

Interoffice Memo

To: President Yoes

From: Crabbe, Brown & James, LLP

Date: August 1, 2021

Re: FOP: COVID-19 Questions & Answers

File No. 10093-27992

QUESTIONS

(1) Can a public employer mandate that employees get vaccinated?

Answer: Yes.

Public employers can require their employees to get vaccinated against COVID-19. However, if a mandatory vaccine policy is implemented, the employer may be required to accommodate an employee's medical conditions under the Americans with Disabilities Act (ADA) or religious belief under Title VII of the Civil Rights Act of 1964.

Mandatory vaccination policies have been commonplace in the workforce for years. Employers already have set mandates for various diseases including influenza, measles, mumps, rubella, and other infectious diseases. Indeed, public employers are currently requiring its employees to be vaccinated against COVID-19. For example, Indiana University – a public university – implemented a policy requiring all students, faculty, and staff to be fully vaccinated before returning to campus for the fall semester of 2021.¹ Faculty and staff who refuse vaccination face termination. Indiana University students attempted to enjoin the university from imposing such policy, however, the Northern District Court of Indiana denied the injunction stating that the “Fourteenth Amendment permits Indiana University to pursue a reasonable and due process of vaccination in the legitimate interest of public health for its students, faculty, and staff.”² University of Michigan and Michigan State University have followed Indiana, and will mandate students, staff, and faculty to be vaccinated.

Furthermore, the state of California and New York City gave state and municipal employees a choice of getting vaccinated or face weekly testing.³ New York City's policy will cover 350,000 public workers – including teachers and police officers. Similarly, the state of New York will require employees at state-owned hospitals and veterans' home to be vaccinated. Additionally, the Department of Veterans Affairs became the first *federal* agency to require vaccinations for all frontline health care workers.⁴ Lastly,

¹ *Klaassen v. The Trustees of Indiana University*, 2021 WL 3073926, (N.D. In, July 18, 2021) <https://www.courthousenews.com/wp-content/uploads/2021/07/klaassen-indiana.pdf>

² *Id.* at *46.

³ Emma G. Fitzsimmons, Shawn Hubler and Jennifer Steinhauer, *New York City and California to Require Vaccines or Tests for Workers*, The New York Times (July 26, 2021), <https://www.nytimes.com/2021/07/26/nyregion/covid-vaccine-ny-ca-mandatory.html>

⁴ *Id.*

the Biden Administration announced that federal workers will be required to prove their vaccination status or submit to other safety protocols such as wearing a mask, testing, physical distancing, and restricting official travel.⁵

(2) *If the employee refuses to get vaccinated, can the governmental entity mandate that the employee be tested for COVID-19? How often? And who must incur the costs of such tests?*

Answer: Yes, the employer can mandate that the employee be tested for COVID-19. It is the employer's decision to determine frequency and who incurs the cost of the tests.

Unvaccinated employees can be subjected to COVID-19 testing. Although the ADA generally prohibits medical examinations of employees, such examinations are permissible to determine whether an employee poses a direct threat to the workplace. In guidance issued on April 23, 2020, the EEOC stated that the COVID-19 pandemic poses a direct threat to the workplace – opening the door for COVID-19 testing of employees to reduce the risk of infection.⁶

President Biden recently announced that the four million federal employees need to be vaccinated against COVID-19.⁷ Those who do not get vaccinated will have to physically distance, wear masks and comply with limits on official travel. The unvaccinated will also have to submit to regular COVID-19 testing. Each federal agency will come up with a plan for testing its unvaccinated work force. The costs and procedures of the testing protocols will depend on the number of unvaccinated people they need to monitor.⁸ In addition, New York and California started testing requirements for unvaccinated state workers but neither has specified who will pay for the service.⁹

In terms of testing costs, employers have taken a range of approaches from the employer fully covering the costs, to placing such cost on the unvaccinated workers. In some instances, employers are having workers chip in for the costs such as a \$15 co-pay for the testing at an on-site clinic. While employees also have the option to be tested at an outside provider which typically bills patients and their insurance. For example, the California Statewide Law Enforcement Association is giving employees the option of providing proof of vaccination or adhering to mask and testing requirements.¹⁰ For its procedures, “testing will be done at no cost to the employee and on State time and determining how employees will be compensated for self-quarantine if mandated to do so.” As such, there is no specific guidance on who has to bear the costs of mandated testing therefore unvaccinated employees may have to pay for any required testing.

