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Take Your Best Shot: What Employers Should Know About the COVID-19 Vaccine

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As the world awaits the widespread availability of the COVID-19 vaccines, employers need to assess whether they will require employees to get the vaccine. Employers have a significant role in encouraging vaccination and the development of herd immunity. Experts predict that at least seventy percent of people would need to get vaccinated against the coronavirus for herd immunity to be reached.[1] In anticipation of this, on December 16, 2020, the U.S. Equal Employment Opportunity Commission (EEOC) released guidance stating that employers *can* require workers to receive a COVID-19 vaccination without violating non-discrimination laws – though they may have to provide exemptions or accommodations to employees with disabilities that may prevent them from getting vaccinated, pregnant or lactating workers, and those with religious objections to vaccines.[2]

The EEOC takes no position on whether employers should mandate, or merely recommend, that employees be vaccinated. In reality, most employers are encouraging it for now. There are a variety of reasons why employers are unlikely to mandate COVID-19 vaccinations including concerns around resistance from employees who oppose the vaccine, especially from employees who are not in a protected category (e.g., disability, pregnancy, religious beliefs), concerns about liability from any adverse reaction to the vaccine by employees, and concerns about maintaining a safe workplace in addition to the administrative difficulties with enforcing any mandate. This paper tackles the legal and practical considerations for employers as they assess whether to mandate or encourage vaccinations.

I. Background on the Covid-19 Vaccines

A. CDC Authorization and FDA Approval of the Vaccines

Currently, the Centers for Disease Control and Prevention ("CDC") authorizes and recommends three vaccines to prevent COVID-19: Pfizer-BioNTech, Moderna, and Janssen.

1. Pfizer-BioNTech and Moderna Vaccines

On December 11, 2020, the U.S. Food and Drug Administration ("FDA") issued an Emergency Use Authorization ("EUA") for the Pfizer-BioNTech vaccine allowing it to be used for individuals 16 years of age and older.[3] The FDA issued another EUA on December 18, 2020, for the Moderna vaccine allowing it to be used for individuals 18 years of age and older during the coronavirus pandemic.[4] The Pfizer-BioNTech vaccine consists of two shots, given three weeks apart and the Moderna vaccine also consists of two shots, given 28 days apart.

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[1] Topher Spiro & Zeke Emanuel, *A Comprehensive COVID-19 Vaccine Plan*, Ctr. for Am. Progress 5 (July 28, 2020), https://www.americanprogress.org/issues/healthcare/reports/2020/07/28/488196/comprehensive-covid-19-vaccine-plan/.

[2] *What You Should Know About COVID-19 and the ADA, the Rehabilitation Action and Other EEO Laws*, U.S. Equal Emp. Opportunity Commission (Dec. 16, 2020), https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws (herein "EEOC Guidance Coronavirus").

[3] *FDA Takes Key Action in Fight Against COVID-19 By Issuing Emergency Use Authorization for First COVID-19 Vaccine*, U.S. Food and Drug Admin., https://www.fda.gov/news-events/press-announcements/fda-takes-key-action-fight-against-covid-19-issuing-emergency-use-authorization-first-covid-19.

[4] *FDA Takes Additional Action in Fight Against Covid-19 By Issuing Emergency Use Authorization for Second COVID-19 Vaccine*, U.S. Food and Drug Admin., https://www.fda.gov/news-events/press-announcements/fda-takes-additional-action-fight-against-covid-19-issuing-emergency-use-authorization-second-covid.

