

LEGAL QUESTIONS RE: COVID VACCINE

— NATIONAL CONCRETE BURIAL VAULT ASSOCIATION —

January 20, 2021 - In this NCBVA newsletter: **10 Questions for Employers regarding the COVID-19 Vaccine** (a new article by [Poul Lemasters, NCBVA Legal Counsel](#)) + [link to register for Q&A call on Friday, 1/22](#).

THE COVID VACCINE IS HERE! CAN WE ALL RELAX?

The world is about to be a safer place. All we need is a vaccine to be found. We got it. Then all we need is the vaccine to be approved. We got it. Now all we need is the vaccine to be manufactured. We got it. Now we just need everyone to take it. Do we got that? The questions that many people are asking are what employers can and can't do when it comes to the COVID-19 vaccine.

With the vaccine now found, approved, and manufactured (at the time of writing this article both the Pfizer vaccine and the Moderna vaccine had been approved and were being administered), many businesses are considering how it will be distributed. With deathcare on the front end of receiving the vaccination, many businesses are also wondering how to implement the vaccine into the workplace.

With so many unanswered questions, here is a look at 10 questions every business employer should know and understand.

If you need any answers to these questions - then this article and Q&A conference call (THIS FRIDAY, January 22 @ 2pm ET) are for you. [Register](#)



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Friday, January 22 @2pm ET



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10 QUESTIONS EVERY BUSINESS EMPLOYER SHOULD KNOW AND UNDERSTAND

1. CAN MY BUSINESS REQUIRE EMPLOYEES TO RECEIVE THE VACCINE?

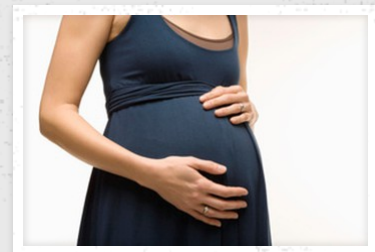
The short answer is most likely yes. As an employer you can most likely mandate that employees receive the vaccine.

Historically, some vaccines have been allowed to be mandated in some settings, typically healthcare. Keep in mind that this is all on the basis that the vaccine is available and, in enough supply, to be provided to your employees. [Register](#).



2. ARE THERE 'GOOD' REASONS AN EMPLOYEE CAN HAVE TO NOT GET THE VACCINE?

Yes. There is always an exception, or exceptions, to the rule, and it is no different with the coronavirus vaccine. In the case of mandatory vaccines, the most probable exceptions will include accommodating an employee who can't take the vaccine because of a medical condition or an employee who can't take it because of a religious belief. This is all based on the requirements under the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII).



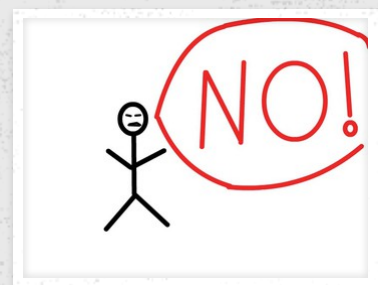
If the employee says they have a religious or medical reason for not getting the vaccine, the question then becomes how much the employer can ask to prove the employees reasoning

For religious belief, the employee need only show a sincere belief. This is a delicate issue and one that most employers do not challenge. For the medical condition, the employee could be asked to have a health care provider determine, and it could be due to things such as pregnancy or an underlying health condition. In either case, the threshold of proving the reasoning is not a high or difficult threshold.

As an employer, you must also remember that if an employee shows a reason for not receiving the vaccine, the employer could then have to offer some reasonable accommodation as an alternative. For example, perhaps the employee would have to wear a mask; or work remotely, or simply work away from others. The point is that if the employee has a reason, and you as the employer want to challenge the reason, you may still have to offer other accommodations. [Register](#).

3. WHAT IF AN EMPLOYEE SIMPLY DOESN'T WANT THE VACCINE?

This could pose an issue if you are requiring the vaccine. If an employer requires the vaccine, but the employee has no justified reason for refusing the vaccine, it could create a workplace issue for the employer. By not terminating - then what is the ramification for other employees? If you have a required mandate, and then someone gets sick because you have not enforced - then what is your liability as an employer? These are open-ended questions because at this time we do not have enough guidance. However, it does point in the direction that a mandate of requiring the vaccine may have more risk to the employer than a recommendation that all employees get vaccinated. [Register](#).



