



COVID-19 Vaccination Requirements: Potential Constraints on Employer Mandates Under Federal Law

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The [COVID-19 pandemic](#) has forced unprecedented workplace changes and raised a [host of legal issues](#). Employers may struggle with how to protect workers from infection, avoid disruptions that may result from sick leave and employee quarantines, and manage [potential liability](#) if an employee contracts the virus at work. [Some](#) have noted employers' plans to encourage or require [COVID-19 vaccinations](#) for workers as they become available. Policies will undoubtedly vary. Observers expect that health care, travel, and retail businesses will [more likely mandate or encourage vaccines](#), while those with less customer interaction and more work-at-home capacity may defer to employee choice on whether to seek vaccination. Some expect that [smaller businesses](#), too, may be more likely to require vaccination, because a wave of infection among a smaller staff could shut down operations. In [accordance with guidance](#) from the Centers for Disease Control and Prevention (CDC), many health care providers [already mandate annual flu vaccination](#), providing an informative precedent for COVID-19 vaccination policies.

Whatever approach vaccination-policy decisionmakers consider, federal antidiscrimination statutes, among other laws, may inform, and perhaps constrain, the implementation of vaccination mandates. Federal civil rights laws do not bar vaccination mandates by private and state government employers, but they may affect their scope. Some laws, for example, restrict employers from making certain medical examinations or inquiries, while others require employers to consider workers' religious objections to vaccination and potential disabilities preventing vaccination. The coronavirus pandemic is unique and, thus far, courts have not evaluated vaccination requirements in this context. But the Equal Employment Opportunity Commission (EEOC), which enforces these [federal civil rights laws in employment](#), has issued [guidance on COVID-19](#) and vaccination policies. In addition, an underlying principle of many employment antidiscrimination laws that call for accommodation is reasonableness. Concerns about employees spreading COVID-19 will likely weigh heavily in any challenge to a vaccine mandate.

This Sidebar provides a general background, in light of recent EEOC guidance and courts' prior adjudication of employer vaccine mandates, on federal antidiscrimination statutes (including the Americans with Disabilities Act [ADA] and Title VII of the Civil Rights Act of 1964) relevant to employers or lawmakers crafting vaccination requirements. In addition, the Sidebar briefly considers

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other laws that could constrain employer vaccine mandates, including the Religious Freedom Restoration Act (RFRA). RFRA may limit some government employers' adoption of vaccine mandates and affect future legislation governing vaccine mandates, even legislation that would compel private employers to adopt vaccine mandates or require certain categories of employees to be vaccinated. Finally, the Sidebar concludes by identifying potential legislative options for Congress to clarify how these statutes apply in pandemic circumstances.

Federal Civil Rights Laws and Employee Vaccination Policies

While federal employment antidiscrimination law does not bar employers from requiring vaccinations, it does require employers to make certain exemptions for employees with disabilities or religious concerns. The [ADA](#) and the [Rehabilitation Act of 1973](#) (applying ADA standards to federal employers and grant recipients) require employers to make changes to work rules for some employees with disabilities. These laws [would apply to employer vaccine mandates](#). Disability laws also restrict certain medical inquiries. Second, [Title VII](#) of the Civil Rights Act of 1964 requires employers to take into account workers' religious objections to vaccination and health concerns of pregnant employees.

Title VII and federal disability protections apply to most state, federal, and private employers. These laws have a number of exemptions. Of particular relevance, neither the [ADA](#) nor [Title VII applies](#) to employers of fewer than 15 workers. To date, there is little case law regarding how these statutes might apply to COVID-19 vaccination policies, but case law concerning other vaccination policies, along with EEOC guidance concerning COVID-19 specifically, may be instructive.

