



LEHR MIDDLEBROOKS  
VREELAND & THOMPSON, P.C.

LABOR • EMPLOYMENT • BENEFITS

## FLU VACCINE CONSIDERATIONS

*August 27, 2020*

As August comes to a close, many employers are anxious that with Fall will come flu season, placing employers in the position of battling staffing challenges and employee health issues from two dueling infections. While healthcare employers have long mandated flu vaccines for employees, many non-healthcare employers are considering imposing flu vaccine requirements for the first time. Keep reading for consideration and employee talking points about requiring or encouraging a flu vaccine.

**Federal law does not prohibit a vaccine requirement.** Under federal law, employers may impose reasonable vaccine requirements. This means that while vaccines may be required, in most situations there should be exemptions or accommodations made for bona fide religious or health objections pursuant to Title VII and the Americans with Disabilities Act. Employees asserting disability-related reasons have the highest level of protection. Some states may permit other reasons an employee may be exempted from a vaccine requirement, so you should always review with your employment counsel the impact of state law on policy decisions like this one.

**Healthcare employers have already established the standard accommodation for vaccine-refusing employees: a face mask.** Healthcare employers have been requiring the flu vaccine for years now (some of them having been legally mandated to do so), and we can expect that the practices that have worked

in healthcare will generally suffice for most other businesses. When healthcare employers receive a valid religious or health-related request from an employee to avoid the flu vaccine, healthcare employers have generally accommodated the employee by requiring them to wear a face mask while working.

**Factors to consider when deciding to encourage or mandate flu vaccination.** Employers in other industries will need to plan proactively to decide if they will *encourage* or *mandate* flu vaccines this year.<sup>1</sup> Factors to consider include: What is the current risk of transmission in the workplace (i.e., are workers close together or working closely with consumers)? Are there special business justifications beyond weathering the attendance fall out of flu season in the midst of a pandemic (e.g., working with vulnerable populations, or working in a job where rates of transmission to consumers or co-workers would be expected to be high)? What current health safety measures are in effect (i.e., are face masks already required)? What is the employer's level of expertise to promptly evaluate religious, health, and personal requests for accommodation, and what is the expected volume of those requests? What is the risk to employee morale and/or risk of losing valued employees if a flu vaccine is mandatory? Employers should work with legal counsel to assess how these factors line up for their particular work setting and population.

**Employers choosing to mandate the flu vaccine should expect resistance.** Nationally, a slight majority of U.S. adults do not receive the flu vaccine each year. For the 2018-19 flu season (the most recent flu season for which statistics from the CDC are available), only 45.3% of adults got the vaccine. For Alabama, the

---

<sup>1</sup> For what it's worth, the EEOC prefers employers to encourage influenza vaccination, rather than mandate it. (<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>, Q.13)

figure was 44.8%. However, among most working-age adults (age 18-64) in Alabama, the vaccination rate was just 37.4% (nationally, that figure is 39.0%). Because a healthy (or not-so-healthy) proportion of adults opt out of the flu vaccine each year, any employer mandating the flu vaccine should be prepared to tackle morale issues and a number of requests for accommodation, many of them referencing a mix of religious, health-related, and “personal liberty”-related reasons. Finally, since the healthcare environment has established that masks are the standard accommodation, if an employer is already requiring face masks, will it feel that the morale costs of mandatory vaccinations were worth it if a not insignificant of employees remain unvaccinated under religious or medical excuses?

Whether an employer decides to encourage or mandate the flu vaccine, it is important to be able to articulate the importance of vaccination and combat internet-meme pseudoscience. If the decision is made to mandate the vaccine, there should be messaging from the top, consistently enforced by managers, as to the rationale for this decision. For example, an employer might want to look to its attendance statistics to see if leave balances are on average lower this year than in prior years, and use those average numbers to encourage employees to think about the consequences of getting the flu. Also, employers should publicize the details for providers where their employees can obtain free or reduced cost flu vaccinations.

**What does this mean for when a COVID-19 vaccine is developed?** While it’s not unreasonable to expect that the legal guidance for a still-hypothetical COVID-19 vaccine would track the flu shot guidance, that expectation is underwritten by assumptions, including that a COVID-19 vaccine would have similar efficacy and

similarly-established medical reasons that would contraindicate its use, and also that no applicable government agency would publish guidance approving employers to mandate the vaccine for employees in shared workspaces except in narrow and specifically-defined health circumstances. All three assumptions and many others<sup>2</sup> could easily and foreseeably be challenged by reality. In any event, there will likely be ample time between the discovery of any COVID vaccine and its manufacture in sufficient quantities for widespread use for those parameters to be better defined.

684864

---

<sup>2</sup> For example, will there be a federal tort immunity statute passed, and will it specifically cover employers requiring a COVID vaccine? As there is far more than one vaccine in development, will there be more than one vaccine to choose from, and could employers have valid reasons for requiring one vaccine over another?