

COVID-19 VACCINATION AND MASKING IN WISCONSIN: June 2021
Can an Employer Really Mandate the Vaccine and Masks?

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Employers have an obligation to provide a safe workplace for their employees. As a result, many employers will look to implement mandatory covid vaccination policies and will continue to require face masks whether or not required by state law. Below we provide answers based on the best information currently available to some of the most frequent questions we receive.

Q: State and local mask mandates have ended, can my employer still require masks at work?

Employers may still require employees to wear masks. No rule or regulation prevents employers from requiring masks. The CDC still recommends masking in some circumstances and recommends that masking continue after vaccination until a sufficient percentage of the public are vaccinated. The CDC's recommendation is sufficient to support an employer requirement that employee PPE must include a suitable face mask. Additionally, many local health departments ended their mask mandates with the condition that employer retain the authority to require masks. However, certain workplaces, such as hospitals or corrections facilities are still subject to masking requirements from local health orders. Ultimately, employers retain their authority to require PPE in the workplace.

Q: Can an employer require employees to get vaccinated for COVID-19?

A: Yes, with narrow exceptions related to 1) the existence of a CBA that prohibits such a requirement or 2) an employee's disability that prevents that person's vaccination or, possibly, a sincerely held religious belief. Depending on the circumstances and reason the employee cannot or will not get vaccinated, the refusing employee may be subject to termination or other disciplinary action.

Collective Bargaining Agreements may impose some limitations on mandatory vaccination. A vaccination program is ordinarily a mandatory subject of bargaining. Employees covered by a collective bargaining agreement should look at that agreement carefully, particularly the management rights clause, to determine whether management has the right to unilaterally implement a vaccination requirement. Because of changes made by the NLRB over the last four years, it is easier for employers to implement mandatory vaccination requirements if the topic is not explicitly addressed in the CBA. In addition, the NLRB has recognized an "exigent circumstances" exception to the duty to bargain.

A Mandatory Vaccination Policy cannot be Discriminatory. While employers have an obligation to maintain a safe workplace, they cannot impose a vaccination

requirement that discriminates against employees who are unable, for medical reasons, or unwilling due to religious beliefs, to obtain a vaccine and instead may be required to make reasonable accommodations for such employees. Reasonable accommodations may include teleworking, imposing more stringent PPE requirements, or reassigning the employee.

Q: Can my employer ask if I've been vaccinated?

Yes. An employer does not violate Title VII, the ADA or HIPAA if it asks employees about their vaccination status or requires proof of vaccination. Employees are also obligated to respond to these questions. Employees who refuse to respond or are dishonest in responding may be subject to discipline for dishonesty.

Q. Can my employer require me to show proof of vaccination?

A: Yes. An employer may request proof of vaccination but is limited in the follow up questions it may ask. An employer should not ask questions or require proof that could information about an employee's medical conditions or disability. The EEOC has concluded that the CDC's Covid-19 card vaccination record/card is appropriate proof as it does not contain other confidential medical information.

In addition, an employer may offer an incentive to employees who show their proof of vaccination..

Q: What if an employee cannot get the vaccine because of a disability?

A: If the employer mandates vaccination and the employee cannot be vaccinated because of a bona fide disability, the employee must notify the employer and ask for an accommodation. The employer may have to offer a reasonable accommodation before terminating the employee's employment. The ADA requires that the employer consider whether the unvaccinated employee is a threat to the workforce and discuss with the employee whether he/she can be accommodated in a way that minimizes this risk to other employees. An employee is not entitled to the accommodation he or she wants, only a reasonable one. A reasonable accommodation may be additional PPE, reassignment to a non-public facing or other position, among other possibilities.

Employees who cannot be vaccinated due to disability may still qualify for FMLA leave, paid sick leave under the Families First Coronavirus Response Act, and/or benefits under other employer policies.

NOTE: Although pregnancy is not a disability, an employee whose physician recommends the employee not be vaccinated can alert the employer and is entitled to similar protections to those described in the answer above.

Q: Can an employer require unvaccinated employees to wear masks if it allowed vaccinated employees to work without masks?

