



TAUC Member Guidance for Workplace COVID-19 Vaccination Requirements

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Introduction

Many contractors are currently tackling how to craft reasonable COVID-19 vaccination policies for their employees that create a safe work environment while, at the same time, minimize the risk of liability and lawsuits. In doing so, union contractors will need to work within the framework of collective bargaining agreements (“CBAs”).

Ultimately, there is no easy step-by-step guide regarding how best to inoculate your union workers against COVID-19. These decisions will be based on multiple factors, including the relevant CBA, the nature of the contractor’s business and operations, owner requirements and union support for mandatory vaccines. Set forth below are a list of questions and answers to assist contractors in developing their workplace vaccine policies.

Questions & Answers

- 1. May a contractor require its employees to have a COVID-19 vaccination as a condition of employment?**

Without language in its collective bargaining agreement which would enable it to do so, a contractor may not require COVID-19 vaccination as a condition of employment without first going to the union and discussing its implementation and effects. Even with language specific or broad enough to allow a contractor to act alone, good labor relations would dictate that a contractor meet with its union to discuss the implementation of the program. We do not expect this to be a problem in that unions are supportive of

vaccination for their members and are calling for construction workers to be given vaccination priority as essential workers. As in the case of substance abuse testing, we expect unions will support vaccination programs which are fair and nondiscriminatory.

Many union and non-union employers have determined that the most effective strategy is to educate employees about the benefits of the vaccine and strongly encourage them to obtain it. Additionally, employers have also found that by giving employees time off to obtain the vaccine, creating incentives, and providing information on testing sites and vaccine registration, employees are more likely to get vaccinated. Additionally, many companies have determined that encouraging employees to get the vaccine, as opposed to requiring it, creates goodwill and reduces the risk of employee complaints and lawsuits.

2. Is there language in the National Maintenance Agreements (NMA) which permits a contractor to institute a mandatory vaccination program?

Arguably, Article XVII — Safety in the NMA would allow a contractor to implement a vaccination program. As in the case of substance abuse testing, which is specifically provided for under that Article, any such vaccination program would be subject to the grievance procedure. However, as indicated above, good labor relations would suggest notifying the union before implementing a vaccination program and discussing ahead of time any problems or concerns which the union may have.

3. What are some of the issues that a contractor and the union may want to look at?

Issues that may arise when implementing a vaccination program include: availability of vaccines; employees that are not yet eligible for vaccination; employees who refuse vaccination; accommodation of employees who refuse vaccination for legitimate medical or religious reasons; payment for vaccines; acceptable proof of vaccination; payment for time spent to be vaccinated; and incentives to encourage employee vaccination.

4. If a contractor has a policy which requires a COVID-19 vaccination as a condition of employment, are there circumstances under which an employee may refuse vaccination?

Yes. If the contractor has more than 15 employees, the ADA will apply. Under the ADA, a contractor must provide reasonable accommodations to individuals who cannot be vaccinated because of a disability, such as an allergy to vaccines. In this situation, the contractor and employee should engage in an interactive process to determine what reasonable accommodation would be appropriate.

Additionally, under Title VII of the Civil Rights Act of 1964, an employer must grant accommodations to individuals who have genuinely held religious beliefs that prevent them from obtaining the vaccine. However, a company is not required to grant

accommodations if the person's request does not rise to the level of a sincerely held religious belief. Therefore, people who have concerns related to the vaccine, do not believe that COVID-19 actually exists, or claim they belong to a religious faith solely for the purpose of avoiding getting the vaccine, do not qualify under this exemption.

In determining whether a person has a genuinely held religious belief, the contractor may make a limited inquiry into the facts and circumstances of the employee's claim that the belief or practice at issue is religious and sincerely held. This can include obtaining written materials or verification by others who are aware of the employee's religious practice or belief. However, any more in-depth investigation into an employee's religious beliefs should be avoided.

If any of your employees make an ADA or Title VII claim, we recommend speaking to your legal counsel prior to making any decisions regarding whether to deny or provide an accommodation. There are specific processes set forth by the Equal Employment Opportunity Commission that a contractor will need to adhere to when determining reasonable accommodations for a disability or religious belief. Additionally, there may be state and local laws regarding disabilities and discrimination that provide additional protections not set forth by the ADA or Title VII.

5. May an owner require vaccination as a condition of access to its facility or job site?

Similar to substance abuse testing and security requirements, an owner could make COVID-19 vaccination a condition of access to its plant or job site. In such instances, a contractor and its unions would have no choice but to comply with the owner's requirement. As in the case of substance abuse testing and security, it would be incumbent upon the contractor to discuss the consequences of this requirement with its unions, just as if the contractor had initiated the policy itself. However, unlike a policy initiated by the contractor, there would be no opportunity to provide a reasonable accommodation, and any employee refusing to be vaccinated for medical or religious reasons would have to be sent back to the hiring hall or employed elsewhere.

6. May a contractor make COVID-19 vaccination a condition for referral to a job site?

This is a negotiable issue between the contractor and union.

7. Can you require a vaccination for new hires?

Again, this is a negotiable issue between the contractor and union.

8. Where does an employee get a COVID-19 vaccination?

Distribution networks differ from state to state. The Center for Disease Control (the

“CDC”) has a website that can assist individuals in finding a vaccination in their area: <https://www.cdc.gov/vaccines/covid-19/reporting/vaccinefinder.html>.

9. If an employee gets the COVID-19 vaccine when either recommended or required by the employer, and has an adverse reaction requiring medical attention or time off work, is it an OSHA recordable? Is it covered by Workers’ Compensation?

The adverse reaction is recordable if it is work-related and meets the general recording criteria contained in 29 CFR 1904.7. Typically, if an employer requires the vaccine, or if the employer provides the vaccine, but does not require it, a reaction to the vaccine would be work-related.

Additionally, if an employee sustains a needlestick injury during a vaccination administered by the employer, such an injury would also be recordable.

If a contractor requires all employees get the vaccine, the vaccine would be considered part of work. Therefore, under most state laws, the adverse reaction would be covered by workers’ compensation. However, it is recommended that contractors check with their insurance carriers to confirm such coverage.

10. What if an employee is not currently eligible to receive a vaccination under state and federal guidelines?

An employer should not attempt to circumvent state or federal guidelines when trying to vaccinate its workforce.