

NJBIA Human Resource Council: Can Employers Mandate the COVID-19 Vaccine?

Douglas Diaz, Esq. of Archer Law, and Dr. Margaret Fisher, MD, FAAP, special adviser to the state Health Commissioner, Judith Persichilli, provided guidance to NJBIA's Human Resource Council on various aspects of the COVID-19 vaccination process.

The following FAQ summarizes the answers the speakers gave to employers' questions at the online meeting held on Wednesday, Jan. 13, 2021.

Guidance from Douglas Diaz, Esq.

Can I mandate the COVID-19 vaccine for my employees?

Yes, but employers will have to adhere to disability, pregnancy, religion, and accommodation requirements.

What disability requirements must an employer adhere to when vaccinating employees?

The Americans with Disabilities Act (ADA) and the NJ Law Against Discrimination limit employers from requiring medical examinations, unless the examination is 'job-related and consistent with business necessity.'

Although the Equal Employment Opportunity Commission (EEOC) states that the COVID-19 vaccine itself is not a medical exam, some of the pre-screening questions could fall under that classification and, therefore, an employer would have to show they are 'job-related and consistent with business necessity.'

Questions should be tailored to vaccine-related information to avoid getting an employee's extensive medical history.

The EEOC also recommends making vaccines voluntary or getting third party to handle vaccination for employees, if required. If an outside provider handles vaccination, the ADA restrictions would not apply. The ADA also requires reasonable accommodation for those with disabilities. The ADA classifies a disability as any physical/mental impairment that substantially affects major life activities, while New Jersey sees it as anything that prevents the normal exercise of bodily/mental functions. Both are broadly interpreted.

Although the EEOC notes that an unvaccinated person can pose a 'direct threat' to others, employers still need to provide reasonable accommodations unless doing so would cause an undue burden, which is difficult to show under the ADA.

How can I reasonably accommodate my employee?

The employer and employee must engage in an "interactive process" where they have back-and-forth dialogue about how to accommodate the issue. Prior to the pandemic, remote work might not have been considered a reasonable accommodation, but now it almost certainly would be, where practicable.

How should I get proof of an employee's vaccination?

Employers should request nothing except proof of vaccination, by having an employee authorize the testing site to provide the employer with proof via a HIPAA form. Diaz recommended avoiding asking questions about why an employee didn't get vaccinated.

What about those who object because of religious beliefs?

1. Federal/state laws require reasonable accommodations when an employee's "sincerely held" religious beliefs prevent them from getting vaccinated. The standard here is that a religion addresses fundamental and ultimate questions regarding deep/imponderable matters
2. Be comprehensive in nature
3. Recognizable by certain formal and external signs

An employer might ask an employee for proof of membership in a religion.

It is important to note that personal preferences do not meet this standard, meaning that someone's objection to vaccination because they simply do not like vaccines is insufficient.

Notably, there is a lower standard for showing that a reasonable accommodation would cause an undue hardship to an employer in the religious context relative to under the ADA. An employer might be able to prove an undue hardship if the accommodation compromises workplace safety.

Where does OSHA fall on mandating vaccines?

OSHA provided that employers could mandate the flu vaccine, but had to provide employees with information on the "benefits of vaccinations."

Where do states fall on mandating vaccines?

It is not yet clear if states will mandate COVID-19 vaccines, although states do have police powers to protect public health and the safety of their citizens. There is legislation pending in New York to mandate the COVID-19 vaccine. There was also a flu vaccination mandate for healthcare workers in New Jersey in 2020.

Are there any labor standards that need to be addressed in vaccination requirements?

The National Labor Relations Act protects employees who come together to protest mandatory vaccinations. Vaccinations would have to be a subject of bargaining agreements if an employer worked with unions.

Could I be exposed to liability issues?

There could be some concerns in this area, although any negative consequences resulting from a negligently administered vaccine would be a worker's compensation issue. The Public Readiness and Emergency Preparedness Act provides immunity from lawsuits concerning the administration or distribution of a vaccine.

What about employee concerns about working with an unvaccinated worker?

This is uncharted territory. If you can show a level of anxiety that is more than just general fear, then maybe you go through the disability route, but it probably won't be enough to just say you're afraid.

What can I do to convince my employees to get the vaccine?

Employers could provide incentives to employees for getting vaccinated.

Guidance from Dr. Margaret Fisher, MD, FAAP

How is the state rolling out the vaccine?

So far, the state has administered over 200,000 vaccines, which is a good starting point but not enough. There are 260 vaccination sites set up in the state and there will soon be six mega-sites vaccinating those who live, work, or are educated in New Jersey.

Individuals should register through the New Jersey Vaccine Scheduling System (NJVSS) as soon as possible, which will help you register, get screened for eligibility, and eventually make necessary appointments. Over 1 million have pre-registered through NJVSS, representing individuals from each phase of eligibility.

Who can get vaccinated?

Although factors like age and occupation will impact when someone can get vaccinated, New Jersey is ensuring equitable access to those who live, work, or are educated in the state.

What should I tell someone who is concerned about getting vaccinated?

Vaccines were tested in large clinical trials with people of different ages, races, ethnicities, and medical conditions to make sure they meet safety standards. The most common complaint after vaccination is pain at the injection site; other commonly reported symptoms include fatigue, fever, and headache. Everyone should get vaccinated, including pregnant women and women of child-bearing age.

What phase are we in and when can my industry get vaccinated?

The vaccination rollout started in December with those in Phase 1A: healthcare personnel and long-term care residents. Since then, vaccination has opened up to law enforcement and fire personnel in phase 1B. As of Jan. 14, those 65 and older are eligible as well as those ages 16-64 with a medical condition, identified by the CDC, that increases the risk of severe illness from COVID-19. The state expects to soon expand access to other categories. Employers not focus too much in where they fall in the phases, because expanding eligibility will be determined by the supply.

How much does the vaccine cost?

The vaccine will be provided free of charge to consumers, but providers will face some costs associated with administering the vaccine.

What can I do to improve the vaccine rollout?

Public confidence is key. Between November and now, public willingness to get vaccinated has increased from 47% to 61%. Although this is very positive, we still need confidence to go up. Notably, willingness is higher among older adults than young people, and higher among men than women.

The DOH is running public campaigns to improve awareness and confidence in the vaccine. However, we hope that employers will also play an active role in spreading useful and accurate information on the vaccine.

Finally, address your employees concerns. Many are worried about the vaccine and employers should play an active role in discussing the vaccine and better informing their employees.

Where can I or my employees get vaccinated?

Individuals will be able to get vaccinated in any county throughout the state. The DOH currently has a map of all vaccination sites and what types of sites they are (hospitals, urgent care, mega-sites, etc.). The counties with the most residents have the most sites, but they are still adding sites.

How can I become a Point of Dispensing (POD) site?

Sites must be registered with the DOH to be a POD.

What happens after people get vaccinated?

We will still need people to continue mask-wearing and other precautions until the virus goes away. It is still unclear whether someone who is vaccinated is still be able to transmit the virus.

Why is there such a disparity between counties in vaccination sites?

There have been some issues in setting up sites, delays caused by the holidays, poor reporting, and some hesitancy because people haven't wanted to get vaccinated. DOH wants sites in every county available to everyone.

Does the vaccine mean you won't get COVID-19 or just mean you would only get a mild version?

Potentially both things are true. There is less overall disease in those who get vaccinated. But with the Moderna vaccine, for example, there were less people who got hospitalized. Nothing is perfect, but it seems like even if infection isn't fully prevented, there will be less severe illness for those vaccinated.