

# Jason Habinsky in HR Dive: '5 Questions to Ask Before Adopting a Coronavirus Vaccine Policy'

December 22, 2020 Jason Habinsky

**PRACTICES** Labor and Employment, Employment Litigation

Haynes Boone Partner [Jason Habinsky](#) talked with *HR Dive* about the U.S. Equal Employment Opportunity Commission's (EEOC's) latest guidance on employer mandates for the COVID-19 vaccine.

Below is an excerpt:

On Dec. 16, the EEOC all but confirmed that employers may require proof that employees have received a COVID-19 vaccination without violating non-discrimination laws such as the Americans with Disabilities Act (ADA), stating that such mandates are not ADA-defined medical exams in and of themselves. Though the agency did outline some exceptions, members of the employment law community who spoke to *HR Dive* believe the guidance will be of use to employers.

At the same time, EEOC did not outright sign off on employer's vaccines mandates altogether.

"It wasn't as clear as you would expect," Jason Habinsky, partner at Haynes Boone and chair of the firm's labor and employment practice group, said of the guidance. Habinsky's takeaway is that EEOC is saying "in certain circumstances you can require it, but if you do, here are some things to keep in mind."

The guidance also leaves out certain information on how a vaccine mandate might impact certain classes of workers, including pregnant workers and workers under age 18. These are just a few examples of an area in which employers may have more questions than answers.

## **#1: Could a mandate's exceptions 'swallow the rule?'**

... there are at least two additional subsets of workers whom employers may need to keep in mind as they determine how to handle vaccination policies.

Pregnant workers are one such group, and they are protected both by the federal Pregnancy Discrimination Act as well as various state and local laws, Habinsky said. He noted that EEO law requires employers to provide reasonable accommodations to employees who are pregnant for any disabilities or medical issues related to their pregnancies.

## **#3: Should workers be given PTO to receive a vaccine? How about incentives?**

Incentivizing employees to receive a vaccine is "critical," Habinsky said, and providing paid time off to receive a vaccine could be one way of doing so.

## **4: What if a group of employees refuses to be vaccinated? Is that protected activity under the NLRA?**

Employers may also need to be aware of any guidance on vaccinations published by the Occupational Safety and Health Administration. The OSH Act's general duty clause specifies that employers must provide "a place of employment ... free from recognized hazards that are causing or are likely to cause death or serious physical harm" to employees.

### **#5: How might things change as the vaccine becomes more widely available?**

Ultimately, the availability of a vaccine will factor heavily in determining to what extent employers may be able to mandate vaccination, Habinsky said.

To read the full article, click [here](#).