 of the NLRA protects certain "concerted activity" regarding working conditions,[42] which might extend to protests or other labor action regarding a vaccine policy. Crucially, however, the NLRA does not protect non-compliance with workplace safety rules (such as employees attempting to style refusal to be vaccinated as a legally protected labor protest).[43] Further, to the extent there is a risk of labor activity *against* a vaccine mandate, employers should be aware that there is a countervailing risk of labor activity *for* a mandate, such as strikes by employees who refuse to come to work until their colleagues have been vaccinated.

G. Don't Lean Too Hard (or Perhaps at All) on Waivers

Finally, for those employees who, whether by choice or a valid exemption, are not vaccinated, some employers are considering requiring a waiver indicating that the employee understands the medical risks of this decision and accepts any associated risk. Given the limitations on the enforceability and permissibility of such waivers, however, a robust disclosure may be a better format. OSHA, for instance, has long required an attestation for employees in the context of bloodborne pathogen vaccines acknowledging their understanding of the risks should they not be vaccinated.[44] Seeing the risks of declining the vaccine clearly laid out in writing may, at the margin, increase buy-in.

That said, as a liability protection device, there is reason to be skeptical about such disclosures or waivers. In many jurisdictions, courts will find that employee liability waivers for workplace illnesses and injuries are not enforceable or even permissible, given the perceived imbalance of bargaining power or the operation of state workers' compensation laws (which in some cases are read to preclude such waivers).[45] Accordingly, while it may make sense to provide certain disclosures to unvaccinated employees, an actual waiver of liability may be prohibited or unenforceable.

* * *

As noted at the outset, no one size fits all, especially given the different levels of risk of infection spread in different industries and workplaces, as well as the fast-evolving legislative and regulatory environment around COVID-19. Consulting with experienced employment law counsel is essential to ensuring that your workplace can best address these complex and fast?moving questions.

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[1] An earlier version of this article originally appeared as a Gibson Dunn & Crutcher Client Alert titled, "An Employer Playbook for the COVID 'Vaccine Wars'", *available at* https://www.gibsondunn.com/wp-content/uploads/2020/12/an-employer-playbook-for-the-covid-vaccine-wars.pdf. For additional legal resources and guidance regarding the impact of COVID-19 in the workplace, *see* https://www.gibsondunn.com/coronavirus-covid-19-resource-center/.

[2] Jessica Glenza, "FDA approves Pfizer/BioNTech coronavirus vaccine for emergency use in US," The Guardian (Dec. 11, 2020), *available at* https://www.theguardian.com/world/2020/dec/11/fda-approves-pfizer-biontech-covid-19-coronavirus-vaccine-for-use-in-us.

[3] Lauran Neergaard and Linda A. Johnson, "Pfizer says COVID-19 vaccine is looking 90% effective," Associated Press (Nov. 10, 2020), *available at*

https://apnews.com/article/pfizer-vaccine-effective-early-data-4f4ae2e3bad122d17742be22a2240ae8.

[4] Denise Grady *et al.*, F.D.A. Authorizes Moderna Vaccine, Adding Millions of Doses to U.S. Supply, N.Y. Times (Dec. 18, 2020), *available at* https://www.nytimes.com/2020/12/18/health/covid-vaccine-fda-moderna.html; *see also* Denise Grady, "Early Data Show Moderna's Coronavirus Vaccine Is 94.5% Effective," N.Y. Times (Nov. 16, 2020), *available at* https://www.nytimes.com/2020/11/16/health/Covid-moderna-vaccine.html.

[5] *See, e.g.*, RJ Reinhart, "More Americans Now Willing to Get COVID-19 Vaccine," Gallup (Nov. 17, 2020), *available at* https://news.gallup.com/poll/325208/americans-willing-covid-vaccine.aspx (survey indicating that, as of late November, 42% of Americans would not agree to be vaccinated against COVID-19, up from 34% in July); Bill Hutchinson, "Over half of NYC firefighters would refuse COVID-19 vaccine, survey finds," ABC News (Dec. 7, 2020), *available at* https://abcnews.go.com/Health/half-nyc-firefighters-refuse-covid-19-vaccine-survey/story?id=74582249.

