



LEHR MIDDLEBROOKS  
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## **VOLUNTARY OR MANDATORY VACCINATION?**

### MANDATORY

Employers may want to implement a mandatory vaccination program to reduce the risk of absenteeism and exposure to third parties, such as customers and patients. Employers generally have that right. Two legal exceptions are under the American with Disabilities Act and Title VII religious accommodation. Under the ADA, if an employee has a medical basis for refusing the vaccine, the employer may confirm that basis and then consider reasonable accommodation. Reasonable accommodation may be requirements to wear PPE or to determine if working remotely is possible. Ultimately, if accommodation cannot occur, the employer may suspend or separate the employee.

Under religious accommodation, the employer has the right to ask for confirmation of an employee's religious belief, practice or observance such that taking the vaccine is precluded. However, the employee's religious belief does not have to be associated with an organized religion, it need only be sincerely held and religious in nature. Then the employer would consider reasonable accommodation, as under the ADA. In both situations, reasonable accommodation does not require creating or finding a job at the same pay rate—it may pay less.

There are practical considerations when requiring a vaccination:

1. What if a substantial number of employees refuse the vaccine for personal (but not religious or medical) reasons? Although the employer in most cases may terminate, that is not necessarily a practical approach. Where an employer anticipates the refusal of a substantial part of the employee population, it should promote education and demonstration and consider incentives to encourage

employees to take the vaccine. These promotion techniques are discussed in the following section.

2. How will employers handle the various timetables of when vaccines will be available based on age, medical condition, and job responsibilities? Note that employers should not ask employees their medical conditions, but may ask employees which “group” they are in, as long as those priority groups continue to include both disabled and non-disabled individuals.
3. How will employers handle applicants? As with other conditional offer medical questions, the employer may require confirmation of the applicant’s vaccination. The employer may notify the applicant that a vaccine is required. Should the applicant respond with an ADA or religious basis for not taking the vaccine, then the employer should move to the reasonable accommodation discussion.

Public health surveys show that more people will take the vaccine than surveys reported during August and October. Employers who wish to make vaccines mandatory should set a realistic date by when this must occur. For those employers that want to explore a vaccine mandate, [please click here to review our coverage of the EEOC’s guidance for such a program.](#)

## VOLUNTARY

For a variety of reasons, many employers will choose not to mandate that their employees receive a COVID-19 vaccine, at least in 2021. Reasons not to mandate a vaccine include the logistical challenges of determining who can reasonably receive the vaccine, general management beliefs and practices, low impact/spread in the community, ability to accommodate COVID-related absences or continued alternate work arrangements, concerns (especially for public employers) about the legal impact of the vaccine’s Emergency Use Authorization status, lack of will/desire/expertise to sift through accommodation requests that such a mandate might generate, and concerns about how a mandate would impact employee morale. We don’t quibble with any of

these reasons, and we affirm the right of employers to make difficult decisions at all times, but especially these times.

For those employers who want their employees to be vaccinated, but don't want to mandate it, what can be done? We suggest education, demonstration, access, and incentives.

**Education:** Engage with employees at shift meetings, company-wide emails, bulletin boards, and newsletters about the vaccines' efficacy and safety and where they can receive it. Consider having health care workers video-conferenced in to answer questions about the pandemic and their experience with the vaccine, or gather questions from employees for a local doctor or public health expert to respond to, in writing or by recording. (We think local voices and faces can be more persuasive here than national experts, and probably more available too!).

**Demonstration:** Encourage management to get vaccinated with employees if you're able to provide on-site vaccination, or, if not, to photograph their experience and post it on social media, the Company intranet, bulletin boards, etc. Leaders need to be out in front, putting their arms where their mouths are.

**Access:** Employers with adequate facilities should reach out to local health authorities and pharmacies to seek to partner to host vaccination clinics. Surveys suggest the majority of Americans don't have set-in-stone opinions on the vaccine. Removing the barriers (or perceived barriers) of having to request time off of work to go to a clinic/parking lot/convention hall across town twice over two weeks will almost certainly result in some choosing to get vaccinated who wouldn't have otherwise unless the vaccine came to them.

**Incentives:** Employers may incentivize employees to receive the COVID-19 vaccine. [Unfortunately, guidance on the amount of incentive an employer may provide is stuck in limbo for now.](#) We think \$50 is an amount unlikely to be challenged as so substantial as to make an employee's participation less than voluntary. There are also psychological reasons to keep the incentives modest, as studies have found that large bounties communicate the idea that a large risk is being undertaken. Employers should also be mindful that employees who can substantiate that they genuinely can't receive

the vaccine because of a disability should still receive the incentive or have an alternative, non-stigmatizing way to participate in the program and receive the incentive (we don't know of an alternative other than the public health measures that should already be broadly implemented, so in most cases an employee with a disability would receive the incentive upon substantiation of their disabling reason not to receive the vaccine).

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