

# Best Practices for Vaccines and the Workplace

By Mark Wilson and Emma Trivax

**F**rom *Jacobson v. Commonwealth of Massachusetts*, 197 US 11; 25 S Ct 358 (1905) to *People ex rel. Hill v. Board of Ed. of City of Lansing*, 224 Mich 388; 195 NW 95 (1923), compulsory vaccination by the government and other governing bodies has been permitted when public health and safety is deemed to be at risk. Some hospital systems have begun to mandate the COVID-19 vaccine. For example, the Henry Ford Health System updated its policy to require all employees, volunteers, students, and some contractors receive the full COVID-19 vaccine by September 10. However, with the recent case of *In re Cert Questions from United States District Court, Western District of Michigan*<sup>1</sup> eliminating the governor's power to declare a state of emergency and all associated police powers, many employers are wondering whether they can mandate vaccinations for their staff.

## Mandating the COVID-19 vaccine

### OSHA and MIOSHA

Pursuant to the Occupational Safety and Health Administration at the federal and state levels, employers have a duty to provide a workplace free from serious recognized hazards that cause or are likely to cause death or serious physical harm to employees.<sup>2</sup> Thus, as the supporting science and data sets grow, employers are questioning when they will have a health and safety obligation to mandate government authorized vaccinations to

forestall a serious hazard, such as COVID-19, arising or spreading in their workplace. The Equal Opportunity Employment Commission (EEOC) has already released guidance that allows employers to mandate influenza vaccines subject to the Americans with Disabilities Act (ADA) and Title VII exceptions and has used this same logic in providing guidance on mandating COVID-19 vaccinations in the workplace.<sup>3</sup>

### The Americans with Disabilities Act

The ADA has long established factors to protect employees from disability discrimination in the workplace. First, employers are limited in making disability-related inquiries and requiring medical examinations for all employees; second, employers cannot exclude a qualified individual with a disability from the workplace for health and safety reasons unless they pose a direct threat; and third, reasonable accommodations must be given to disabled individuals unless it would cause undue hardship.<sup>4</sup> If none of those factors are violated, an employer may require the mandatory COVID-19 vaccine and could potentially remove the employee from the workplace for refusing to comply.

Mandating that employees get the vaccine or asking about vaccination status is not considered a “medical examination” under the ADA. On the other hand, employers generally cannot ask why someone’s disability

precludes them from getting the vaccine — that would become a medical or disability-related inquiry, which is prohibited by the ADA. However, such an inquiry is permitted if it is job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence, that an employee will pose a direct threat due to a medical condition.<sup>5</sup>

A direct threat is a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”<sup>6</sup> Though there are multiple factors in determining what constitutes a direct threat,<sup>7</sup> the EEOC has already confirmed that COVID-19 is a direct threat to a workplace. Any individual with a disability that poses a direct threat to the workplace despite reasonable accommodations being available is not protected by the ADA.

The ADA definition of “reasonable accommodation” lists accommodations that may be required of an employer including (a) making existing facilities useable to the disabled individual and (b) restructuring the job and the individual’s schedule; reassignment to a vacant position; acquisition or modification of equipment or devices; appropriate adjustment or modifications of examinations, training materials, or policies; provision of qualified readers or interpreters; or any other reasonable accommodation.<sup>8</sup>

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Employers must reasonably accommodate the disabled individual up until the point of undue hardship. Generally, undue hardship means an action requiring significant difficulty or expense, in light of numerous considerations.<sup>9</sup> While the undue hardship standard is often difficult to show, an employee also must be able to show they can perform the essential functions of the position to be qualified for it. Consequently, an employer is not required to make changes to an employee's essential job functions.

Many employers have utilized telework since the pandemic's onset. The fact that an employer went fully remote during the pandemic does not mean that telework will now be a required reasonable accommodation if the company is back to being fully in person. Though not required, an employer is permitted to terminate an employee with disabilities if, because of the employee's disability, that person poses a direct threat to health or safety in the workplace and no reasonable accommodation can be made without undue burden or if the employee cannot perform the essential functions of the job.<sup>10</sup>

#### Title VII

A common misconception of employers and employees alike is that individuals can deny getting a vaccination based on the free exercise clause of the First Amendment and cannot be penalized for such a decision. However, the First Amendment *only applies* when the government, not private employers, is infringing on those rights. That said, Title VII of the Civil Rights Act of 1964 protects private employees from discrimination based on race, color, religion, sex, and national origin. The exemption from an employer's vaccine mandate that generally arises under Title VII would be a religious exemption.

Under Title VII, once a qualified employer receives notice of an employee's sincerely held religious belief, practice, or observance, the employer must provide a reasonable accommodation unless it poses an undue hardship. Under Title VII, the undue hardship threshold is lower than that of the ADA and only requires "more than a de minimis cost" to the operation of the employer's business.