⁵ Alexandra Jaffe and Ricardo Alonso-Zaldivar, *Federal workers required to get vaccinated or face mandatory masking, weekly testing, distancing*, ABC7 (June 29, 2021), <https://abc7chicago.com/biden-federal-employees-vaccines-vaccine-mandate-speech-today-cdc-masks/10916412/>

⁶ *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, U.S. Equal Employment Opportunity Commission (revised March 2020), <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act>

⁷ Alexandra Jaffe and Ricardo Alonso-Zaldivar, *Federal workers required to get vaccinated or face mandatory masking, weekly testing, distancing*, ABC7 (June 29, 2021), <https://abc7chicago.com/biden-federal-employees-vaccines-vaccine-mandate-speech-today-cdc-masks/10916412/>

⁸ Sarah Kliff, *New Rule Raises Question: Who'll Pay for All the Covid Tests?* The New York Times (July 31, 2021), <https://www.nytimes.com/2021/07/31/upshot/unvaccinated-covid-tests.html>

⁹ *Id.*

¹⁰ *Following Governor Newsom's First-in-the-Nation Vaccination Measures, California Employers Follow Suit*, California Government Office of Governor Gavin Newsome, (July 30, 2021), <https://www.gov.ca.gov/2021/07/30/following-governor-newsoms-first-in-the-nation-vaccination-measures-california-employers-follow-suit/>

(3) *If the employer mandates that an employee gets vaccinated and the employee gets sick, will the employee have a cause of action against the employer and/or the physician or medical entity that administers the vaccine?*

Answer: An employee's recourse for an adverse reaction due to a mandated COVID-19 vaccine would most likely be covered by workers compensation.

An employer mandated COVID-19 vaccine would be considered apart of work, so under most state laws, an adverse reaction would likely be covered by workers' compensation and treated as an on-the-job injury.¹¹ Workers' compensation has been the employee's only recourse for other employer-required vaccinations, so it is likely that a COVID-19 vaccine would be treated the same.¹²

An employee would **not** have a cause of action against the manufacturer or medical entity providing the vaccine pursuant to the Public Readiness and Emergency Preparedness Act (PREP Act).¹³ The PREP Act authorizes the Secretary of Health and Human Services to limit legal liability for "losses relating to the administration of medical countermeasure such as diagnostics, treatments, and vaccines."¹⁴ In a declaration effective February 4, 2020, the Secretary of Health and Human Services invoked the PREP Act thereby providing legal protection to companies making or distributing the vaccine.¹⁵ The only exception to PREP Act immunity is for death or serious physical injury caused by "willful misconduct." This protection lasts until 2024.

(4) *What are the privacy rights of the employees relative to vaccination when an employer requires that they furnish proof of vaccination or confidentiality or privilege?*

Answer: Documentation or other confirmation of vaccination provided by the employee is medical information and must be kept confidential.

An employer can ask the vaccination status of its employees in an effort to maintain a safe work environment. Indeed, employers have a legitimate business reason to keep track of employees who have been vaccinated. Contrary to public perception, it is not a Health Insurance Portability and Accountability Act (HIPAA) violation for an employer to ask if an employee is vaccinated against COVID-19¹⁶. HIPAA only applies to specific health-related entities, such as insurance providers, doctors, and hospitals. However, if an employer is going to ask for a vaccination card to make a copy, the employer must maintain such information as it maintains other medical information.

¹¹ Lisa Nagele-Piazza, *COVID-19 Vaccines and Employer Liability*, the Society for Human Resource Management, (Jan. 20, 2021), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/covid-19-vaccines-and-employer-liability.aspx>

¹² *Id.*

¹³ *Public Readiness and Emergency Preparedness Act*, U.S. Department of Health & Human Services, <https://www.phe.gov/Preparedness/legal/prepact/Pages/default.aspx>

¹⁴ *PREP Act Immunity from Liability for COVID-19 Vaccinators*, U.S. Department of Health & Human Services, <https://www.phe.gov/emergency/events/COVID19/COVIDvaccinators/Pages/PREP-Act-Immunity-from-Liability-for-COVID-19-Vaccinators.aspx>

