

# Requiring COVID-19 Vaccinations in The Workplace

## Dealing With Religious, Disability and Pregnancy Discrimination Issues

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With COVID-19 vaccinations beginning to be provided selectively throughout the country, employers are increasingly raising the following questions – Can our business require employees to receive the COVID-19 vaccine? Are there risks or issues to consider in either requiring or not requiring the vaccine?

Veterinary clinics and hospitals are no exception regarding raising such questions and reviewing risk assessments. This article will discuss key points regarding mandatory COVID-19 vaccination programs in the workplace.

### **Now is the time to consider the vaccine requirement issue**

From a timing perspective, this issue should be considered and addressed by employers now, as it is anticipated there will be more vaccines available to a wider group of people by spring and early summer.

There are no applicable statutes, regulations or court precedents establishing law on the issue of mandatory COVID vaccines in the pandemic era. However, on December 16, 2020, the United States Equal Employment Opportunity Commission (EEOC) issued guidance to employers considering implementation of mandatory COVID-19 vaccination programs for employees. The EEOC Guidance also addressed employers' obligations under federal civil rights laws.

It is important to understand two general points regarding the December 16th EEOC guidance:

1. EEOC guidance is not law. Just as it states, it is only "guidance."
2. As new information is learned about the vaccine – such as its longevity as well as treatment and logistical issues – it is almost certain that the EEOC will add to or revise its December 16<sup>th</sup> guidance to reflect more current information. It is also possible that other federal government agencies and/or state agencies will issue additional guidance or even regulations concerning COVID-19 vaccines and mandatory vaccination programs.

The December 16th EEOC guidance does not state definitively that mandatory vaccination policies are lawful. However, the wording of the guidance reflects the EEOC's position that requiring a workplace COVID-19 vaccination in order for an employee to continue employment or return to the workplace from a remote assignment is not automatically unlawful provided that certain protected classes are dealt with in an appropriate manner.

### **Exemptions and accommodations must be made**

Specifically, the EEOC guidance states that employers adopting mandatory vaccination policies must provide exemptions or accommodations to employees based on religious, disability, or pregnancy-related issues that may prevent them from obtaining a vaccination.

Also, employers must remain cognizant of OSHA's general duty clause which requires employers to ensure they provide employees with "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees..." As the COVID-approved vaccines have shown thus far to be more than 90% effective and safe to use, it likely is a means to make sure that a place of employment is free from a recognized hazard (COVID-19) that can cause death or serious physical harm. This OSHA requirement makes it at least arguable that mandatory COVID vaccinations are necessary to meet the general duty clause. However, OSHA has not issued any guidance at this time regarding COVID vaccines, and has not previously required vaccinations (such as with the flu) to meet the general duty clause. That being said, COVID-19 is a truly unique workplace challenge that has presented new approaches to dealing with its serious and lethal effects, and OSHA may move to require vaccines to meet the general duty clause.

As there may be additional guidance issued by the EEOC, OSHA, CDC, the State of Wisconsin and/or other federal or state agencies in upcoming months, as well as certain aspects of the COVID-19 vaccine that remain uncertain at this time, it may be best for employers to make a preliminary decision on the issue of mandatory COVID-19 vaccines, and then "finalize" it as additional guidance and information becomes available. Even a "final" policy adopted by your veterinary practice may need to be modified depending on additional future developments and governmental guidance/regulations. At a minimum, all veterinary practices should consider at this time whether they lean toward the option of implementing a mandatory vaccination program or toward the option of simply encouraging or recommending employees be vaccinated.

Furthermore, vaccination requirements involve federal civil rights laws, such as the Americans with Disabilities Act (ADA), the Genetic Information Nondiscrimination Act (GINA), the Pregnancy Discrimination Act, the religious protections of Title VII of the Civil Rights Act of 1964 (Title VII), as well as the Wisconsin Fair Employment Act.

For purposes of this article, the focus will be on religious and disability accommodations, as well as addressing pregnancy issues in a non-discriminatory manner.

With disability accommodation issues, it is common to ask the employee to provide a doctor's note regarding the medical issue and any restrictions, so that an employer can then make decisions regarding accommodations requested. This is part of the recognized interactive process under the ADA and State laws. That process should not change for employees who claim they cannot be vaccinated for COVID due to a disability. Stay consistent with what is required in considering accommodations, which means asking for a doctor's note confirming that an employee cannot have the vaccination due to a medical issue.

Regarding religious accommodation, asking for documentation is more limited than with asking for documentation on disability issues. Asking for documentation may be part of the religious accommodation process, but oftentimes it is not. The EEOC has issued guidance on asking for documentation for religious accommodations and stated:

"[b]ecause the definition of religion is broad and protects beliefs and practices with which the employer may be unfamiliar, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely-held religious belief. If, however, an employee requests religious accommodation, and an employer

has an objective basis for questioning either the religious nature or the sincerity of a particular belief or practice, the employer would be justified in seeking additional supporting information."

So, an employer can require documentation even for religious accommodation but only in much more limited situations.

For pregnancy, it depends what the medical community decides on that issue and whether the vaccine is dangerous to have while pregnant. That may vary depending on whether an employee is having a complicated pregnancy. It appears that for pregnant employees, this will be a very personal choice, and one that the employer should be careful not to force on the pregnant employee.

### **Review is ongoing**

Obviously, there are still a lot of issues up in the air regarding mandatory workplace COVID-19 vaccinations, creating written policies of that type, and the timing of such policies. Again, in all likelihood, if an employer wants to require vaccinations of all employees, it appears that will be permitted. But, accommodations and/or exemptions for religious, disability or pregnancy reasons will need to be considered along with whether there is an actual undue hardship for an employer if employees are not vaccinated in those categories.

This issue will almost certainly require review and reconsideration numerous times in 2021.