4. ULTIMATELY CAN I FIRE SOMEONE IF THEY REFUSE?

Maybe - but it isn't just a matter of them refusing and then you fire them. The Equal Employment Opportunity Commission (EEOC) has recently addressed this topic and stated that in order to fire an employee who refuses to get the vaccine, the employer must show an objective, direct health and safety risk. In order to do this, the employer must assess four factors in making this determination:



1. the duration of the risk presented by the unvaccinated employee;
2. the nature and severity of the potential harm presented by the unvaccinated employee's presence in the workplace;
3. the likelihood that harm will occur; and
4. how imminent that harm is to others in the workplace.

That does not mean that the employer may terminate the employee's employment after this review. It means the employer then needs to determine if other accommodations can be provided to permit the employee to continue working, such as permitting the employee to work, or continue to work, remotely, or having the employee work in another location on-site where the threat is reduced or eliminated. After conducting this analysis and ultimately concluding that the employee cannot be reasonably accommodated can the employer then terminate the employee. [Register](#).

5. CAN I MAKE THEM SIGN A WAIVER / HOLD HARMLESS IF THEY REFUSE TO GET THE VACCINE?



Probably not. Early on in the pandemic, employers began asking -and in some cases requiring- employees to sign liability waivers relating to future COVID claims. These waivers ranged from not suing because of sickness to death, or even being placed in the workplace where proper personal protective equipment (PPE) could not be provided. Employers who did not sign such waivers were sometimes terminated.

There were several lawsuits against employers for requiring such waivers and most of these waivers were found illegal. The reason they were illegal - and unenforceable, was for two main reasons. The first was the unequal bargaining power between employers and employees. Forcing an employee to sign such a waiver in fear of losing their job is seen as an unequal bargaining situation, and most courts will find for the employee. Second, it is illegal for an employer to force an employee to waive their workers' compensation rights. Workers' compensation is typically a state-run benefit, and as such the employer cannot force an employer to negotiate away its rights to this benefit.

Overall, a waiver against any claims due to refusing a COVID vaccine is most likely non-enforceable. Additionally, many of the employers who did require waivers early on received very bad press from the local community. [Register](#).

6. CAN I REQUIRE PROOF THAT AN EMPLOYEE DID RECEIVE THE VACCINE?



Yes. The EEOC determined the vaccine, in and of itself, is not a medical examination under the ADA and therefore an employer can ask for proof. If it was a medical examination - then the employer must demonstrate job-relatedness before the examination. If you will require proof of receiving the vaccine, keep it simple. Keep in mind that if you ask for proof and the employee says, "I decided not to get the vaccine" and then you ask, "Why aren't you getting the

them to share the photo they posted on Facebook - because it seems everyone getting a vaccine is sharing the pic on the internet! [Register](#).

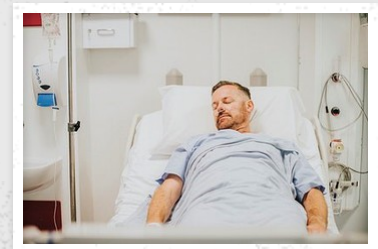
7. I HEARD THAT BECAUSE THE VACCINE IS NOT FULLY APPROVED, I CAN'T REQUIRE IT BE TAKEN.



No. There was discussion early on that because the vaccine has only received emergency use authorization that it would be difficult for employers to require it be taken. However, the EEOC in its most recent guidelines, stated that it is allowable for an employer to mandate a vaccination policy, including receiving the current vaccines.

There is history here as well. In 2009, the EEOC published guidance on pandemic preparedness, and the EEOC explicitly said that employers could require employees to get the flu vaccine so long as employers provided reasonable accommodations to people with disabilities and those with religious objections, as required by the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964 (Title VII). [Register](#).

8. WHAT IF AN EMPLOYEE GETS SICK FROM THE VACCINE - IS THAT A POTENTIAL WORKERS' COMPENSATION CLAIM?



Yes. There are many states that have specific language as it relates to vaccination of employees. For example, language such as the following is common in various states:

Any injury to or disease or death of an employee arising from the administration of a vaccine, as part of a voluntary inoculation program in connection with the person's employment or recommendation for the inoculation of workers in the employee's occupation, geographical area, or other category that includes the employee is deemed to arise out of and in the course of the employment.

Language such as this puts any adverse effect to the employee squarely in the realm of a workers' compensation claim. Before you think to not offer the vaccine at all, so you can avoid liability - read the question on an OSHA view of the vaccine. [Register](#).

