



MEMORANDUM

TO: FPSA Members

**FROM: Matt Malott, FPSA Chairman
David Seckman, FPSA CEO**

RE: Mandatory Vaccines in the Workplace

DATE: February 2, 2021

As we learned in March 2020, the Food and Agriculture Industry is part of the critical infrastructure as defined by the Cybersecurity and Infrastructure Security Agency (CISA) of the U.S. Department of Homeland Security.

In December 2020, the CDC's Advisory Committee on Immunization (ACIP), relying on the CISA Guidance, determined that **front line essential workers** – which ACIP defined as those workers in critical infrastructure industries whose jobs require them to work on-site and in close proximity to the coworkers or the public – would be eligible to receive the COVID-19 vaccine in Phase 1b.

Importantly, food and agricultural workers are specifically included in the ACIP list of front-line essential workers. Because of this designation, there is a real possibility that the COVID-19 vaccine will be available to your employees. Consequently, employers in our industry should consider whether to adopt a vaccine policy, and if so, whether to require or recommend that employees be vaccinated for COVID-19. Before doing so, however, it is important to understand the legal framework.

Under the Americans With Disabilities Act (ADA) and similar state and local laws, employers typically are not permitted to ask current employees medical questions or require employees to submit to medical exams unless it is job-related and consistent with business necessity.

In March 2020, the Equal Employment Opportunity Commission (EEOC) updated its [Pandemic Preparedness Guidance](#) and in December 2020, the EEOC issued [Guidance](#) on what employers should know about COVID-19 and the laws the EEOC enforces, such as the Americans With Disabilities Act (ADA), the Genetic Information Non-discrimination Act (GINA) and Title VII.

This guidance makes clear that it does not violate the ADA and GINA – as long as COVID-19 remains a global pandemic and as long as the inquiries are made in way that does not violate the confidentiality requirements of the ADA and GINA – to require employees to:

- Answer questions about COVID-19 symptoms;
- Have their temperature taken;

- Show proof of a negative COVID-19 test;
- Wear personal protective equipment, such as a face mask, with some exceptions; and,
- Be vaccinated for COVID-19, with some exceptions.

It is the exceptions that employers must be mindful of to avoid liability under the ADA and Title VII.

If an employee indicates that they cannot get a vaccine due to a medical condition, the employer must determine whether exempting the employee from the vaccine requirement would pose a direct threat due to 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 determination of whether a direct threat exists is a complicated analysis, which must be based on an individualized assessment of various factors. In addition, even if the employer concludes that a direct threat exists, the employer must engage in an interactive dialogue with the employee to determine whether there is a reasonable accommodation that would allow the employee to continue working, such as allowing the worker to work remotely, reassignment, or temporary leave.

Similarly, if an employee indicates that they cannot get a vaccine due to their religion, the employer must engage in an interactive dialogue with the employee to determine whether there is a reasonable accommodation that would allow the employee to continue working.

It is important to understand that there is no "bright-line test" that defines direct threat or reasonable accommodation. Instead, the determination must be based on the individual facts and circumstances of the particular situation.

For this reason, many employers have decided (1) against adopting a mandatory COVID-19 vaccination requirement but instead have decided to encourage employees to be vaccinated *or* (2) if they adopt a mandatory COVID-19 vaccine policy, to grant an exemption to the vaccine requirement for any employee who cannot receive a vaccine due to their medical condition or their religion.

In addition to the above accommodation issues, employers should be mindful that there are a variety of other legal obligations, such as the following:

- All employers must consider their obligation to provide a safe workplace under the Occupational Safety and Health Administration Act ("OSHA"). Currently, there is no specific standard under OSHA that applies; instead the general duty clause applies. But President Biden recently instructed OSHA to consider whether a standard is necessary. So this could change and may impact the analysis on whether to make COVID-19 vaccines mandatory.
- Employers with collective bargaining agreements must consider their legal obligations under the National Labor Relations Act before instituting a vaccine program.
- The confidentiality requirements of the ADA, GINA, and applicable state laws, including various privacy laws continue to apply and must be followed.

- Guidance from state and local public health authorities must be followed at all times.
- Other state and local laws might be applicable and must be followed at all times.

With this legal framework in mind, there are several steps employers might consider before implementing a vaccine policy:

- Discuss internally whether a mandatory COVID-19 vaccine policy is needed.
- Develop the business justification as to whether it is needed (or not).
- Update existing policies or draft new ones reflecting your company's vaccine policy, including components such as a process for requesting and reviewing accommodations, how to handle and safeguard confidential medical information, and what discipline will occur if employees refuse to be vaccinated (if being vaccinated is mandatory and an accommodation is not granted).
- Incorporate into the policy education about the benefits of being vaccinated, and develop positive messaging.
- Assist your employees with obtaining vaccines from third parties by providing proof of their status as a Phase 1b employee (if true), and direct them to local vaccine sites.
- If your policy does not mandate COVID-19 vaccines, consider whether it would be appropriate to offer incentives for employees who voluntarily get vaccinated.

While the EEOC, the CDC, OSHA and state and local authorities have provided helpful guidance to assist employers with satisfying their legal obligations, it remains a very fluid situation. As the COVID-19 vaccine becomes more widely available, it is likely that additional guidance will be issued.