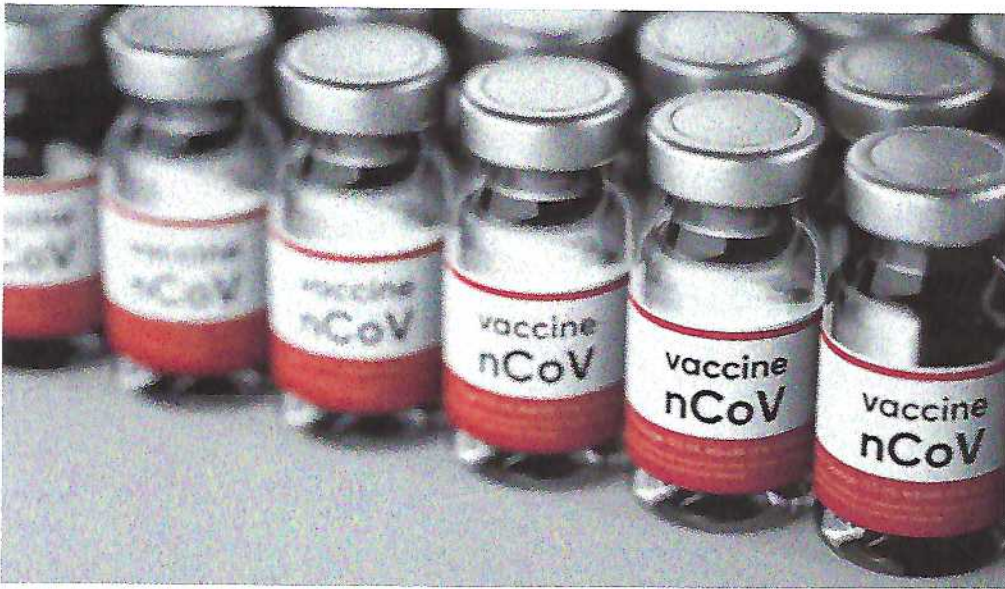


COVID-19 Vaccination Requirements in the Local Government Workplace

August 11, 2021 by [Flannary Collins](#)

Category: [Personnel Policies](#), [COVID-19](#)



Editor's notes:

This blog was originally published in October 2020 and has been updated several times, including information on the legality of mandatory vaccinations for vaccines subject to emergency use authorization (EUA), references to the state vaccination requirements for certain employees, and full FDA approval of the Pfizer (Comirnaty) vaccine for people 16 and older.

- *Summit Law has removed its [Mandatory COVID-19 Vaccination Policy Guidance](#) as the law has evolved and is now advising employers that the decision to require vaccination is likely not a mandatory subject of bargaining although the impacts have to be bargained.*
- *For information on vaccine incentives, see our blog [Vaccine Incentives in the Local Government Workplace](#).*

Planning for an eventual full return to the workplace is on everyone's minds, and in thinking about that return, one issue being debated is the legality of requiring employees to take a COVID-19 vaccine as a condition to returning to work.

We know employees can be required to take a [COVID-19 test](#) (but not a [COVID-19 antibody test](#)) in order to return to work, but can employees be required to receive COVID-19 vaccines? The answer appears to be "yes," with some caveats.

Thus, before adoption of a mandatory vaccination program, a local government employer needs to do their due diligence on researching the issues. This blog article sets forth some of the main legal issues to consider.

State Vaccine Requirement

On August 9, 2021, Governor Inslee issued Proclamation 21-14 requiring most state employees and all healthcare/long-term care workers to be fully vaccinated (two weeks past the date of the final vaccination) by October 18 as a condition of employment, which means the employees would need to receive their final vaccination by October 4.

On August 20, the governor updated the proclamation and expanded these requirements to education and childcare providers, including workers at youth park and recreation programs.

For details regarding the state vaccination requirement, see our blog post [Face Coverings and Vaccine Requirements: Where Things Stand as of August 23, 2021](#).

Local Vaccine Requirements

Governor Inslee has also encouraged local governments and other branches of state government to adopt similar vaccine requirements for all their employees, which some have begun to do (such as the City of Seattle and [King County](#)). Such local requirements likely impact collective bargaining agreements. See the resources linked at the bottom of this blog for more guidance involving union-represented employees.

Importantly, local government employers need to be aware of the laws that may impact mandatory vaccination policies, including the Americans with Disabilities Act (ADA) and the Civil Rights Act of 1964.

We'll also need to keep our eye on litigation that challenges mandatory vaccination policies. Most claims center around whether an employer can require that employees receive a vaccine that the Federal Drug Administration (FDA) approved under the Emergency Use Authorization (EUA). Employees argue it cannot be mandated because the EUA requires an option to refuse administration of the vaccine and to be informed of the consequences of refusing the vaccine and of alternatives to the vaccine, along with their benefits and risks. The Department of Justice recently issued an [opinion](#) interpreting the law around EUAs as not prohibiting employers from imposing such requirements, and noting that the only [federal court decision](#) on this issue has rejected the challenge, although that case has been appealed and other cases are still pending.