Reasonable Accommodations for Employees with Disabilities

In the context of COVID-19, some workers may request an exemption from mandatory vaccination because of a medical condition. If an employee's medical condition amounts to a disability—that is, an “[impairment that substantially limits one or more major life activities](#)”—then the ADA or the [Rehabilitation Act](#) apply, barring employers from taking adverse action against a worker [because of disability](#). Further, federal disability law requires employers to provide requested [reasonable accommodations](#) unless they would impose an [undue hardship](#) on the employer. In considering an accommodation request, an employer [must assess](#) whether a disability precludes vaccination, available alternatives, and (in the case of an infectious disease) possible threats from vaccine exemptions.

Coronavirus Vaccination Risks and Disability

While much remains unknown, reports suggest that people with some medical conditions may not be able to receive a COVID-19 vaccination. For example, vaccine manufacturer Pfizer states that its [vaccine should not be given](#) to anyone with a known history of severe allergic reaction to a component of the vaccine. In accordance, the CDC recommends that anyone with an allergy to an ingredient in one of the COVID-19 vaccines [should not receive that vaccine](#). What is more, people who have had [an allergic reaction to another vaccine](#)—even a mild reaction, the CDC says—should consult with a doctor about getting a COVID-19 vaccine. The CDC emphasizes, however, that [the coronavirus and responding vaccines are new](#), and data on COVID-19 vaccination for some populations are limited.

Whenever an employee raises medical concerns about vaccination, [employers must consider](#) whether disability laws require an accommodation, including a possible exemption. Depending on work circumstances, potential accommodation for an unvaccinated employee might include temporary job restructuring, [work at home](#), distancing from coworkers or customers, or [other measures](#). In the end, if a worker cannot get vaccinated for reasons of disability or (as discussed below) religion, and a reasonable accommodation is not possible, [the EEOC acknowledges](#) that the employer may bar the employee from the workplace.

Direct Threat Exception to Reasonable Accommodation

In general, when a worker requests a modification in working conditions because of a disability, an employer must ordinarily evaluate whether it can provide a [reasonable accommodation](#). During the COVID-19 emergency, while employers [must still](#) consider accommodation requests, some might make use of a provision in the ADA that provides that an employer need not accommodate an employee who poses a [“direct threat.”](#) Under it, employers may exclude employees with disabilities if their presence would create [“a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”](#) The EEOC has concluded that this provision applies in [pandemic circumstances](#), permitting employers to keep infected employees out of the workplace.

In some cases, this rule might also [justify](#) barring an unvaccinated worker from the workplace, even if disability prevents vaccination. Use of this exception, however, first requires an [individualized, objective assessment](#) of the risk the unvaccinated employee presents. The risk’s duration, imminence, the likelihood of harm, and the degree of harm are all relevant. All in all, the EEOC suggests that in the case of COVID-19 vaccination a [“conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus at the worksite.”](#) An employer should consider workplace-specific factors, such as [“\[t\]he prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown.”](#) More generally, the EEOC has [clarified](#) that [“\[t\]he ADA and the Rehabilitation Act do not interfere with employers following advice from the CDC and other public health authorities on appropriate steps to take relating to the workplace.”](#)

Courts’ Assessments of Mandatory Vaccination Under Federal Disability Statutes

Courts have yet to assess mandatory vaccine requirements during the COVID-19 pandemic, but they have occasionally reviewed challenges to mandatory flu vaccination requirements under civil rights statutes. In many cases employers have prevailed, including when an employee [did not prove that she had an alleged allergy and did not seek out available hypoallergenic vaccines](#). In another case, a court concluded that an [employee could not show](#) she had a disability if she did not prove that her allergy substantially limited a major life activity.

In other circumstances, judges have looked more favorably on an employee’s requests. [The Third Circuit concluded](#) that severe anxiety over an injection might qualify as a disability, at least in the case of a nurse who refused a tetanus, diphtheria, and pertussis vaccine. The court [held](#) that a plaintiff had sufficiently raised an ADA claim, given that she proposed wearing a mask instead of getting a vaccine and her employer rejected the offer without proposing any alternative.

Religious Accommodations Under Title VII

[Title VII](#) similarly requires employers to accommodate workers’ religious practices unless they impose an [“undue hardship on the conduct of the employer’s business.”](#) As a general matter, this Title VII provision applies when an employee’s religious belief or practice conflicts with a job requirement.

