

VLCT Guidance on COVID-19 Vaccination Mandates For Vermont Municipal Employees

This guidance memorandum (“memo”) addresses whether Vermont municipalities may require employees to be vaccinated against COVID-19. The purpose of this memo is to provide broad guidance on some of the issues related to vaccination mandates.¹ The memo does not recommend whether municipal employers should adopt vaccine mandates and is not legal advice. Municipal employers should consult their attorneys to address specific situations, especially because the law in the area of COVID-19 and vaccines is evolving and it is possible that prospective changes in the law may make the guidance presented here obsolete.

Are vaccine mandates legal?

Yes, all Vermont employers may require employees physically entering the workspace to be vaccinated against COVID-19, provided vaccination is job-related, consistent with business necessity, and is freely available to all employees.² The workspace is not limited to municipal offices and facilities, but may extend to any place that an employee has in-person contact with others. A vaccination requirement is likely not consistent with business necessity if an employee’s job duties include no in-person contact with co-workers or members of the public, though it is difficult to imagine a municipal employment position that involves no in-person contact with any other person. Municipal employers mandating vaccines should pay employees for time spent getting vaccinated. If employees suffer side-effects which cause them to miss time from work, workers’ compensation might potentially apply and so it may be prudent to consider whether to submit a first report of injury in such cases.

Municipal labor unions may view a vaccination requirement as a change to the terms and conditions of employment which must be bargained before it can be applied to union employees. The particular terms of a collective bargaining agreement could determine whether the municipal employer may proceed without bargaining. It may be advisable for employers to at least first consult with union representatives before considering whether to possibly include such employees

¹ The subject of vaccine incentive programs is not addressed here, but there may be legal issues arising from such programs.

² See *EEOC What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws - Technical Assistance Questions and Answers - Updated on May 28, 2021*, § K.5, available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D> (hereafter “EEOC Tech. Asst.”). Although the ADA only applies to employers with fifteen or more employees, Vermont’s Fair Employment Practices Act (“FEPA”) generally mirrors the ADA and applies to all Vermont employers including municipalities.

within a vaccine mandate.

May employers ask for proof of vaccination?

Yes, employers may require documentation that employees have received COVID-19 vaccination.³ Such information must be held confidential by employers, and records should be maintained in a manner which is secure and separate from ordinary personnel files. Employers may not disclose to other employees or the public whether particular employees are or are not vaccinated.

Where an employer requires that vaccination be provided by the employer's agent, such as at a vaccination clinic arranged for municipal employees, health screening questions must be job-related and consistent with business necessity. On the other hand, if employees are free to choose whether to receive the vaccine from the employer or some other available source, this requirement need not be met.⁴

Are there exceptions employers must recognize for some employees?

Special considerations arise for employees who are unable to be vaccinated because of (1) a disability, (2) a sincerely held religious belief, practice, or observance, or (3) pregnancy/childbirth.⁵ In general, it is recommended that employers assume that an employee who raises any of these issues as a reason they cannot be vaccinated is, in fact, unable to be vaccinated for the reason stated. However, employers may inquire further when reasonable to do so, and all information received must be treated confidentially.

Disability and Pregnancy – While addressing disabilities in the workplace generally may involve health conditions already known to or obvious to an employer, it is less likely that an employer will have information that a specific employee cannot be vaccinated due to a health condition. And, while the Centers for Disease Control (“CDC”) generally recommends vaccination for people who are pregnant,⁶ a particular employee may have unique health issues related to a pregnancy which make the employee ineligible for vaccination. In cases where employers do not have sufficient information to corroborate that a health-related issue prevents vaccination, employers may request appropriate medical documentation as to an individual's particular circumstances.

³ EEOC Tech. Asst. §§ K.6, 9.

⁴ EEOC Tech. Asst. § K.7.

⁵ While federal law only prohibits discrimination on the basis of pregnancy which causes disability, Vermont state law requires accommodations for any “pregnancy-related condition” which affects an employee's ability to perform her job. See 21 V.S.A. § 495k.

⁶ See <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html> (updated Sept. 3, 2021).

Sincerely Held Religious Belief – In the context of discrimination law, religion is treated broadly and may include beliefs, practices, and observances with which an employer may be unfamiliar. Adherence to an established traditional religion is not required. An employer should therefore ordinarily assume that an employee’s request for religious accommodation does qualify the individual for a reasonable accommodation. However, if the employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer may request additional supporting information.⁷

Accommodations, undue hardship, and direct threat.