Once vaccines receive final FDA approval, the EUA argument will no longer have legal standing. On August 23, the Pfizer vaccine (which will now be marketed as Comirnaty) [received full U.S. Food and Drug Administration \(FDA\) approval](#) for people 16 and older and is no longer subject to emergency use authorization (EUA) for that age group.

Medical Accommodations Under the Americans with Disabilities Act

In terms of mandatory vaccination programs, the Americans with Disabilities Act (ADA) primarily comes into play with respect to: (1) an employer's pre-screening questions asked prior to administering a vaccine, which may elicit information about a disability; (2) ADA-covered disability reasons that may prevent a person from receiving a vaccine; and (3) providing a reasonable accommodation for employees with ADA-covered disabilities that prevent them from taking a vaccine.

The U.S. Equal Employment Opportunity Commission (EEOC) recently released detailed [guidance about the ADA and COVID-19 mandatory vaccination programs](#). Highlights from the EEOC guidance are as follows:

- The ADA permits employers to adopt qualification standards — such as a mandatory vaccination program — that prohibit employees from posing a direct threat to the health and safety of others in the workplace. In this

circumstance, an unvaccinated employee could pose a direct threat to others in the workplace.

- A mandatory vaccination program may result in screening out or tending to screen out individuals with disabilities from employment because their disability prevents them from being vaccinated, and therefore, from being employed. If this occurs the employer must show an unvaccinated employee would pose a “direct threat” to the health or safety of the employee or to others, one that cannot be eliminated or reduced by reasonable accommodation.
- If an unvaccinated employee does pose a direct threat, the employer must try to provide a reasonable accommodation for the unvaccinated employee, such as telework, so long as the accommodation does not pose an undue hardship to the employer (e.g., significant difficulty or expense).
- Prior to adopting a policy on vaccinations, local government employers should review the EEOC guidance in full.

Religious Exemptions Under Title VII of the Civil Rights Act of 1964

A second issue to consider is whether Title VII of the Civil Rights Act of 1964 requires an employer to grant a religious exemption. Under Title VII of the Act, a sincerely held religious belief, practice, or observance can exempt an employee from a mandatory vaccination policy unless it imposes an undue hardship on the employer. Religious accommodations are subject to a lesser standard than medical accommodations, although the EEOC guidance recommends the employer assume an employee’s request is based on a sincerely held religious belief. The employer must provide religious accommodation — in this case, opting out of a mandatory vaccine — only if the accommodation does not pose even a de minimis burden on the employer.

Constitutional Protections

The main constitutional arguments against government-mandated vaccination policies — e.g., substantive due process clause (14th Amendment), religious freedom clause (First Amendment) — apply only to state action (see *Shelley v. Kraemer*, *Grosjean v. American Press Co*), but even state-mandated vaccination policies have been upheld. In the seminal case from 1905, *Jacobson v. Massachusetts*, the U.S. Supreme Court upheld a Massachusetts state law that made smallpox vaccines compulsory. The court held that mandatory vaccines are within the state’s police power because the state’s interest in protecting public health and safety outweighed an individual’s constitutional rights to liberty during the smallpox epidemic. The court also held this authority may be delegated to a local body.

Washington State has used its police power in requiring vaccinations for children attending schools (see [Chapter 28A.210 RCW](#)), although it recognizes medical and religious exemptions. While this Washington State statute has not been subject to a constitutional challenge, similar school vaccination requirements in other states have been upheld as a valid exercise of police power (see *Zucht v. King*; a 1920s mandatory vaccination program for school children in San Antonio, Texas, was upheld as a constitutional exercise of city police power). Last year, in response to the measles outbreak, the State of New York eliminated the religious exemption for vaccination for school children; this also survived legal challenges.

Collective Bargaining and Leave Issues

While not explored in this blog, other issues agencies should review are whether employees must be paid for the time it takes to get a vaccine (recommended) and whether a vaccination requirement is a mandatory subject of bargaining. Summit Law has removed its [Mandatory COVID-19 Vaccination Policy Guidance](#) (previously linked from

this article) as the law has evolved and is now advising employers that the decision to require vaccination is likely *not* a mandatory subject of bargaining, although the impacts have to be bargained.

Conclusion

Before fully reopening, a local government should put in place a clear vaccination policy so employees understand what is expected of them once they return to the workplace. MRSC will continue to follow this issue and update our own guidance, including posting any employee vaccination policies on our [COVID-19 Operations and Personnel Issues](#) webpage.

MRSC is a private nonprofit organization serving local governments in Washington State. Eligible government agencies in Washington State may use our free, one-on-one [Ask MRSC service](#) to get answers to legal, policy, or financial questions.



About Flannary Collins

Flannary Collins is the Managing Attorney for MRSC. Flannary first joined MRSC as a legal consultant in August 2013 after serving as assistant city attorney for the city of Shoreline where she advised all city departments on a wide range of issues.

At MRSC, Flannary enjoys providing legal guidance to municipalities on all municipal issues, including the OPMA, PRA, and personnel. She also serves on the WSAMA Board of Directors as Secretary-Treasurer.

[VIEW ALL POSTS BY FLANNARY COLLINS](#) ▶

Follow us: