

Electronic Alert

Volume 24, Issue 5

January 22, 2021

Should Employers Require COVID-19 Vaccinations? Considerations & Best Practices for Employers

By Charlotte Hodde & Natalie Pattison

Many employers are deciding whether they can—or should—require employees to receive a COVID-19 vaccine. Here’s what we know so far:

Employers Can Legally Require Vaccination, With Some Exceptions.

The general rule, with some exceptions, is, yes, employers can require employees to be vaccinated. There are three main exceptions to the general rule: disability accommodations, religious accommodations, and healthcare workers in Oregon. Current guidance from both the U.S. Equal Employment Opportunity Commission (“EEOC”) and the Oregon Bureau of Labor & Industries (“BOLI”) confirm this position. See our previous E-Alert on the EEOC’s guidance for more details.

Here are the exceptions:

- Disability Accommodations: Employers must provide reasonable accommodations for employees who object to being vaccinated due to a disability, unless it would impose undue hardship.
- Religious Accommodations: Employers must provide reasonable accommodations for employees who object to being vaccinated due to sincerely held religious beliefs, unless it would impose undue hardship.
- Healthcare Workers in Oregon (ORS 433.416): Oregon law provides that healthcare workers may **not** be required to receive immunization as a condition of work unless the immunization is otherwise required by federal or state law, rule, or regulation. See our previous E-Alert on this Oregon statute for more information, including who is a healthcare worker under this statute.

However, There Are Additional Considerations.

Even though employers generally can require employees to be vaccinated, there are other important considerations.

- Impact of the FDA’s Emergency Use Authorization: So far, the approved vaccines were processed under the U.S. Food and Drug Administration Emergency Use Authorization (EUA) process. That process requires vaccine recipients to be notified that they have the option to accept or refuse the vaccine. It is not yet clear whether this right-to-refuse might

limit an employer's ability to require vaccinations. For example, Oregon recognizes public policy wrongful termination claims to the extent an employer terminates an employee for pursuing statutory rights directly related to employment, so a kind of wrongful termination theory might be asserted by an employee who refuses to be vaccinated based on the EUA "right-to-refuse."

- Workers' Compensation: An employee who has a negative reaction to a mandatory vaccine may well have a compensable injury resulting in a workers' compensation claim, or may seek to avoid the exclusivity of workers' compensation by asserting a deliberate injury. This is one consideration employers may evaluate in deciding to offer any vaccination through a third-party provider.
- Unionized Workplaces: Requiring vaccination is a mandatory subject of bargaining under the National Labor Relations Act, and may be something already addressed in a Collective Bargaining Agreement.
- Wage & Hour Considerations: Employers who require their Oregon employees to receive a COVID-19 vaccine may need to compensate them for the time spent getting vaccinated. BOLI's recent guidance suggests that time spent getting vaccinated falls under the broad category of "medical attention," which triggers Oregon wage and hour requirements. Under those requirements:
 - If an employee is required to get a vaccine and receives the doses on-site or off-site when they would otherwise be working, their employer must treat that time as hours worked in payroll.
 - If the employee gets their required vaccine at an off-site location **and** outside of their working hours, their employer is not required to pay them for their time spent getting vaccinated.

Pending Oregon OSHA standards may require payment for the out-of-pocket costs an employee incurs in getting vaccinated as well as travel.

- Proof of Receipt of Vaccination: Asking for proof of receipt of vaccination is not itself a disability-related inquiry under the ADA. However, employers should be cautious when requesting proof of vaccination, even if the employer is only asking to collect information and not as part of a mandatory vaccine requirement. Employers should only ask for a "yes" or "no" and not why an employee did or did not receive the vaccine or ask for any medical-related information to avoid triggering ADA standards.
- Incentive Programs: Employers who offer an incentive to encourage employees to receive the vaccine must analyze whether the incentive is permissible. Depending on the structure of the incentive, it could constitute a "wellness program" governed by the ADA, HIPAA, or GINA, in which case the program will need to be designed with these laws in mind, including limits on the incentive that may be offered. However, even where these laws do not apply, incentive programs must be carefully crafted to avoid potential employment law issues, including pay equity concerns, that could be raised by employees who refuse to receive the vaccine.

Employer-mandated vaccines have become a complicated issue in Oregon. As the law on COVID-19 vaccines continues to develop and change, employers should remain diligent and flexible when making decisions about their vaccine policies. Employers should consult with counsel to determine whether they can legally require vaccines and analyze other important considerations for their particular workplace, including wage and hour, pay equity, wellness program, and other considerations.

For any questions about navigating COVID-19 in the workplace, contact Charlotte Hodde or Natalie Pattison at 503-228-0500, or at chodde@barran.com or npattison@barran.com.