

COVID-19 VACCINATION & EMPLOYMENT

A Q&A for Employers & Employees

1. Can employers require vaccination for COVID-19?

The general rule is yes. Employers can take a wide range of actions to protect the workplace, including requirements for employees to be vaccinated.

2. What happens if I refuse to be vaccinated?

It depends. Arkansas is an “at will” state when it comes to employment, which means that employers can set working conditions, including mandatory vaccinations. Consequently, the general rule is that employers can terminate an employee or reject an applicant for refusing to be vaccinated. However, there are a couple of exceptions for employers subject to the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964. If an employee has a medical reason or sincerely held religious belief that prevents him or her from being vaccinated, the employer must offer a reasonable accommodation to continue to work.

3. What does a reasonable accommodation look like?

This will vary depending on the work environment. In an office-based work environment, remote work could be an alternative. Some employers may continue to offer on-site work, but in an isolated location where the threat is reduced or eliminated. Employers do not have to offer accommodation that would present an “undue hardship” to the employer.

4. What if there is no reasonable accommodation?

Under the ADA, an employer may exclude an employee from the workplace if the employee’s presence is a “direct threat to the health or safety of individuals in the workplace.” To determine whether a “direct threat” exists, the employer assesses the following four factors: 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. An airborne, highly contagious virus like COVID-19 is likely to meet this test. An employer may exclude an employee from the workplace for refusing to be vaccinated due to a sincerely held religious belief. The employer will assess whether the employee has rights under any other laws prior to taking any additional adverse action.

5. Are employers likely to require vaccination for COVID-19?

Until COVID-19 vaccinations receive full licensure by the U.S. Food and Drug Administration (as opposed to the current emergency use authorization status), employers are unlikely to require vaccination. Instead, many are now educating employees about vaccination and strongly encouraging it, and some are offering incentives for vaccination. Some employers such as Trader Joe's and Dollar General are offering incentive payments or gift cards of varying amounts for vaccination, while others are offering additional leave time or incorporating vaccination into their wellness programs, such as Arkansas's own Washington Regional Medical Center. Regardless of the type of incentive, employers will need to assess the potential for discriminatory effects associated with the incentive, just as they would a vaccine requirement.

FIGURE 1: WASHINGTON REGIONAL MEDICAL CENTER EXAMPLE

Washington Regional Medical Center (WRMC) is in the sixth year of its OurHealth Wellness Plan. Prior to 2021, WRMC staff members were asked to complete the following four steps to receive an annual discount on the employee portion of their health insurance premiums of between 22% and 55%, depending upon the plan option chosen:

- Step 1: Complete an annual wellness visit with a primary care provider (PCP) or obstetrician/gynecologist.
- Step 2: Register on the WRMC Employee Assistance Plan (EAP) website and complete one of the health risk assessments (HRA) offered.
- Step 3: Complete one EAP online class or monthly lunch-and-learns or webinars.
- Step 4: Complete one wellness activity from the seven dimensions of wellness, which include spiritual, intellectual, and social wellness activities in addition to physical wellness.

2021 Wellness Plan Modifications

In 2021, WRMC replaced steps 2, 3, and 4 with a timely COVID-19 vaccination as a requirement to receive the discount. "We discussed eliminating the PCP visit and HRA component but felt for the health of our workforce we should keep this important preventive health feature," said WRMC President and CEO Larry Shackelford. "Ensuring that our employees and patients are protected from this virus through timely vaccination is an absolute priority for our organization."