[6] For an accessible introduction to this process, see FDA, "Vaccine Development – 101," *available at* https://www.fda.gov/vaccines-blood-biologics/development-approval-process-cber/vaccine-development-101.

[7] *See, e.g.*, *Testimony to the Subcomm. on Oversight and Investigation of the H. Comm. on Energy and Commerce* 1 (Sept. 30, 2020) (statement of Ashish K. Jha, Dean of Brown University School of Public Health), *available at* https://docs.house.gov/meetings/IF/IF02/20200930/111063/HHRG-116-IF02-Wstate-JhaA-20200930.pdf.

[8] *See, e.g.*, Carla Black et al., CDC, *Health Care Personnel and Flu Vaccination, Internet Panel Survey, United States, November 2017* (2017), *available at* https://www.cdc.gov/flu/fluvaxview/hcp-ips-nov2017.htm (noting a 60-70% flu vaccination rate among healthcare personnel).

[9] *See, e.g.*, CDC, *Flu Vaccination Coverage, United States, 2019–20 Influenza Season* (Oct. 1, 2020), *available at* https://www.cdc.gov/flu/fluvaxview/coverage-1920estimates.htm.

[10] *See, e.g.*, Rita Rubin, *As Their Numbers Grow, COVID-19 'Long Haulers' Stump Experts*, J. of Am. Med. (Sept. 23, 2020), *available at* https://jamanetwork.com/journals/jama/fullarticle/2771111 (noting scientific studies estimating that approximately 10% of people who have had COVID-19 experience long-term symptoms, from fatigue to joint pain, and that these effects manifested even in individuals who were not initially seriously ill).

[11] *See, e.g.*, "Some Savannah restaurants close due to positive COVID-19 cases," WTOC (June 19, 2020), *available at* https://www.wtoc.com/2020/06/24/some-savannah-restaurants-close-due-positive-covid-cases/.

[12] *See, e.g.*, Jean Casarez, "Wrongful death lawsuit filed against long-term care facility over staffer's Covid?19 death," CNN (July 10, 2020), *available at* https://www.cnn.com/2020/07/10/us/wrongful-death-lawsuit-care-facility/index.html.

[13] *See, e.g.*, "CEOs Seek Liability Shield in Next Relief Bill: Congress Update," Bloomberg News (Dec. 22, 2020), *available at* https://www.bloomberg.com/news/articles/2020-12-22/trump-has-a-week-to-sign-massive-year-end-bill-congress-update.

[14] *See* discussion *infra.*

[15] 29 U.S.C. § 654.

[16] *See generally* U.S. DOL, OSHA Report 4045-06 2020, *Guidance on Returning to Work* (2020), *available at* https://www.osha.gov/Publications/OSHA4045.pdf.

[17] 42 U.S.C. § 12112 (barring discrimination on the basis of a "disability"). Because "disability," as defined in the ADA and further defined in subsequent ADAAA, includes *any* "physical or mental impairment that substantially limits one or more major life activities of [an] individual," *id.* § 12102, employees who do not wish to be vaccinated may argue that they have a disability that prevents them from being vaccinated.

[18] *Id.* § 2000e-2 (prohibiting discrimination on the basis of an "individual's race, color, religion, sex, or national origin").

[19] *See, e.g.*, EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, (Dec. 16, 2020), at ¶¶ K2, K3, K5, *available at* https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

[20] *See, e.g.*, OSHA, Standards Interpretation of Nov. 9, 2019, *available at* https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09 ("[A]lthough OSHA does not specifically require employees to take the vaccines, an employer may do so").

[21] Note, however, that to the extent OSHA or state regulators ultimately require, as a generally applicable workplace safety rule, that certain workplace vaccination policies be put into place, such health and safety rules would likely trump contrary (that is, more permissive) CBA terms. *See* discussion *infra*; *see also United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1236 (D.C. Cir. 1980) (noting duty to bargain with unions over safety and health matters does not excuse employers from complying with OSHA safety standards); *Paige v. Henry J. Kaiser Co.*, 826 F.2d 857, 863 (9th Cir. 1987) (same, as applied to California's state-level OSHA equivalent).