In the context of vaccine objections, courts have examined a variety of religious beliefs and possible accommodations. In one such case, a Muslim worker in a Boston hospital sought an exemption to a flu vaccine citing [concerns about pork ingredients](#). The defendant generally accommodated employees’ opposition to pork-based ingredients [with a gelatin-free flu vaccine](#). But while this accommodation resolved other workers’ religious concerns, plaintiff believed many vaccines were [“contaminated.”](#) The hospital also tried to accommodate plaintiff by finding her a position outside of patient care, but did not succeed. The [court held](#) that the hospital had reasonably accommodated plaintiff when it helped her seek

an alternate position and held, in the alternative, that retaining her would have imposed an undue hardship. The record showed the hardship of infection risk, the court concluded, because it documented “the Hospital’s understanding of the medical consensus on influenza vaccination” for health care workers.

In the Title VII accommodation context, courts have held that an “employer suffers undue hardship when required to bear a greater than *de minimus* [sic] cost or imposition upon co-workers” for religious adjustments. Whether an accommodation is an undue burden takes into account other employees’ rights, efficiency, cost, and other considerations. The Supreme Court has explained that Title VII does not require accommodations that come “at the expense of others.” For example, when an employee sought a particular work schedule to accommodate Sabbath observance, the Court concluded that Title VII did not require an employer to modify other workers’ seniority rights to provide the accommodation.

In further defining what qualifies as a religious practice, EEOC regulations include “moral or ethical beliefs . . . held with the strength of traditional religious views.” This encompasses idiosyncratic beliefs, which “no religious group espouses,” or those “the religious group to which the individual professes to belong may not accept.” Ordinarily, the EEOC recommends, employers should “assume that an employee’s request for religious accommodation is based on a sincerely held religious belief.” But if there is “an objective basis for questioning either the religious nature or the sincerity of a particular belief,” the employer may request additional supporting information.

Courts have considered a range of beliefs. For example, a district court in Ohio found it “plausible” that a hospital employee refusing an animal-based flu vaccine “could subscribe to veganism with a sincerity equating that of traditional religious views,” given that she cited Bible verses as support.

In other cases, courts have concluded that an objector’s beliefs, however strongly held, were not religious in nature and thus did not qualify for legal protection. For example, the Third Circuit, considering an objection to a mandatory flu vaccine, concluded that an employee’s “personal belief[]” that “the flu vaccine may do more harm than good” amounted to “a medical belief, not a religious one” under Title VII. Although the employee cited a passage attributed to Buddhism in his complaint, he did “not belong to any religious organization.” And the employee’s belief that “one should not harm their [sic] own body” was, in the court’s view, an “isolated moral teaching” rather than “a comprehensive system of beliefs.” In a similar vein, the Second Circuit rejected a religious challenge in another context, school vaccination requirements. It upheld a finding that parents’ “strong convictions concerning the necessity of a ‘natural existence,’” grounded in “scientific and secular theories” were not religious.

Vaccination and Pregnant Employees

Pregnant women, as well, may have particular medical concerns and they enjoy legal protections under federal civil rights laws. While data are limited, the CDC has yet to identify specific safety concerns about pregnancy and COVID-19 vaccinations. But the CDC has suggested that “a discussion with a healthcare provider might help” a pregnant woman “make an informed decision” about vaccination.

Three civil rights statutes may be relevant to vaccine mandates for pregnant employees. The [Pregnancy Discrimination Act](#) (PDA), a component of [Title VII](#), protects pregnant workers but does not expressly require accommodation. It mandates pregnant women “be treated the same . . . as other persons not so affected but similar in their ability or inability to work.” In general, it might be argued that the PDA bars employers from offering some workers vaccine exemptions while denying them to pregnant women.

