

**COVID-19 Vaccine and the Workplace:
Employer Considerations and Responsibilities,
Checklist, and Frequently Asked Questions**

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Introduction

Now that vaccinations for COVID-19 are available and being rolled out, employers are confronted with how, or if, to address the vaccination of their employees. As with everything relating to COVID-19, many of these issues are complex and require consideration of various factors that affect the particular workplace.

For example, federal guidance provides that employers may generally require employees to get vaccinated, subject to certain exceptions. However, a state-specific distribution plan may affect an employer's plan to mandate or encourage its employees to get vaccinated against COVID-19. Employers should have an understanding of the various issues with which they may have to grapple should they choose to implement a COVID-19 vaccination plan in their workplace.

Below are several issues that employers may encounter as they determine whether to address COVID-19 vaccinations. For employers operating in more than one state, this analysis may be complicated by additional considerations, including any differences in state guidance and restrictions.

Disclaimer: The COVID-19 pandemic and vaccinations are rapidly evolving situations. The following is a summary providing guidance on the key aspects of the law and is subject to change as more information is released by government agencies and new laws are passed at the federal, state, and local levels. Each employer's situation is unique and may require additional considerations than those discussed below. Federal, state, and local laws are more complex than presented here. This information is simplified for the sake of brevity and is not intended to be a substitute for legal advice. This information is provided with the understanding that (1) the author and publisher are not rendering legal advice; and (2) this information is not a substitute for the advice of competent legal counsel. For more information, please contact a human resource professional or an employment law attorney.

Be Familiar with Federal, State and Local Guidance and Restrictions

Initially, an employer should consult legal authority and guidance from federal, state, and local agencies on issues relating to vaccinations and the workplace. This information will guide employers as they look to determine what they may and may not do when it comes to addressing the vaccination of their employees.

For instance, employers should be mindful that the federal Equal Employment Opportunity Commission (EEOC) has issued [guidance](#) indicating that employers may mandate COVID-19 vaccines. That being said, the EEOC made it clear that employers must provide reasonable accommodations to employees who decline to get vaccinated due to a [disability under the Americans with Disabilities Act \(ADA\)](#) or a [sincerely held religious belief under Title VII of the Civil Rights Act \(Title VII\)](#).

In addition, the General Duty Clause under the Occupational Safety and Health Act (OSH Act) requires employers to rid the workplace of all known hazards. The Occupational Safety and Health Administration (OSHA) has recognized COVID-19 as a known hazard, so employers may determine that a vaccination mandate is an appropriate measure to protect against the virus.

Note also that several federal laws prohibit retaliation against employees who object to or refuse to get vaccinations based on medical concerns (under the ADA), health and safety concerns (under the OSH Act), and religious grounds (under Title VII).

Also be mindful that the federal National Labor Relations Act (NLRA) provides certain rights and protections to employees in unionized *and* nonunionized workplaces. Under Section 7 of the NLRA, employees have the right to engage in "concerted activities" for the purpose of "mutual aid and protection." This NLRA provision may protect the rights of employees who engage in concerted activities with regard to a vaccination policy, including protesting or complaining to management about a mandatory vaccination policy; organizing or otherwise working on office communications or flyers among co-workers concerning a vaccination mandate; or simply discussing the vaccine with co-workers.

Individual states may also have laws relating to an employer's ability to require or recommend vaccinations for its workforce. For example, Oregon prohibits an employer from requiring an employee to get vaccinated as a condition of employment unless that immunization is required by federal or state law, rule, or regulation. Meanwhile, a number of states require certain health care personnel to get particular vaccinations, such as those for influenza and Hepatitis B. Some states also have laws that limit the reasons an employee may present for refusing a vaccination, e.g., medical or religious/personal belief. While there currently are no state laws or regulations addressing an employer's right to specifically mandate COVID-19 vaccines, employers should expect states, as well as municipalities, to take action to either ban or require vaccine mandates.

Importantly, employers must also consult their state's vaccine distribution plan. Each state has its own distribution plan establishing the order in which groups of individuals become eligible to receive the COVID vaccine. Employers will have to determine when

their mandate, if any, would be triggered for each employee and how long that employee will have to get vaccinated once they become eligible. In addition, monitor the state's vaccine availability, as it also affects an employee's ability to get vaccinated.

Consider the Nature of Your Business and Industry

Consider the nature of the business and industry when deciding how (or whether) to address the vaccination of employees. For example, employers in the healthcare field and other high-risk settings may determine that a vaccination mandate is appropriate given the increased chance of exposure to COVID-19. Other employers with essential workers (e.g., those in transportation and childcare) and those with frequent contact with the public (e.g., retail) may also decide that a policy mandating or encouraging vaccination is a proper course to take.

That being said, an employer that requires its employees to receive the COVID vaccine should ensure its rationale is job-related and consistent with business necessity. Employers should also make sure that any mandate is applied consistently across the workforce, and any exceptions and accommodations are handled in a legally compliant and nondiscriminatory manner.

Account for Past Employee Compliance with Health and Safety Protocols

Whether employees have complied with COVID-related health and safety measures in the past may give employers a good indication of how they may react to a policy mandating or encouraging vaccinations. For example, if an employee resisted (and continues to resist) a face-covering requirement, they may likely object to a workplace policy that requires them to be vaccinated against COVID-19.

An employee's noncompliance or raised objections to a safety measure may be tied to a number of reasons, e.g., lack of understanding of COVID-19 risks; personal, social, or political beliefs. Perhaps several employees do not believe in the health risks associated with COVID-19 or do not understand the dangers in transmitting the virus. Regardless of the reason, expect a similar reaction if implementing a vaccination requirement. In a situation where a large segment of the workforce resisted the implementation of COVID safety measures, consider a policy encouraging vaccines in order to eliminate the need to discipline or terminate those employees for noncompliance with a mandate. *See also* [Objections and Refusals to Get Vaccinated](#).