Title VII defines religion as including "all aspects of religious observance and practice, as well as belief."<sup>11</sup> Furthermore,

the Supreme Court defined religious practices to include "moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views."<sup>12</sup> According to the EEOC, if an employee requests a religious accommodation and an employer has an objective basis for questioning the religious nature or sincerity of the belief, the employer is justified in requesting additional supporting information. Most employers have found it extremely difficult to challenge a sincerely held religious belief. Thus, even if an objective questioning basis exists and further inquiry is requested, employers often forego trying to challenge whether a belief is sincerely held.

Under Title VII, there is no set definition for a reasonable accommodation, but the undue hardship definition impacts what is considered a reasonable accommodation. In *Trans World Airlines v. Hardison*, the Court found that an undue hardship means "more than a de minimis," or trivial, cost to the employer.<sup>13</sup> This is a much lower standard than the ADA standard, and employers have more latitude to reject these requests for accommodations. Most, if not all, of the reasonable accommodations set out by the ADA would likely be considered more than a de minimis cost to the employer under Title VII. Of course, employers should use discretion and evaluate each situation on a case-by-case basis. If a reasonable accommodation exceeds a de minimis cost to the employer, the employer may terminate the unvaccinated employee if, without any kind of accommodation, that employee would create a threat to the safety of other employees in the workplace.

#### Proof of vaccination

If an employer implements a mandatory vaccination policy, the employer is permitted to ask for proof of vaccination. HIPAA does not preclude most employers from seeking this information; it only applies to covered entities and their business associates. More specifically, covered entities are limited to health plans, health care clearing houses, and health care providers.<sup>14</sup> Furthermore, asking for proof of vaccination is not prohibited under the ADA because it will not elicit information about an employee's

disability. As such, employers are permitted to request proof that their employees have been vaccinated.<sup>15</sup>

#### Conclusion

In light of the sweeping COVID-19 pandemic that still plagues large swaths of the world and with the approved and authorized COVID-19 vaccinations readily available, many employers are anywhere from anxious to desperate to resume safe in-person operations. While employers may mandate vaccinations, the EEOC recommends that employers just strongly suggest getting the vaccine to its employees. This policy allows employers to avoid undertaking the complex analyses discussed above if they did implement an absolute mandate. Employers may remove an employee from the workplace if they pose a threat to the safety of the workplace and they cannot make a reasonable accommodation without undue hardship under the ADA or Title VII. ■



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*(Continued on the following page)*

## ENDNOTES

1. *In re Cert Questions from United States District Court, Western District of Michigan*, 506 Mich 332; 958 NW2d 1 (2020).
2. MCL 408.1011(a) and 29 USC 654(a)(1).
3. *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, EEOC (March 19, 2020), available at <<https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act#18>> [<https://perma.cc/W9JKXHV9>] and *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* (June 28, 2021), available at <<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>> [<https://perma.cc/23PD-RTKE>]. All websites cited in this article were accessed July 9, 2021.
4. *Id.*
5. 42 USC 12112(d)(4)(A), 29 CFR 1630.2(r); and *Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees under the ADA*, EEOC (July 27, 2000), available at <[https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees#N\\_39\\_](https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees#N_39_)>.
6. 29 CFR 1630.2(r).
7. 29 CFR 1630.2(r)(1)–(4).
8. 42 USC 12111(9).
9. 42 USC 12111(10) and 29 CFR 1630.2(p).
10. *Employers and the ADA: Myths and Facts*, Ofc of Disability Employment Policy, US Dep't of Labor, available at <<https://www.dol.gov/agencies/odep/publications/fact-sheets/americans-with-disabilities-act#:~:text=The%20termination%20is%20unrelated%20to,or%20safety%20in%20the%20workplace>> [<https://perma.cc/2YWE-5SND>].
11. 42 USC 2000e.
12. *United States v. Seeger*, 380 US 163; 85 S Ct 850; 13 L Ed 2d 733 (1965) and *Welsh v. United States*, 398 US 333; 90 S Ct 1792; 26 L Ed 2d 308 (1970); 29 CFR 1605.1.
13. *Trans World Airlines, Inc v. Hardison*, 432 US 63; 97 S Ct 2264; 53 L Ed 2d 113 (1977).
14. 45 CFR 160.103.
15. Employees can always self-disclose their vaccination status, or they can request a HIPAA authorization from the vaccine provider and have the provider disclose vaccination status to the employer.

## Interest Rates for Money Judgments

Under MCL 600.6013 (Revised July 1, 2021\*)

**I. [MCL 600.6013(8)] FOR ALL COMPLAINTS FILED ON OR AFTER JANUARY 1, 1987 UNLESS SECTION II, III, or IV APPLIES:**

Interest on a money judgment recovered in a civil action is calculated at 6-month intervals from the date of filing the complaint at a rate of interest equal to 1% plus the average interest rate paid at auctions of 5-year United States treasury notes during the 6 months immediately preceding July 1 and January 1, as certified by the state treasurer, and compounded annually, according to this section. Interest under this subsection is calculated on the entire amount of the money judgment, including attorney fees and other costs. See interest rate chart below.

