



# What Employers Need to Know After FDA Grants Emergency Use Authorization For COVID-19 Vaccine

Insights

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As most know by now, the Food and Drug Administration (FDA) granted emergency use authorization for Pfizer's COVID-19 vaccine in the U.S on Friday, December 11, and the first Americans began to receive the vaccine this morning. The government is expecting an initial 2.9 million doses of the vaccine to be distributed in the coming weeks, and projections indicate that there may be enough vaccine to reach the vast majority of Americans who want to take it by early April 2021. Given the astronomical rise in the infection rate and the death rate topping 300,000, employer interest in the vaccines is extremely high. Thus, employers are asking whether they can, or should, require employees to take the vaccine. What do you need to know about this game-changing development?

## What Is Emergency Use Authorization?

Before we discuss employers' rights and obligations with respect to workplace usage of the vaccine, it is important to understand the current state of affairs. Distribution of the COVID-19 vaccine has not yet been licensed under the FDA's usual processes. The FDA's Emergency Use Authorization (EUA), under which the vaccine was authorized, is a "mechanism to facilitate the availability and use of medical countermeasures, including vaccines, during public health emergencies, such as the current COVID-19 pandemic." The vaccine is currently available only pursuant to an EUA.

Under this EUA, the FDA has not yet compiled all the evidence and clinical data that it would examine before fully approving a drug for public distribution and use. The FDA has, however, stated that the vaccine has met its "rigorous, scientific standards for safety, effectiveness, and manufacturing quality needed to support emergency use authorization" and that "its known and potential benefits clearly outweigh its known and potential risks."

In the wake of these unique circumstances, it remains somewhat unclear whether employers may *require* employees to be inoculated with a vaccine approved only pursuant to an EUA. In these waters, which have been mostly uncharted in the past, the language for EUAs could preclude employers from enforcing a requirement to take a vaccine issued under an EUA. Given the severity of the COVID-19 pandemic, however, more guidance is anticipated even as the initial doses of the vaccine are distributed.

## Can Employers Require That Employees Take a COVID-19 Vaccine?

Once the vaccine receives full approval from the FDA, we expect employers to have the right to require employees to receive it, subject to some limitations that we have described during the past several weeks and subject to further guidance from the Equal Employment Opportunity Commission (EEOC). As of today, there still has not yet been guidance from the CDC or the EEOC regarding the workplace law implications of the COVID-19 vaccination.

### **What Should Employers Consider Now?**

Regardless of the guidance that will likely be forthcoming from the EEOC and/or CDC, you should begin to consider how strongly you want to encourage employees to take the vaccine when it becomes available to your employees. The date your workers become eligible to receive the vaccine largely depends on the industry you are in (such as the healthcare field or some designated essential activity).

Another consideration: if you *require* employees to be vaccinated, you will be subject to the almost-certain requirement to accommodate employee requests for exemptions based upon medical circumstances or sincerely held religious beliefs. Further, if you implement a vaccine mandate, you should also be prepared to articulate your job-related reason for requiring a vaccine. For example, there may be no basis for requiring an employee who is working remotely to be inoculated.

### **Should Employers Require The COVID-19 Vaccination?**

Various polls have suggested that while the public's willingness to take a COVID-19 vaccine may be increasing, a large segment of the workforce – perhaps one third or more – will likely be skeptical or may even refuse to take it. As a practical matter, you should try to anticipate how a vaccine mandate would be received in your workforce and consider how to respond if a large segment of the workforce pushes back.

You should also consider specifically which job classifications would be required to receive a vaccine, the logistics of delivering the vaccine or otherwise ensuring it is easily administered, and the general employee and public relations aspects of such an undertaking. Options may include offering incentives to employees to encourage them to get vaccinated, and investigating how you can make it easier for workers to obtain the vaccination.

### **Conclusion**

The pandemic continues to require employers to follow new developments and remain fluid in your approach to the associated challenges. The emerging availability of COVID-19 vaccines will be no different.

As wider availability of the vaccine draws closer, you should be prepared with at least a policy framework and a communications plan. We will continue to monitor developments related to the new vaccines and related workplace questions that arise. Make sure you are subscribed to Fisher Phillips' alert system to get the most up-to-date information.

If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our [Vaccine Resource Center for Employers](#) or contact any attorney in on our [FP Vaccine Subcommittee](#).

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*This Legal Alert provides an overview of developing workplace issues. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*

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