Accommodations and undue hardship – State and federal law require employers to at least consider, and possibly provide, reasonable accommodations for employees who do not get vaccinated against COVID-19 for one of the reasons discussed above.⁸ An accommodation is an adjustment or modification enabling an individual to perform a job. Under disability law, and likely for pregnant employees, an accommodation is reasonable if it does not pose “undue hardship” to the employer, meaning it does not cause significant difficulty or expense.⁹ For employees who cannot be vaccinated for religious reasons, undue hardship likely means anything more than a minimal cost or burden on an employer.¹⁰

The process for addressing accommodation requests related to COVID-19 vaccination are the same as for disabilities in general. It is strongly recommended that employers implementing a vaccine mandate policy adopt clear procedures for addressing requests for accommodations. EEOC recommends the Job Accommodation Network (“JAN”) as a resource for how to address accommodations relating to vaccines: <https://askjan.org/topics/COVID-19.cfm>.

An employee, or a spouse or family member, for example, does not need to say they “request an accommodation.” Where an employer reasonably understands an accommodation is requested, an interactive process should take place to identify whether there are options to allow the employee to work without causing an undue hardship for the employer. Employers may rely on CDC recommendations when deciding whether an effective accommodation is available and would not pose an undue hardship.¹¹

⁷ EEOC Tech. Asst. § K.12.

⁸ EEOC Tech. Asst. § K.1.

⁹ EEOC Tech. Asst. § K.6.

¹⁰ EEOC Tech. Asst. § K.12.

¹¹ EEOC Tech. Asst. § K.6.

Depending on the circumstances, examples of accommodations for employees who cannot be vaccinated may include the following, possibly in some combination:¹²

- Use of a face mask or other PPE;
- Social distancing;
- Modified schedule;
- Regular COVID-19 testing;
- Remote work;
- Reassignment; and
- Leave of absence.

An employer must keep confidential the fact that an employee has requested and/or is being granted an accommodation.¹³ While some accommodations might be obvious to observers and co-workers, an employer may not disclose to anyone that a particular employee is being afforded an accommodation. Employers should not take any adverse action against an employee relating to a request for an accommodation, regardless of whether the employer ultimately does not accept the grounds presented for requesting an accommodation.

Direct threat – The other reason, besides undue hardship, an employer may decline to accommodate an unvaccinated employee is when the accommodation would not prevent a “direct threat” to the workplace or the individual employee. “Direct threat” means a “significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation.” Employers should evaluate four factors to make an individualized assessment as to whether a specific unvaccinated employee does pose a direct threat:¹⁴

- The duration of the risk;
- The nature and severity of the potential harm;
- The likelihood that the potential harm will occur; and
- The imminence of the potential harm.

Whether a particular employee poses a direct threat should be based on reasonable medical judgment that relies on the most current medical knowledge about COVID-19. Whether an individual employee’s unvaccinated status creates a direct threat to that employee must be based on an individualized assessment by a qualified medical provider.

¹² EEOC Tech. Asst. § K.2.

¹³ EEOC Tech. Asst. § K.6.

¹⁴ EEOC Tech. Asst. § K.5.

Whether an employee's unvaccinated status presents a direct threat to others should also be based on medical information. For example, medical knowledge to consider in determining risk may include the level of community spread at the time of the assessment. EEOC advises that CDC guidance is an appropriate source of current medical knowledge about COVID-19.¹⁵ In evaluating the direct threat factors, an employer's assessment should take account of the work environment, such as: whether the employee works alone or with others; works inside or outside; the available ventilation; the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees; the number of partially or fully-vaccinated individuals already in the workplace; whether other employees are wearing masks or undergoing routine screening testing; and the space available for social distancing.¹⁶ Depending on the circumstances, employers may be able to make these determinations on their own, or consultation with an expert qualified to assess the risk posed by an unvaccinated employee in the workplace may be appropriate.

Confidentiality of information and records.

Employers must maintain confidentiality of information and records relating to employees' vaccination status, health conditions, religious beliefs, and accommodations which are requested and/or granted. Employers are required to maintain records of such information in a manner which is secure and separate from ordinary personnel files, and the information should only be accessible by need-to-know personnel and officials. All of these confidentiality requirements apply to such information regardless of whether an employer adopts a vaccine mandate policy.

May a municipal employer dismiss an employee for refusing vaccination?

Yes: Provided one of the protected categories discussed above is not involved, an employer may prohibit an unvaccinated individual from entering the workplace and dismiss the employee. However, employers must still adhere to applicable personnel policies, including but not limited to disciplinary and dismissal procedures, collective bargaining agreements, contracts with individual employees, and/or applicable statutes and municipal charter provisions. Again, unionized workforces may present particular concerns as to whether the employer may impose disciplinary consequences without first bargaining vaccination issues with the union.

Where an employee cannot be vaccinated due to disability, religious belief, or pregnancy, the employer may only prohibit the employee from entering the

¹⁵ EEOC Tech. Asst. § K.5.