9. IS OSHA INVOLVED IN THE VACCINE PROCESS?

Sort of. There are several people who believe OSHA may eventually set guidelines on the employer's responsibility to offer the vaccine to employees. **(At the time of this article, EEOC had published its guidelines for COVID vaccine distribution but OSHA had not.)** OSHA has a history of overseeing and regulating the distribution of vaccines between employers and employees. In 2009 OSHA published a letter of interpretation in which it stated that employers could require employees to get a seasonal flu vaccine (of course with caveats to ADA and TITLE VII that we listed above). OSHA also instituted the Hepatitis B vaccination protection program under its Bloodborne Pathogens Standard. Based on this history, it is possible that OSHA could release a new program for COVID 19 vaccines.



However, keep in mind OSHA has a General Duty Clause which it can use to issue citations when no specific OSHA standard applies. Under current recommendations, any employer that fails to offer COVID-19 vaccines could potentially fall under this general duty clause provision, and face fines for not providing the vaccine to those recommended to receive it. Under current OSHA regulations, employers must ensure that all occupationally exposed workers are trained about vaccines and vaccination, including efficacy, safety, method of administration, and the benefits of vaccination.

This can be seen in the hepatitis B protection program, where employers must also inform employees that the vaccine and vaccination are offered at no cost to the worker. Under the Hepatitis B program, it is worth noting that in addition to offering the vaccine, employers must ensure that workers who decline vaccination sign a declination form. The purpose, according to OSHA, is to encourage greater participation in the vaccination program by stating that a worker declining the vaccination remains at risk of acquiring hepatitis B. The form also states that if a worker initially declines to receive the vaccine, but at a later date decides to accept it, the employer is required to make it available, at no cost, provided the worker is still occupationally exposed. This author believes that this is a great template for a COVID19 vaccine program. [Register](#).

10. WHAT'S A GOOD PLAN FOR A BUSINESS IN REGARD TO OFFERING THE VACCINE?



In this person's opinion, consider handling the vaccine under the current Hepatitis B Vaccination Protection Program under OSHA. Under OSHA, an employer must establish an exposure control plan for any employee that they reasonably anticipate may come into contact with blood or other potentially infectious materials. As part of the exposure plan, an employer must make the Hepatitis B vaccination available to such employees. The employer can't force the Hepatitis B vaccine, but it can recommend it and offer a plan to take it. As an employer, consider following this same plan in regard to the Coronavirus vaccination. The plan is already in place and already provides protection to the employer; and as such could be a good starting

point for a vaccination program in your workplace. The plan is built on recommendation - not requirement. [Register](#).

IN CLOSING...

The vaccine subject is very new, and as of now the focus has been implementation - not liability. And while there has been an overwhelming push for all to take, there has been no mandate on the Federal or State side. There is a current trend suggesting that employers recommend versus require. Whatever plan your business decides to follow - make sure you have a plan in place.

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CON CALL AND Q&A SESSION WITH OUR LEGAL COUNSEL

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FRIDAY, JANUARY 22 - 2pm ET

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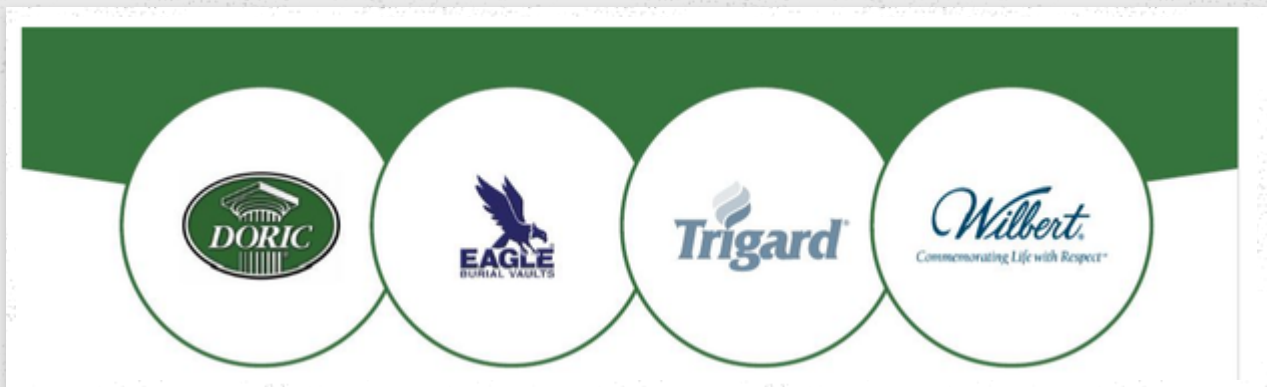
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