A: Yes. An employer can require unvaccinated employees to take extra precautions, such as continued mask wearing, distancing, or reassignment in order to protect the health and safety of other its other employees and customers.

Q: Can an employee object to getting the vaccine because of their closely held religious beliefs?

A: An employee who asserts a closely held religious objection must be allowed to engage in the interactive accommodation process similar to a disable employee. The employer must have an objective basis for questioning the religious beliefs of an employee. The employer must attempt to accommodate the employee before excluding the person from working at the jobsite or terminating employment.

Q: Can an employer legally offer employees money to induce them to be vaccinated?

A: Yes, as long as the incentive is small and therefore not coercive and is not prohibited by the CBA.

Where employees are covered by a CBA, an incentive may be a unilateral change and constitute an unfair labor practice if it is not discussed with the union in advance.

Q: What if the project owner requires that all employees on the job site be vaccinated?

A A project owner may require that anyone on the job site be vaccinated and may refuse to allow unvaccinated employees of subcontractors on the site. In such a situation, and as long as the policy is not discriminatory, the employer may not be able to permit unvaccinated employees on the job site.

Q: What if an employer mandates vaccination and an employee has a negative reaction to the vaccine?

A: An illness or injury that arises out of and in the course and scope of employment may have a claim against the employer's worker's compensation insurance policy. If an employer mandates its employees to be vaccinated at work or on work time, and an employee has an adverse reaction that results in injury or illness, that employee may have a worker's compensation claim against their employer.

Q: Can an employee be terminated or disciplined for lying about getting the vaccine?

A: Yes. Employers are allowed to ask employees about their vaccination status without violating the ADA or Title VII. If the employee engages in dishonestly in responding to the employer's question about vaccination status, the employer could discipline the employees for their dishonesty.

Q: What should a Union do if an Employer says it wants to implement a mandatory vaccination policy?

Do not concede that the employer may unilaterally implement the policy; you want to help shape it and ensure that members' concerns and well-being are looked after in the event a policy is implemented. The duty to bargain will likely be determined by the CBA's language. Because most CBAs will not have language specific to mandatory vaccination, the right to implement such a policy (or not) will be derived from the management rights language.

If the employer is bargaining over the decision to implement, the Union will want to consider the reach of the policy – is it limited in scope? – does it last forever or just for covid? Will they use it to require flu vaccinations in the future or to open the door to address other unforeseen circumstances?

The parties will also have to discuss how to accommodate employees who cannot or will not be vaccinated in order to minimize the risk to other employees and the unvaccinated employee.

It will also be important to bargain over the effects of the policy, including (but not limited to) absences and attendance issues and covid-screening policies. It is widely recognized that recipients of the vaccine – particularly after the second dose – feel ill for a day or two. Since most employers have covid-screening policies that prohibit sick employees from coming to work if they have certain symptoms, the union and employer should address how those policies affect employees whose symptoms are likely due to vaccination. In addition, the union and employer may need to address their attendance and/or sick leave policy to account for such absences.

Q: Can the employer require the employee to undergo a temperature check, complete a symptoms questionnaire, or submit to other COVID-19 screenings before beginning work?

Yes. Because of the hazards posed by having employees and clients exposed to COVID-19, employers can require employees to undergo mandatory screenings before working each day. However, time spent undergoing the mandatory screenings may be worktime for purposes of employee pay, depending on the length of time to complete the screenings. Much like security screenings to keep

weapons and contraband out of a prison or prevent theft, the covid screening is a preparatory activity that improves the efficiency of the employer's operations. Time spent undergoing the screenings to keep COVID-19 out of the employer's workplace may be worktime. Once time spent undergoing the screenings is counted as work time, subsequent time spent by the employer to walk to the timeclock or gather supplies/materials also must count as work time.

Q: Is an employer allowed to have a vaccination campaign in the workplace?

A: Yes. Employers can provide employees and their family members with education, resources, and information regarding the vaccine and can offer incentives to employees who get vaccinated.

These FAQs are based on the best available information as of June 1, 2021, and should not be construed as legal advice. We will make every effort to update this document as new information becomes available or the information changes. As with any question, the answer or end result may vary based on the specific circumstances of a particular situation.