[22] *See, e.g.*, Joe Sonka, "Kentucky legislator pre-files bill prohibiting colleges from mandating vaccines," Louisville Courier J. (Dec. 4, 2020), *available at* https://www.courier-journal.com/story/news/politics/ky-general-assembly/2020/12/04/kentucky-bill-would-prohibit-colleges-mandating-covid-19-vaccine/3827327001/.

[23] *See* 42 U.S.C. §12102 (defining "disability" to include *any* "physical or mental impairment that substantially limits one or more major life activities of [an] individual.").

[24] *See generally* EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, (Dec. 16, 2020), at ¶ K5, available at https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (setting out "interactive process" for employees seeking exemption from workplace COVID-19 vaccination requirements).

[25] *See* EEOC, Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, EEOC-CVG-2003-1, Oct. 17, 2002 ("May an employer ask an individual for documentation when the individual requests reasonable accommodation? . . . Yes. When the disability and/or the need for accommodation is not obvious, the employer may ask the individual for reasonable documentation about his/her disability and functional limitations."); *see also* EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, (Dec. 16, 2020), at ¶ K5, *available at* https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (describing possibility, in context of COVID-19 vaccination requirement, of "obtain[ing] supporting documentation about the employee's disability").

[26] *See* EEOC, Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, EEOC-CVG-2003-1 (Oct. 17, 2002), *available at* https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada; *accord* EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, (Dec. 16, 2020), at ¶ K5, *available at* https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

[27] For analysis of an analogous question, see, for example, *EEOC v. Baystate Med. Ctr., Inc.*, No. 3:16-cv-30086, Dkt. No. 125 (D. Mass. June 15, 2020) (Order upholding policy that required unvaccinated healthcare workers to, as a condition of employment, wear masks even though vaccinated colleagues were not required to) [Order text accessible via PACER and CM/ECF and partially reprinted at Vin Gurrieri, "EEOC Religious Bias Suit Over Hospital Worker Firing Tossed," Law360 (June 16, 2020), *available at* https://www.law360.com/articles/1283456/eeoc-religious-bias-suit-over-hospital-worker-firing-tossed]; *see also Holmes v. Gen. Dynamics Mission Sys., Inc.*, No. 19-1771, 2020 WL 7238415, at *3 (4th Cir. Dec. 9, 2020) (suggesting that as "long as [a workplace safety] requirement is valid, any employee who is categorically unable to comply . . . will not be considered a 'qualified' individual for ADA purposes," and so may independently be denied a particular requested accommodation on such basis) (internal punctuation and citation omitted).

[28] *See generally* EEOC, Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA, EEOC-CVG-2003-1 (Oct. 17, 2002), *available at* https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada; *accord* EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, (Dec. 16, 2020), at ¶ K5, *available at* https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

[29] *See* EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, (Dec. 16, 2020), at ¶ K7, *available at* https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws ("If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace.").

[30] Specifically, EEOC guidance indicates such protections extend to "[r]eligious beliefs include theistic beliefs (i.e. those that include a belief in God) as well as non-theistic 'moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.'" EEOC, *Questions and Answers: Religious Discrimination in the Workplace*, EEOC-NVTA-2008-2 (July 22, 2008), *available at* https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace/.

[31] *Id.*; *accord* EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, (Dec. 16, 2020), at ¶ K6, *available at* https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws ("If, however, an employee requests a religious accommodation, and an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.").

[32] *See* EEOC, *Section 12 Religious Discrimination*, EEOC-CVG-2008-1 (July 22, 2008), *available*

at https://www.eeoc.gov/laws/guidance/section-12-religious-discrimination.

[33] *Id.*

[34] *See* EEOC, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship under the ADA*, EEOC-CVG-2003-1 (Oct. 17, 2002), *available at* https://www.eeoc.gov/laws/guidance/enforcement-guidance-reasonable-accommodation-and-undue-hardship-under-ada.

[35] EEOC, *Questions and Answers: Religious Discrimination in the Workplace*, EEOC-NVTA-2008-2 (July 22, 2008), *available at* https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace/; *accord* EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, (Dec. 16, 2020), at ¶ K6, *available at* https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws.

