

## Mandate COVID-19 vaccines for all employees? Like everything, it's complicated



By [Aaron Nicodemus](#) | Tue, Oct 6, 2020 12:41 PM

**So you want to mandate that all of your company's employees get the coronavirus vaccine, once it's available? Such a requirement is legal, but there are a host of considerations that might make it impractical, employment experts say.**

Until now, employers who ordered their employees to take vaccines as a condition of work were mostly limited to the healthcare industry. But with the persistent and long-lasting threat posed by COVID-19, employers in industries like hotels, hospitality, and manufacturing are asking about whether they can issue mandatory coronavirus vaccine orders for all employees.

Mandating vaccines for all employees would certainly help reduce the risk of on-the-job transmission and could reduce an employer's liability in terms of coronavirus-related workplace illness.

So the first question is, is it legal for an employer to mandate that employees take the coronavirus vaccine? The short answer is yes. Healthcare employers like hospitals and nursing homes have a long history of successfully requiring all employees to be vaccinated in order to work in facilities that serve medically fragile patients.

But that yes comes with a number of caveats, said Barry Hartstein, co-chair of the Equal Employment Opportunity & Diversity Practice Group at the employment law firm Littler Mendelson.

"Until we know more about a vaccine's effectiveness, how frequently someone has to take it, and any potential side effects, we're recommending that employers wait and see," he said. Any vaccine will likely not be widely available until mid-2021, even if frontline workers and vulnerable populations may be vaccinated sooner. It would be unwise to mandate that all employees be vaccinated if they cannot easily obtain one.

"We're still waiting for a vaccine to be released," said Rob Wilson, president of Employco, a human resources outsourcing firm. "I think it's a decision people will have to make on their own."

In the event a coronavirus vaccine is developed that is safe, effective, and widely available, even then a vaccine mandate may not be the way to go.

If an employer wants employees to get the coronavirus vaccine, it is best to strongly recommend it, rather than mandate it, Hartstein said.

One reason why is liability risk. Employers who mandate that employees take any vaccine—be it for the flu, measles, or other communicable diseases—open themselves to potential liability if an employee suffers an adverse reaction to the vaccine.

Pharmaceutical giant AstraZeneca **halted a late-stage coronavirus vaccine trial** in September when a U.K. volunteer was diagnosed with “transverse myelitis, an inflammatory syndrome that affects the spinal cord and is often sparked by viral infections,” according to a *New York Times* story. It is still unknown whether the diagnosis was caused by the virus. The vaccine trial **resumed after a short pause**, the company said.

Should an employee suffer a vaccine-related adverse reaction, that employer is open to workers compensation claims by that employee. The California Supreme Court has ruled, on an employer mandate for influenza vaccine, that an employee who was ordered to be vaccinated and then suffered an adverse reaction was compensable under the Workers’ Compensation Act.

“Thus, mandatory vaccinations may lead to potential workers’ compensation claims from employees who suffer an adverse reaction to a potential vaccine,” according to **a Littler report** that weighed the legal ramifications of an employer vaccine mandate.

In addition, the U.S. Occupational Safety & Health Administration (OSHA) has not included an employee vaccine mandate in its recommendations for **how to ensure a safe workplace** during the coronavirus pandemic. The agency’s recommendations apply to all workers—from those considered at the lowest risk of infection to high-risk workers in healthcare facilities, laboratories, and morgues.

U.S. employers also must consider that employees have several options to legally opt out of being vaccinated. Employees who successfully opt out of being vaccinated would then require their employer to place them at workstations that are substantially separate from other, vaccinated employees, in order to comply with rules laid down by the U.S. Equal Employment Opportunity Commission (EEOC).

Employees can claim a religious exemption under the Civil Rights Act of 1964 or a disability exemption if their disability is covered by the Americans with Disability Act (ADA). (Pregnancy is considered a qualifying, albeit temporary, ADA disability that would allow an employee to forgo a vaccine).

Unions can mount another obstacle to the implementation of an employer vaccine mandate. “There is a strong likelihood that employers may face challenges if an employer mandates vaccinations in a union-represented work environment,” the Littler report said. If the local, state, or federal government has not mandated that people take a vaccine—and it is unlikely that they will—

employers will have little legal standing to force the issue in their negotiations with the union, Littler said.

And then there is the anti-vaccine movement. Some employees may refuse to take a coronavirus vaccine because they don't believe it will be safe and may attempt to convince other employees to come around to their view.

"To the extent that an employee or group of employees mobilize co-workers to challenge mandatory vaccines being imposed by an employer, this could be viewed as 'protected concerted activity' under Section 7 of the National Labor Relations Act (NLRA) even in the absence of a union and result in potential unfair labor practices being filed against the employer," the Littler report said.