

## **Update on COVID Vaccinations in the Workplace: The Only Constant is Change**

By [Harvey R. Linder](#)  
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Now that the COVID-19 vaccines have begun to be distributed, employers are asking how it affects their employees and their businesses. The most prevalent question relates to whether employers can mandate that their employees be vaccinated.

When vaccines first became available back in December 2020, this law firm, as well as many others, advised their clients that they could mandate that their employees receive vaccinations. This advice was based upon both direct EEOC and OSHA guidance, as well as traditional employment law principals.

As we have seen throughout this pandemic period, federal, state, and local guidelines have evolved or changed on an almost daily basis. This week, the Food and Drug Administration (“FDA”), citing the Federal Food, Drug, and Cosmetic Act (“ACT”), stated that federal law provides that, at least until the vaccines are licensed, individuals must have the option to accept or decline to be vaccinated. **Thus, it is recommended that no company require or mandate its employees to get the vaccine.**

Even though the FDA granted emergency use authorizations (“EUAs”) for the Pfizer/BioNTech and Moderna vaccines in December 2020, the clinical trials the FDA will rely upon to ultimately determine whether to license these vaccines are still ongoing. These emergency authorizations are designed to remain in effect for approximately the two years that are necessary to establish whether these vaccines are safe and effective enough for the FDA to formally license.

The abridged timelines for the emergency use reveals there is much the FDA does not know about these products (even though it authorizes them for emergency use). Unresolved is their effectiveness against asymptomatic infection, death, and the transmission of SARS-CoV-2, the virus that causes the disease.

Given the current uncertainty about the two vaccines, their EUAs explicitly state that each is “an investigational vaccine not licensed for any indication” and require that all “*promotional material relating to the Covid-19 Vaccine clearly and conspicuously ... state that **this product has not been approved or licensed by the FDA, but has been authorized for emergency use by FDA***” (emphasis added).

The same section of the ACT that authorizes the FDA to grant emergency use authorization also requires the secretary of Health and Human Services to “*ensure that individuals to whom the product is administered are informed ... of the option to accept or refuse administration of the product.*” (emphasis added) Thus, clearly, until the

vaccines are formally licensed by the FDA, employers cannot mandate that its employees get the vaccine.

Certainly, employers can encourage (without fear of retaliation) its employees to get the vaccine. But, at this time, this is about as far as they should go. If an employer wants to encourage getting the vaccine, the employer could offer to compensate the employee for any off-work time spent being vaccinated. Some employers have even offered small monetary bonuses to its employees for voluntarily receiving the vaccine.

As always, particularly in this ever-changing environment, Employers are advised to consult with their employment and labor attorneys before taking this or any other similar step.

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