[36] *See, e.g.*, *Robinson v. Children's Hosp. Bos.*, No. CV 14-10263-DJC, 2016 WL 1337255, at *10 (D. Mass. Apr. 5, 2016) (finding that for Title VII purposes, healthcare worker's requested accommodation of non?vaccination based on religious beliefs would have imposed "undue hardship" on employer and so did not need to be granted).

[37] Likewise, employers must remain mindful that, to the extent employees exercise legally protected rights with respect to vaccination, they cannot be punished for doing so. *See, e.g.*, EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, (Dec. 16, 2020), at ¶ K5, *available at* https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (warning that, in the context of employees requesting disability accommodations related to COVID-19 vaccine mandates, "[m]anagers and supervisors are reminded that it is unlawful to disclose that an employee is receiving a reasonable accommodation or retaliate against an employee for requesting an accommodation").

[38] Andrea Kane, "Federal government says it will pay for any future coronavirus vaccine for all Americans," CNN (Oct. 28, 2020), *available at* https://www.cnn.com/2020/10/28/health/cms-medicare-covid-vaccine-treatment/index.html .

[39] Katie Connor, "Coronavirus vaccines may be free, but you could still get a bill. What we know," CNET (Dec. 7, 2020), *available at* https://www.cnet.com/personal-finance/coronavirus-vaccines-may-be-free-but-you-could-still-get-a-bill-what-we-know/.

[40] *See, e.g.*, EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, (Dec. 16, 2020), at ¶ K1, *available at* https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (noting that while vaccination itself is not a "workplace medical examination," such that it would trigger special ADA requirements, an employer's administration of a vaccine, which would necessarily include "pre-screening questions," likely would be such an "examination," thus requiring the employer to show the pre-screening questions are "job-related and consistent with business necessity"); *id.* at K ¶¶ K2, K3 (noting that while requiring employees merely to show proof of vaccination is not a "disability-related inquiry" for ADA purposes, an employer that mandates vaccination ***and*** that administers the vaccine itself or contracts with a third party to do so must show that the administration of vaccines (and the pre-screening questions administration required), were prompted by a "direct threat to the health or safety" of the workplace); *id.* at K ¶¶ 8-9 (noting that to the extent employers administer vaccines directly or through contracted third parties, they may take on obligations under the Genetic Information Non-Discrimination Act (GINA)).

[41] Noah Higgins-Dunn, "Trump COVID Vaccine Chief Says Everyone in U.S. could be vaccinated by June," CNBC (Dec. 1, 2020), *available at* https://www.cnbc.com/2020/12/01/trump-covid-vaccine-chief-says-everyone-in-us-could-be-immunized-by-june.html; *see also* Kathleen Dooling *et al.*, "The Advisory Committee on Immunization Practices' Updated Interim Recommendation for Allocation of COVID-19 Vaccine — United States, December 2020," *CDC Morbidity and Mortality Weekly Report* (Dec. 22, 2020), *available at* https://www.cdc.gov/mmwr/volumes/69/wr/mm695152e2.htm (setting out CDC guidance for allocating scare vaccine resources, and indicating which sectors might have priority in allocation).

[42] 29 U.S.C. § 157.

[43] *See, e.g.*, Board Opinion, NLRB Case No. 12-CA-196002, *Argos USA LLC d/b/a Argos Ready Mix, LLC and Construction and Craft Workers Local Union No. 1652, Laborers' International Union of North America, AFL?CIO*, Cases 12–CA–196002 and 12–CA–203177 (Feb. 5, 2020), at 4, *available at* https://apps.nlrb.gov/link/document.aspx/09031d4582f8f960 (finding, in the context of cellphone-while-driving rules, that workplace rules that "ensure the safety of [workers] and the general public" do not interfere with the exercise of Section 7 rights).

[44] *See, e.g.*, OSHA Standard 1910.1030 App A - Hepatitis B Vaccine Declination (requiring workers who opt out of the bloodborne pathogen vaccine to attest that they understand the medical risks of declining a vaccine should they decide to do so).

[45] *See, e.g.*, *Richardson v. Island Harvest, Ltd.*, 166 A.D.3d 827, 828-29 (N.Y. App. Div. 2018) (reasoning that employers and employees are in unequal bargaining positions, and that therefore prospective liability waivers for negligent employer conduct would be held unenforceable).

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