¹⁶ EEOC Tech. Asst. § K.5.

workplace if the employee's presence would present a direct threat which cannot be resolved through reasonable accommodations. The employer must be able to prove the existence of a direct threat. It is strongly recommended that municipal employers consult with legal counsel before potentially taking such a course of action in a given case.

Note that the ability to lawfully dismiss employees for failing to comply with a vaccine mandate in some circumstances does not extend to discipline for raising objection or protesting such a policy. If employees collectively discuss or protest such a policy, their actions could be protected by law regardless of whether they are members of a labor union.

Written employer policies.

A municipal employer choosing to require that employees be vaccinated against COVID-19 should adopt a written policy.¹⁷ While it is once again recommended that legal counsel be consulted in connection with the details of such a policy, examples of some general features which should be considered include:

- Why a vaccine mandate is being adopted;
- Clear deadline for being fully vaccinated;
- What documentation/proof will be required;
- Resources for locating available vaccinations free-of-charge;
- Paid time-off to receive vaccination to recover from any temporary side-effects (which benefits might require union approval for union workers and might trigger workers' compensation);
- Who may be eligible for accommodations and clear information about requesting them such as:
 - Who to contact and how to do so;
 - What types of information/proof might be required;
 - Confidentiality and non-retaliation provisions; and
- A statement that an employee's failure to comply may result in discipline up to dismissal from employment.

While this last item may seem controversial to some, employers should not adopt mandates unless they are prepared to enforce them. For employees eligible to be vaccinated, enforcement of such a policy should be as uniform as possible. Human resources personnel and municipal officials should be prepared both to address accommodations requests and to enforce the policy with respect to employees who choose not to comply. Additionally, if the policy is to be applied to employees who may only be dismissed for "just cause," prior written notice that refusal to be vaccinated could lead to dismissal may be appropriate.

¹⁷ 24 V.S.A. § 1121 expressly authorizes municipalities to adopt personnel rules.

Questions and scenarios which might arise under a vaccine mandate.

Elected officials – Unless a charter provision provides otherwise, elected officials are generally not subject to municipal personnel policies absent agreement to observe such policies.

Federal mandate for employers with 100+ employees – The Biden administration recently announced that the U.S. Department of Labor’s Occupational Safety and Health Administration (“OSHA”) is developing an emergency standard directed at private-sector businesses with 100 or more employees. It is unknown at this time when the emergency standard may be implemented and effective, and it is also unknown whether it will be applicable to public employers. Ordinarily, OSHA does not apply to public employers, unless the State has adopted an OSHA State Plan covering them. Vermont operates an OSHA-approved State Plan covering all local government workers. It would appear that, with respect to municipalities, the mandate will only apply to those with 100 or more employees.

Nursing mothers – Vermont laws which require that a working mother be afforded reasonable opportunities to express breast milk for a nursing child do not affect whether employees may be required to comply with a vaccine mandate. Currently, CDC does recommend COVID-19 vaccination for nursing mothers.

Job applicants – Employers adopting a vaccine mandate should ask job applicants if they are vaccinated only after an unconditional offer of employment has been made because any answer other than a “Yes” will likely lead to further inquiry which might violate ADA rules against asking applicants about their health. If the applicant answers “No,” then the process of determining whether the employee is eligible for reasonable accommodation, and possibly review of direct threat concerns, would be appropriate.

COVID-19 testing – If COVID-19 testing, whether onsite or offsite, is implemented as part of a set of reasonable accommodations in a given case, it might be appropriate to treat time the employee spends being tested as time-worked for purposes of wage calculations.

FDA approvals – Now that the Pfizer vaccine has been fully approved by the FDA, the question of emergency use authorizations (“EUA”) is unlikely to be an issue. However, in the event there comes a time when only EUA vaccines are available, that fact would not affect whether an employer can mandate vaccination.

Booster shots – Can a mandatory vaccine policy require booster shots? EEOC has not yet addressed this question, and it may be that only some employees will require or be eligible for boosters due to a unique health condition. At this time, it is

recommended that a vaccine mandate not address the subject of booster shots.

PACIF Members

PACIF members dealing with issues related to vaccine mandates, as with other employment situations, may access the Human Resources Consultation Program. If your municipality encounters circumstances that need legal guidance, such as the need to accommodate an employee for medical or other reasons, please contact Jill Muhr, Senior Human Resources Consultant, to discuss the situation and whether it qualifies for the [Employment Practices Liability \(EPL\) Referral Program](#). The EPL Referral Program provides PACIF members with a certain amount of free, targeted legal assistance with employment matters. Jill may be reached at jmuhr@vlct.org or via her direct office number at 802.262.1923.