**II. [MCL 600. 6013(7)] FOR COMPLAINTS FILED ON OR AFTER JULY 1, 2002 THAT ARE BASED ON A WRITTEN INSTRUMENT WITH A SPECIFIED INTEREST RATE:**

Interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate specified in the instrument if the rate was legal at the time the instrument was executed. If the rate in the written instrument is a variable rate, interest shall be fixed at the rate in effect under the instrument at the time the complaint is filed. The rate under this subsection shall not exceed 13% per year compounded annually.

**III. [MCL 600. 6013(5 and 6)] FOR COMPLAINTS FILED ON OR AFTER JANUARY 1, 1987, BUT BEFORE JULY 1, 2002 THAT ARE BASED ON A WRITTEN INSTRUMENT:**

Interest is calculated from the date of filing the complaint to the date of satisfaction of the judgment at the rate of 12% per year compounded annually, unless the instrument has a higher rate of interest. In that case, interest shall be calculated at the rate specified in the instrument if the rate was legal at the time the instrument was executed. The rate shall not exceed 13% per year compounded annually after the date judgment is entered.

Notwithstanding the prior paragraph, if the civil action has not resulted in a final, non-appealable judgment as of July 1, 2002, and if a judgment is or has been rendered on a written instrument that does not evidence indebtedness with a specified interest rate, interest is calculated as provided in Section I above.

**IV. ADDITIONAL CONSIDERATIONS:**

If the complaint was filed before January 1, 1987, refer to MCL 600.6013(2)–(4).

Interest is not allowed on future damages from the date of filing the complaint to the date of entry of the judgment. [MCL 600.6013(1)]

The amount of allowable interest may be different in certain settlement and medical malpractice case scenarios. [MCL 600.6013(9-13)]

Effective Date	Average Certified by State Treasurer	Statutory 1%	Interest Rate	Effective Date	Average Certified by State Treasurer	Statutory 1%	Interest Rate
Jan. 1, 2000	5.7563%	1%	6.7563%	Jan. 1, 2011	1.553%	1%	2.553%
July 1, 2000	6.473%	1%	7.473%	July 1, 2011	2.007%	1%	3.007%
Jan. 1, 2001	5.965%	1%	6.965%	Jan. 1, 2012	1.083%	1%	2.083%
July 1, 2001	4.782%	1%	5.782%	July 1, 2012	0.871%	1%	1.871%
Jan. 1, 2002	4.14%	1%	5.14%	Jan. 1, 2013	0.687%	1%	1.687%
July 1, 2002	4.36%	1%	5.36%	July 1, 2013	0.944%	1%	1.944%
Jan. 1, 2003	3.189%	1%	4.189%	Jan. 1, 2014	1.452%	1%	2.452%
July 1, 2003	2.603%	1%	3.603%	July 1, 2014	1.622%	1%	2.622%
Jan. 1, 2004	3.295%	1%	4.295%	Jan. 1, 2015	1.678%	1%	2.678%
July 1, 2004	3.357%	1%	4.357%	July 1, 2015	1.468%	1%	2.468%
Jan. 1, 2005	3.529%	1%	4.529%	Jan. 1, 2016	1.571%	1%	2.571%
July 1, 2005	3.845%	1%	4.845%	July 1, 2016	1.337%	1%	2.337%
Jan. 1, 2006	4.221%	1%	5.221%	Jan. 1, 2017	1.426%	1%	2.426%
July 1, 2006	4.815%	1%	5.815%	July 1, 2017	1.902%	1%	2.902%
Jan. 1, 2007	4.701%	1%	5.701%	Jan. 1, 2018	1.984%	1%	2.984%
July 1, 2007	4.741%	1%	5.741%	July 1, 2018	2.687%	1%	3.687%
Jan. 1, 2008	4.033%	1%	5.033%	Jan. 1, 2019	2.848%	1%	3.848%
July 1, 2008	3.063%	1%	4.063%	July 1, 2019	2.235%	1%	3.235%
Jan. 1, 2009	2.695%	1%	3.695%	Jan. 1, 2020	1.617%	1%	2.617%
July 1, 2009	2.101%	1%	3.101%	July 1, 2020	0.699%	1%	1.699%
Jan. 1, 2010	2.480%	1%	3.480%	Jan. 1, 2021	0.330%	1%	1.330%
July 1, 2010	2.339%	1%	3.339%	July 1, 2021	0.739%	1%	1.739%

\*For the most up-to-date information, visit <http://courts.michigan.gov/Administration/SCAO/Resources/Documents/other/interest.pdf>.