Two disability statutes, the ADA and Rehabilitation Act, also protect some pregnant women. If a pregnancy-related complication is so limiting that it amounts to a disability then, whether or not tied to the pandemic, the pregnant employee enjoys ADA and Rehabilitation Act protections. These include accommodations when reasonable. Beyond that, several state statutes require reasonable accommodations for pregnant workers by state or private employers regardless of disability.

Medical Examinations or Inquiries Under the Americans with Disabilities Act and the Rehabilitation Act

In addition to requiring reasonable accommodation, federal disability laws restrict some medical examinations and inquiries, and they do so for all employees—not just those with disabilities. If an employer imposes a medical examination or asks about potential disability, the test or inquiry must be “[job-related and consistent with business necessity.](#)”

In the case of COVID-19 vaccinations, the EEOC has stated that a vaccination itself [is not a medical examination](#). Further, the agency has concluded that requiring proof of vaccination is not [a disability-related inquiry](#) under the ADA. In the agency’s view, employers may generally require vaccinations and ask for documentation. Courts have yet to evaluate vaccination requirements in a pandemic setting.

Unlike the vaccination procedure itself, pre-vaccination screening questions [might implicate the ADA and Rehabilitation Act](#), if they elicit information about a disability. The EEOC [explains](#) that “[i]f the employer administers the vaccine, it must show that such pre-screening questions it asks employees are ‘job-related and consistent with business necessity.’” To meet this standard, “an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others.”

This same rule would apply if employers ask questions about workers’ disabilities in order to prioritize vaccination for [certain at-risk groups](#). Once an employer had acquired employees’ medical information, disability laws require it be kept [confidential](#).

Under the current federal framework, a voluntary, employer-administered vaccination requirement [would appear to avoid these concerns](#), since employees could decline the vaccine and related questions. What is more, if a third party (not under contract with the employer) administers a required screening and vaccination, screening [questions would not violate the disability laws](#).

Considerations Under the Religious Freedom Restoration Act and Other Laws

Under the federal laws discussed above, if an employer cannot reasonably accommodate a worker’s disability or religious practice, the employer may exclude the employee from the workplace. But before terminating an unvaccinated worker, employers must consider other potential employee protections.

The [Religious Freedom Restoration Act](#) (RFRA) prohibits the federal government and other [covered entities](#) like the District of Columbia and Puerto Rico from “[substantially burden\[ing\]](#)” a person’s exercise of religion except in limited circumstances. RFRA [authorizes](#) a person “whose religious exercise has been burdened in violation” of the statute to sue the government. In such an action, the government may need to [show](#) that the burden imposed furthers a “compelling governmental interest” and is “the least restrictive means” of furthering that interest. RFRA’s standard is thus more rigorous than Title VII’s religious accommodation standard, for which the touchstone is reasonableness. (RFRA also provides more robust protections from application of facially neutral laws and policies than the First Amendment’s [Free Exercise Clause](#), which the Supreme Court has construed as [not normally providing a basis for noncompliance](#) with generally applicable laws and policies. However, the scope of that Clause’s protections is currently the subject of [a pending Supreme Court case](#).) Many [states](#) have adopted their own versions of RFRA.

RFRA could apply in the context of workplace COVID-19 vaccination in two ways. First, if the federal government or a covered entity *as a regulator* passes a law or adopts a rule [mandating vaccination](#) for certain public or private employees, employees with religious objections may have a cause of action

against the government under RFRA. (RFRA provides that new federal statutes must “explicitly exclude[]” RFRA’s application if Congress does not want RFRA to apply to that law.) Likewise, if the law or rule imposes vaccination obligations on [private employers](#), employers with religious objections may also have a RFRA claim. Second, if the federal government or a covered entity *as an employer* adopts its own policy requiring its employees to be vaccinated, employees with religious objections could bring a RFRA claim against their government employer—although some courts might limit their remedy to Title VII. Federal appellate courts have split [on whether](#) Title VII provides the “exclusive” remedy for employees seeking [religious accommodations](#) from their government employers, or whether plaintiffs can bring [separate](#) claims under RFRA and Title VII. The Supreme Court has not yet opined on RFRA’s [relationship with Title VII](#), but in *Bostock v. Clayton County*, the Court recently [posited](#) that “[b]ecause RFRA operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII’s commands in appropriate cases.”

