

Many public employers are exploring the idea of requiring public employees to provide proof of vaccination and, absent such proof, succumb to periodic COVID-19 testing. That possibility has raised a number of questions. What follows is general guidance, please consult your attorney before acting on any advice included here.

**1. Can a public employer mandate that employees get vaccinated?**

Yes, subject to collective bargaining. Federal law allows for mandatory vaccinations. Note that some states, such as Oregon, have specific laws that may prohibit mandatory vaccinations for certain law enforcement, firefighter, and corrections employees.

**2. If a public employee declines to be vaccinated, can the public employer require the employee be tested for COVID-19?**

Yes, subject to collective bargaining. Federal law allows for COVID-19 testing in the workplace. Such a mandate would likely require collective bargaining.

**3. What options are available to a public employee who gets sick after being vaccinated?**

An employee should look to file a worker's compensation claim, seek any COVID leave available through their employer, and, if needed, look to use their sick leave banks. Of note, a ripe area for bargaining is the availability of employer-sponsored COVID leave banks for vaccination side-effects if vaccinations are mandated.

**4. Do public employees have medical privacy rights when a public employer requires proof of vaccination?**

Proof of vaccination provided by the public employee is medical information that must be kept confidential by the public employer under the Americans with Disabilities Act (ADA). Unless the public employer is a "covered entity" (e.g., health plans, healthcare provider), the federal Health Insurance Portability and Accountability Act (HIPAA) does not apply. An area for bargaining could be that the public employer simply verifies – but does not maintain – an employee's proof of vaccination.

**5. What mandatory bargaining issues are at play if an employer mandates vaccination, mandates proof of vaccination, or requires periodic COVID-19 testing for the unvaccinated?**

State law or local bargaining ordinances will dictate the scope of bargaining, which may vary widely. Some of the mandatory bargaining issues at play include:

- Discipline and job security.
- Safety.
- PPE & testing as condition of employment.
- Health benefits.
- Costs of vaccination.
- Leave for obtaining vaccination.
- Leave for side-effects of vaccination.
- Costs of testing the non-vaccinated.
- Frequency of testing the non-vaccinated.
- Medical privacy issues, both as to vaccination verification and testing for the non-vaccinated.
- Procedures for “proof” of vaccination.
- Procedures for testing the non-vaccinated.
- Incentives to get vaccinated.
- Scheduling impacts on staffing and safety.
- Working conditions for the unvaccinated.
- PPE and other precautions.

**6. Don't employees have a constitutional right to refuse COVID-19 vaccination?**

No. The Supreme Court of the United States has upheld compulsory vaccination laws. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).

**7. If an employer has a mandatory vaccination program, must it provide reasonable accommodations to employees on religious or disability grounds?**

Yes, if the employee meets certain legal thresholds for establishing a religious belief or disability. Simply stating in a conclusory fashion that “my religious beliefs” or “my medical condition” gives me a pass from being vaccinated is insufficient under the law. Further, once that legal threshold is met, a public employer’s accommodation need only be “reasonable;” the employee is not entitled to his/her preferred accommodation. That means that a public employer could, for example, reassign an employee to a different position and/or require the employee to wear a mask. And a public employee who refuses those reasonable accommodations is subject to termination. *E.g., Horvath v. City of Leander*, 946 F.3d 787, 792 (5th Cir. 2020).

**8. The vaccines have only emergency use approval from the FDA. Aren’t there FDA statutes on emergency approval that forbid mandatory vaccination programs in the workplace?**

No. A recent federal court decision indicates that the emergency use status of COVID-19 vaccinations under FDA statutes does not preclude mandatory vaccination programs at work. *Bridges v. Houston Methodist Hospital*, Case No. 21-CV-01774 (S.D. Tex. 2021).