

## Can Arizona Employers Require Employees to Obtain a COVID-19 Vaccine?

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The purpose of this memorandum is to provide information regarding whether Arizona employers may require employees to obtain a vaccine to combat the spread of COVID-19. To date, local and state authorities have not provided guidance on this issue.

### I. Requiring Vaccines for Employees

Vaccinations and health screenings are “medical examinations” under the Americans with Disabilities Act (“ADA”). Therefore, the vaccination requirement must be job-related, consistent with business necessity or justified by a direct threat, and be no broader or more intrusive than necessary, for the vaccination requirement to comply with, and be permissible under, the ADA. Courts have long upheld mandatory vaccines in some instances; in 1905, the U.S. Supreme Court upheld a city fine for those who refused smallpox vaccinations. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). More recently in the workplace setting, the Eighth Circuit Court of Appeals upheld a healthcare system’s requirement that its employees immunize against rubella as a condition of employment. *Hustvet v. Allina Health Sys.*, 910 F.3d 399 (8th Cir. 2018).

The Equal Employment Opportunity Commission (“EEOC”) updated guidance on March 19, 2020 entitled *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* at <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>. The guidance states as follows:

**13. May an employer covered by the ADA and Title VII of the Civil Rights Act of 1964 compel all of its employees to take the influenza vaccine regardless of their medical conditions or their religious beliefs during a pandemic?**

No. An employee may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents him from taking the influenza vaccine. This would be a reasonable accommodation barring undue hardship (significant difficulty or expense). Similarly, under Title VII of the Civil Rights Act of 1964, once an employer receives notice that an employee’s sincerely held religious belief, practice, or observance prevents him from taking the influenza vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined by Title VII (“more than *de minimis* cost” to the operation of the employer’s business, which is a lower standard than under the ADA).

Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it. **As of the date this document is being issued, there is no vaccine available for COVID-19.**

*Id.* (emphasis present).

The Occupational Safety and Health Administration (“OSHA”) has not mandated employee vaccinations. However, Section 5(a)(1) of the Occupational Safety and Health Act imposes a general duty on employers to provide a safe and healthy workplace and protect employees against workplace hazards that could cause an accident or illness that would most likely result in death or serious physical harm. The Acting Secretary at OSHA issued a letter in the face of the 2009 H1N1 pandemic that although OSHA does not require vaccines, an employer may do so. *Letter from OSHA Acting Assistant Secretary Jordan Barab to Congresswoman Marcy Kaptur* (Nov 9, 2009) at <https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09>.

If an employer chooses to require vaccinations, it must create a process by which employees may apply for an exemption for religious or disability related reasons, as discussed below.

## II. Granting Exemptions for Staff

If an employer requires an employee to be inoculated with a COVID-19 vaccine, it will be required to consider granting religious exemptions or exemptions under the Americans with Disabilities Act (ADA) to remain compliant with applicable federal laws.

### A. Title VII and Religious Exemption

Title VII of the Civil Rights Act requires an employee to have a “sincerely held religious belief” against vaccination before his/her employer is obligated to provide an accommodation or exemption from being vaccinated. *See also* **A.R.S. § 41-1463 (unlawful to discriminate against an individual employee due to their religion)**. A sincerely held but non-religious opposition to a vaccination is legally insufficient; an employee must demonstrate his or her objection to vaccination is based on a legitimate, genuine *religious* belief. For instance, the Third Circuit Court of Appeals affirmed the dismissal of a hospital employee’s discrimination claim where she was fired for not receiving a flu vaccine in violation of the hospital’s flu-vaccine policy. *Brown v. Children’s Hosp. of Phila.*, 794 Fed. Appx. 226 (3d Cir. 2020). While the court acknowledged the employee’s “holistic health lifestyle” and her own, personal belief that the vaccine might do more harm than good, the court found the employee’s opposition to the flu vaccine was not based upon a sincerely held religious belief. The court reiterated that “it is not sufficient merely to hold a ‘sincere opposition to vaccination’; rather, the individual must show that the ‘opposition to vaccination is a religious belief.’” *Id.* (citing *Fallon v. Mercy Catholic Med. Ctr. of Se. Pa.*, 877 F.3d 487, 490 (3d Cir. 2017)).

Thus, to trigger Title VII's protections, an employee must tell his or her employer that a sincere religious belief conflicts with a job requirement, such as a mandatory vaccination or immunization policy. Then, the employer is obligated to make reasonable accommodations for the employee's religious beliefs and practices unless doing so would result in undue hardship to the employer. The EEOC defines undue hardship as "more than a minimal burden on [the] operation of the business." Please note that this standard is only related to requests for accommodations based on religion.

The EEOC has stated that an "undue hardship" could be one that compromises workplace safety. <https://www.eeoc.gov/laws/guidance/what-you-should-know-workplace-religious-accommodation>. A request to be exempt from vaccination could pose a direct threat to the other employees in certain circumstances.

An employee asking for a religious accommodation must advise the employer of the nature of the conflict between their religious needs and their work environment or duties. Employees should provide enough information to enable the employer to understand what accommodation is needed, and why it is necessitated by a religious practice or belief. Employers may follow-up with employees to request relevant information before making a determination regarding an accommodation request.

## **B. ADA Exemption**

Employees may assert that they are qualified individuals with a disability whose disability prevents them from being vaccinated. In this case, the employer must engage in the ADA's "interactive process" with the employee and offer "reasonable accommodations." The employer must offer these accommodations unless it would place an "undue hardship" on the employer or the employee poses a "direct threat" to the health and safety of others.

Thus, to trigger the ADA's protections, an employee must notify the employer of his or her disability and request a workplace accommodation, such as an exception to a vaccination policy. In response, the employer should meet with the employee to explore a mutually-agreeable accommodation sufficient to allow the employee to continue working in his or her current capacity. Potential accommodations could include things like allowing the employee to work from home (if feasible), requiring a face mask in the workplace, or adjusting the employee's duties to minimize risk of transmission (provided, of course, nothing obligates an employer to change or remove an employee's essential job functions as an accommodation).

Employers can evaluate whether granting the exemption places an "undue hardship," or, in other words, cause *substantial* operational difficulties or expense to the district. The ADA's undue hardship standard is complicated and more stringent than Title VII's standard.

Employers can also evaluate whether granting the accommodation of a vaccine waiver poses a “direct threat” to the employer, other employees, or the general public. Interpreted in the context of a COVID-19 vaccine, the question is whether any form or degree of accommodation would mitigate the substantial harm posed by an unvaccinated employee. The employer would need to evaluate such factors as whether the staff member works with vulnerable populations or in a high-risk setting.

Employers will be required to treat similarly situated employees the same with respect to granting any waiver. For example, the Third Circuit held an employee’s ADA discrimination claim was improperly dismissed due to alleged disparate treatment. *Ruggiero v. Mount Nittany Med. Ctr.*, 736 Fed. Appx. 35 (3rd Cir. 2018). The employee provided two doctor’s notes to the medical center where the employee asked to be exempted from receiving a required TDAP vaccine for medical reasons, specifically, where she had a history of allergies and other medical conditions and suffered from “severe anxiety” regarding side effects. Because she alleged her employment was terminated while other employees were permitted to forego the vaccination and remain employed, the Third Circuit revived her case, finding that her allegations raised an inference of discrimination.

### **III. Conclusion**

Employers may require COVID-19 vaccines subject to allowance for exemptions. Employers should work directly with counsel to address requests for exemptions as each scenario will present different facts.

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