Assuming that an employee in an RFRA action were to demonstrate a “substantial burden” on the employee’s religious exercise, cases involving other [compulsory](#) vaccination programs suggest strong [governmental interests](#) behind immunization efforts against infectious diseases. However, applying RFRA in the context of a COVID-19 gathering restriction in the District of Columbia, a [federal district court](#) cautioned that a government’s “generalized interests” in “combating the COVID-19 pandemic” may not rise to the level of “compelling” under RFRA unless the government can show a compelling reason to apply its policy to “the particular claimant whose sincere exercise of religion is being substantially burdened.” Moreover, whether a particular law or policy is the “least restrictive means” of furthering public health-related interests likely depends on the particulars of the law or policy and any exemptions or accommodations.

Many employees, both in government and the private sector, have additional rights. An employee may be [entitled to leave](#) under the [Family and Medical Leave Act](#) (FMLA) or specific [coronavirus relief measures](#). In [some workplaces](#), a mandatory vaccination regime may [require union approval](#). Local and state labor laws or local coronavirus health measures may apply. Potential vaccination prescreening questions, in addition to raising ADA issues, may implicate the [Genetic Information Nondiscrimination Act](#) (GINA). Concerns [may arise](#) if prescreening questions seek genetic information, perhaps in the form of family members’ medical histories. In considering vaccination policies, employers may also be mindful of a range of other authoritative recommendations and legal requirements, including CDC advisories, local public health directives, and guidance from the [Occupational Health and Safety Administration](#).

Considerations for Congress

There is still much uncertainty about applying various antidiscrimination statutes in pandemic circumstances. For example, Title VII, the ADA, and the Rehabilitation Act each require individualized assessments of whether an accommodation must be granted to a particular employee, making it difficult to predict how employers, agencies, and courts will apply them to widespread COVID-19 risks and whole-workforce vaccination policies. In addition, it may be hard for employers to make some of the required decisions and evaluations quickly, because the statutes require an [interactive process](#) that allows for back-and-forth communication, input from medical providers, and case-specific analysis.

To facilitate a more uniform response, Congress might opt to specify whether or not unvaccinated employees, or certain categories of unvaccinated employees (taking into account their interactions with vulnerable populations) present a “[direct threat](#)” under the ADA in the pandemic exigency. Considering that accommodation provisions permit workers to request modifications to any workplace rule, Congress could consider exempting vaccination policies during the pandemic from ADA, Rehabilitation Act, and Title VII coverage. Alternatively, Congress could specify whether specific protective measures, such as isolation or wearing protective gear, constitute reasonable accommodations. In addition, Congress might

modify existing ADA and Rehabilitation Act restrictions on employers asking disability-related questions to facilitate vaccination and to [prioritize at-risk vaccination candidates](#).

With respect to RFRA, Congress could clarify its interplay with Title VII. If Congress were to expressly extend RFRA to covered governmental entities *as employers*, then employees with religious objections could attempt to show that their employer's vaccination policy imposes a substantial burden on their religious exercise. Alternatively, Congress could expressly provide that Title VII is the exclusive remedy in cases involving religious objections by employees against government employers that are covered entities under RFRA. Or, Congress could take the broader step of exempting vaccination policies from RFRA if Congress decides that RFRA's heightened standard of review should not apply.

Leaving aside existing statutes, Congress could opt for independent legislation with specific rules for pandemic-related workplace safety. Provisions might address vaccination, procedures for exemption, COVID-19 testing, leave, reassignment, and protective equipment.

Congress could also consider measures to fund, mandate, or support voluntary workplace vaccination campaigns. These may increase vaccination rates while avoiding the difficulties of administering exemptions to a mandatory vaccine policy. Such measures include vaccine education initiatives, worksite vaccination, covering vaccine costs, providing incentives, or offering time off for vaccinations and for recovery from any side effects.

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