Both vaccines appear to be more than 90 percent effective in preventing the virus's spread and use messenger RNA technology.[5] Unlike traditional vaccines which generally use a weakened or dead version of a virus, or a laboratory-generated protein, both vaccines use messenger RNA ("mRNA") technology.[6] These vaccines have strands of genetic material called mRNA inside a special coating to protect the mRNA from enzymes in the body that would otherwise break it down.[7] When the vaccine is administered into the upper arm, the vaccine contains molecular instructions that direct cells to create a "spike" protein.[8] This triggers the immune system to learn to react defensively and produce an immune response to the coronavirus pathogen if it tries to invade the body.[9] The CDC has further provided that mRNA vaccines do not contain the live virus that causes COVID-19 and, therefore, cannot give someone COVID-19.[10] Additionally, mRNA vaccines do not interact with a person's DNA because the mRNA does not enter the nucleus of the cell. Cells break down the mRNA quickly.[11]

2. The Janssen COVID-19 Vaccine

On February 27, 2021, the FDA issued an EUA for the third vaccine, the first ever single-dose Janssen vaccine developed by Johnson & Johnson, to prevent COVID-19 in individuals 18 years of age and older.[12] Like the other two vaccines, the Janssen COVID-19 vaccine is also injected into the muscle.[13] Unlike the other vaccines, the Janssen COVID-19 vaccine is a single dose vaccine and uses different technology in its delivery, specifically, viral vector technology. It "uses an adenovirus—a type of virus that causes the common cold—which has been inactivated to carry a gene from the coronavirus into human cells. The cells then produce coronavirus proteins (not the virus itself) to mimic the virus, which helps prime the immune system to fight off later injection if the body encounters the coronavirus."[14] While the Janssen COVID-19 vaccine uses an adenovirus to deliver the genetic material into cells, as discussed above, the Pfizer and Moderna COVID-19 vaccines use mRNA technology which is delivered into the body with a mixture of lipids (fat droplets), salts, and sugars which help it get absorbed into cells.[15] All three of the vaccines deliver genetic instructions.

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[5] Carl Zimmer, *2 Companies Say Their Vaccines Are 95% Effective. What Does That Mean?*, N.Y. TIMES (Nov. 20, 2020, Updated Dec. 4, 2020), https://www.nytimes.com/2020/11/20/health/covid-vaccine-95-effective.html.

[6] *Understanding How COVID-19 Vaccines Work*, Centers for Disease Control and Prevention (Jan. 13, 2021), https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/how-they-work.html.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Janssen COVID-19 Vaccine*, U.S. Food and Drug Admin., https://www.fda.gov/emergency-preparedness-and-response/coronavirus-disease-2019-covid-19/janssen-covid-19-vaccine; Johnson *& Johnson COVID-19 Vaccine Authorized by U.S. FDA For Emergency Use – First Single Shot Vaccine in Fight Against Global Pandemic*, Johnson & Johnson, https://www.jnj.com/johnson-johnson-covid-19-vaccine-authorized-by-u-s-fda-for-emergency-usefirst-single-shot-vaccine-in-fight-against-global-pandemic.

[13] *Fact Sheet for Recipients and Caregivers Emergency Use Authorization (EUA) of the Janssen COVID-19 Vaccine To Prevent Coronavrius Disease 2019 (COVID-19 In Individuals 18 Years of Age And Older*, U.S. Food and Drug Admin., https://www.fda.gov/media/146305/download. The Janssen COVID-19 Vaccine includes the following ingredients: recombinant, replication-incompetent adenovirus type 26 expressing the SARS-CoV-2 spike protein, citric acid monohydrate, trisodium citrate dihydrate, ethanol, 2-hydroxypropyl-β-cyclodextrin (HBCD), polysorbate-80, sodium chloride. *See id.*

[14] *8 Things to Know About Johnson & Johnson's Janssen COVID-19 Vaccine*, Johnson & Johnson, https://www.jnj.com/latest-news/things-to-know-about-johnson-johnson-janssen-covid-19-vaccine.

[15] Sarah Darmanjian, *Comparing COVID-19 vaccines: Pfizer, Moderna and Johnson and Johnson*, News 10, https://www.news10.com/news/comparing-covid-19-vaccines-pfizer-moderna-and-johnson-and-johnson/.

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