¹⁵ HHS Declaration, Federal Register, Vol. 85, No. 52, <https://www.govinfo.gov/content/pkg/FR-2020-03-17/pdf/2020-05484.pdf>

¹⁶ Kaylee DeWitt, *Can my employer legally ask if I received the COVID-19 vaccine?* ABC4.com, (Mar. 26, 2021), <https://www.abc4.com/coronavirus/can-my-employer-legally-ask-me-if-i-received-the-covid-19-vaccine/>; *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. Equal Employment Opportunity Commission (June 28, 2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

Guidance from the EEOC warns employers against requesting medical information during the process of verifying the vaccination to avoid triggering an Americans with Disabilities Act (ADA) or a Genetic Information Nondiscrimination Act (GINA) violation. Under the ADA, an employer may not make a disability-related inquiry (i.e., ask questions that are likely to elicit information about an employee's disability) *unless* the questions are job-related and consistent with business necessity. The EEOC, in this context, defines business-related as a basis to believe that if the employee does not receive the vaccine, the employee will pose a direct threat to the safety of other employees or him or herself.¹⁷

Therefore, there are limits on what an employer can ask or how they may react once aware of an employee's vaccination status. Asking questions about *why* someone is not vaccinated could reveal medical or religious information which are protected by federal laws. However, if an employer has a policy requiring all employees to get vaccinated, then any employee seeking an exemption or accommodation under that policy will be obligated to disclose either a medical disability or religious exemption for their case.

(5) What are the privacy rights of the employees relative to COVID-19 tests when an employer requires that they furnish proof of COVID-19 test?

Answer: The results of an employee's COVID-19 test is medical information and must be kept confidential.

The EEOC's guidance allows for employers to test employees for COVID-19 as well as ask employees if they are experiencing symptoms of the virus, such as fever, chills, cough, shortness of breath, or sore throat. The EEOC indicated that "employers are to maintain all such information about an employee's illness or absence thereof as a confidential medical record in compliance with the ADA."¹⁸

The ADA requires that an employer keep all medical information about employees confidential, even if that information is not about a disability. The results of a COVID-19 test or information that an employee has symptoms of COVID-19 is medical information. But the fact that this is medical information does not prevent the employer from taking actions consistent with guidance from the CDC and other public health authorities to provide a safe workplace. The ADA does not interfere with a designated representative of the employer to take appropriate steps such as interviewing the employee to get a list of people with whom the employee possibly had contact with and notifying those individuals.¹⁹ However, such actions should be done with caution and without revealing the employee's identity. For example, using a generic descriptor, such as "someone at this location" has COVID-19, provides notice and does not violate the ADA's prohibition of disclosure of confidential medical information.

(6) Is Workers Compensation implicated if a public employee contracts COVID-19 and it is believed that it is not job-related? Will that individual be eligible for Workers Compensation or paid sick leave?

Answer: An employee may only be eligible for Workers compensation if the employee contracts COVID-19 on the job or it is job-related.

¹⁷ *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. Equal Employment Opportunity Commission (June 28, 2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

¹⁸ Edward Espinosa, *Addressing Confidentiality with the COVID-19 Surveillance System*, Buckhead Medicine (June 2, 2020), <https://buckheadmedicine.com/addressing-confidentiality-covid-19-surveillance-system/>

¹⁹ *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. Equal Employment Opportunity Commission (June 28, 2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

Though every state has its own workers' compensation system, generally workers' compensation does not cover communicable diseases like COVID-19 because of the varying ways individuals can be exposed to COVID-19.²⁰ Thus, contracting COVID-19 cannot be directly tied to the workplace. For an employee to be eligible for worker's compensation will depend on the nature of the job, the circumstances of the case, and the rules in that state. For example, according to the Ohio Bureau Workers Compensation, an Ohio COVID-19 workers' compensation claim "depends on how you contract COVID-19 and the nature of your occupation."²¹ Jobs with a higher risk of exposure like first responders are more likely to have an eligible COVID-19 workers' compensation claim.

Clearly, first responders face a particular danger of being exposed to COVID-19 because of the nature of their job. Several states took actions to extend workers' compensation coverage to include first responders and health care workers impacted by COVID-19. Some states amended their policy so that COVID-19 infections in certain workers are *presumed* to be work-related and covered under workers' compensation. This presumption places the burden on the employer and insurer to prove that the infection was not work-related making it easier for those workers to file successful claims. For example, Minnesota enacted legislation that creates a presumption that an employee contracted COVID-19 out of and in the course of employment for first responders and healthcare providers – including peace officers.²²

(7) In a unionized workforce, must the employer bargain before mandating employees get COVID-19 vaccines?

Answer: An employer's decision to mandate COVID-19 vaccines will likely be subject to mandatory bargaining.

In a unionized environment, employers are presented with other legal obligations – primarily in the bargaining context – when considering whether to implement a mandatory vaccine mandate.²³ The employer's legal obligations depend upon the collective bargaining agreement. The agreement might have provisions reserving to management the right to promulgate health and safety rules. Such provisions might allow the employer to make unilateral decisions. If the collective bargaining agreement does not authorize unilateral action and does not prevent changes in terms or conditions of employment, the employer will need to give notice to the union and offer an opportunity to bargain over the decision to mandate vaccination.

An employer's decision to require employees be vaccinated as a condition of their employment will likely require bargaining with the union. "[L]abor law presumes that a matter which affects the terms and conditions of employment will be a subject of mandatory bargaining." *Newspaper Guild v. NLRB*, 636 F.2d 550, 561 (D.C. Cir. 1980). Typically, a new workplace rule affects a term or condition of employment is if an employee's breach of the rule can lead to discipline or the loss of an opportunity.

Whether COVID-19 vaccines require bargaining is currently being litigated. The International Brotherhood of Teamsters, Local 743 filed a federal lawsuit in Chicago against a union health fund – the

²⁰ Josh Cunningham, *COVID-19: Workers' Compensation*, National Conference of State Legislatures, (Dec. 9, 2020), <https://www.ncsl.org/research/labor-and-employment/covid-19-workers-compensation.aspx>

²¹ *Coronavirus (COVID-19) Frequently Asked Questions*, Ohio Bureau of Workers' Compensation (March 21, 2021), <https://www.bwc.ohio.gov/downloads/blankpdf/COVID-19-BWCFAQs.pdf>

²² HR 4537, <http://wdoc.house.leg.state.mn.us/leg/LS91/HF4537.0.pdf>

²³ Mark Theodore, Elizabeth Dailey, Dylan Tedford, *Deployment of COVID-19 Vaccines in a Unionized Workforce Frequently Asked Questions*, *The National Law Review* (May 11, 2021), <https://www.natlawreview.com/article/deployment-covid-19-vaccines-unionized-workforce-frequently-asked-questions>

TeamCare fund – challenging the fund’s mandate that its workers get vaccinated or face termination.²⁴ In the complaint, Teamsters allege the fund’s vaccination policy required bargaining and that the fund failed to adequately negotiate over the requirement with the union. It states that wages, benefits, and work rules that can result in termination or discipline are mandatory subjects of bargaining and because TeamCare’s vaccination mandate could result in the termination of workers, it should have required bargaining.

Furthermore, if the employer wants to require employees who do not get the vaccine to comply with additional measures, such as wearing a mask at work, such new working conditions for a portion of the workforce would require bargaining. *Virginia Mason Hospital*, 356 NLRB 564, 566 (2011) (hospital employer’s requirement that employees who did not get flu vaccine must wear masks in patient areas at all times a mandatory subject of bargaining). This is because some employees, but not all, would be required to wear a mask. However, if face coverings in the workplace are mandated by federal, state or local authorities for *all* employees, then there probably is no obligation to bargain. Compliance with a government directive which does not leave employer discretion carries no obligation to bargain. *See, e.g., Standard Candy Co.*, 147 NLRB 1070, 1073 (1964).

Lastly, a mandatory vaccination program for existing employees would also likely be a negotiations issue because it would have disciplinary implications and be negotiable as a “working condition.” However, a requirement that *new hires* be vaccinated would likely not be negotiable as it would only apply pre-employment.

²⁴ *International Brotherhood of Teamsters, local 743 v. Central States, Southeast and Southwest Areas Health and Welfare Pension Fund*, 21-CV-3840, (N.D. Ill., July 19, 2021).
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