Onsite/Remote Employees

Consider whether employees are working remotely and for how long. A vaccination policy requiring employees to get vaccinated will likely be met with resistance if most (or all) employees are working remotely and have no interaction with each other or the public.

National Labor Relations Act/Unions

Unionized Employers

When employees are represented by a union, the first step the employer needs to take before establishing any policy or plan regarding mandating or administering a COVID-19 vaccination is to review the collective bargaining agreement (CBA).

In some workplaces, a CBA may already address vaccination requirements. For example, hospitals and healthcare providers regularly require employees who work closely with patients to receive an annual influenza vaccine.

If there is no provision clearly establishing the right of management to unilaterally require vaccinations or set policy in that area, a unionized employer may be required under the NLRA or by the terms of the CBA to negotiate with the union before issuing a policy. It is important to carefully review the terms of the CBA to determine the extent of an employer's duty to bargain over implementing a vaccine program.

If bargaining is required, the negotiations with the union should happen before announcing a vaccination policy or program. Even where a CBA permits an employer to unilaterally implement a vaccination policy, unions would likely seek to bargain over related issues, such as how a program would be administered, discipline, insurance coverage or company co-payments, or safety concerns.

Nonunionized Employers

Nonunionized employers also must be aware of the how vaccinations are addressed in the workplace. Even without a union representing them, employees have rights under Section 7 of the NLRA to engage in concerted activities for the purpose of mutual aid or protection, including protesting a vaccination policy. See [Objections and Refusals to Get Vaccinated](#).

In addition, a nonunion employer should consider how a union may attempt to use the issue of a COVID-19 vaccination program (either for or against) as an opportunity to organize the workplace. If employees have the perception that the employer is ignoring their concerns or not answering their questions on this issue, they may see a union as an ally that can help.

As with many of the workplace issues that have risen during the COVID-19 pandemic, providing frequent and transparent communication can help to prevent workplace vaccination policies and related issues from being used in an organizing campaign or to limit such a campaign's effectiveness.

Employers with Operations in Multiple States

Employers with operations in multiple states have to take careful note of differences in state guidance, laws, and vaccine-distribution plans. Some states also have specific vaccination requirements for certain industries. Be sure to review state and local law to ensure the vaccination policy complies with the laws of applicable jurisdictions.

On another note, employers with operations in several states may have workforces with different social and political opinions about COVID-19 and related safety and health measures. If a workforce in one state raised objections or was noncompliant with certain safety measures because of their stance on COVID-19, consider whether a mandate is indeed necessary. However, if an employer chooses to have worksite-specific policies, it should have a business justification for making such a distinction.

Vaccination Policies

Employers that wish to take a position on the vaccination of their employees should adopt a policy to communicate and enforce their stance. Specifically, employers may implement one of the following policies:

- Mandatory;
- Voluntary;
- Hybrid; or
- No policy.

Each policy has advantages and disadvantages that should be considered when determining how to approach COVID-19 vaccinations in the workplace.

Mandatory Vaccine Policy

An employer may consider developing and implementing a mandatory COVID-19 vaccination policy. Under the current guidance issued by the EEOC, a COVID-19 vaccine mandate is permissible as long as it addresses certain issues, including a procedure to handle requests for an exemption and/or a reasonable accommodation based on a [disability](#) or [sincerely held religious belief](#). The policy should set forth the right of employees to request such an accommodation, as well as the fact that an accommodation may not be provided if it poses an undue hardship on the employer.

Ensure that such a mandate is job-related and consistent with business necessity. This may largely depend on the industry and the risk of transmission and infection in the workplace. For example, employers in the health care, manufacturing and retail industries may argue that such a mandate is necessary to protect their employees and the public. Accordingly, employers with employees who are at risk for infection or who pose a risk to others will have more of a business justification for a vaccination mandate. Conduct an individualized assessment of the workplace, including potential risk of transmission and alternatives to the vaccination, to determine whether a vaccination mandate is necessary.

In addition, determine whether there are any state or local prohibitions on requiring that employees be vaccinated. While Oregon may currently be the only state that prohibits an employer from requiring an employee to get vaccinated as a condition of employment, it would not be surprising if other states or localities enact their own laws in response to issues raised by the COVID-19 vaccines.

As with any workplace mandate, [consider the consequences](#) for employees who do not comply. How likely is it that the workforce will comply with a vaccination mandate? Employees may have various reasons (other than a disability or religious belief) for objecting to getting the COVID-19 vaccine. For example, an employee may have concerns about the quick development of the vaccine or may oppose it based on their personal beliefs about the virus itself. Regardless of the reason, ensure that any adverse action taken against those who do not comply with the mandate is consistent across the workforce. Implementing a mandatory vaccination policy in a piecemeal fashion could give rise to claims of discrimination. If faced with the possibility of terminating a large segment for refusing to receive the COVID-19 vaccination, consider instead a policy encouraging vaccination.

Voluntary Vaccine Policy

As an alternative to a vaccination mandate, consider a policy that makes vaccination against COVID-19 voluntary. This policy would encourage employees to receive the COVID-19 vaccination as well as educate them about the benefits and protections associated with the vaccine. A policy that encourages vaccination by setting out facts based in science, law, and public health guidance will strengthen the position of an employer that is unable (or unwilling) to implement a vaccination mandate but still wishes to protect the health and safety of its employees.

A voluntary policy will also be easier to implement in a workplace where resistance to a vaccination mandate is likely. A voluntary policy would help an employer avoid losing a number of its employees who fail to comply, thereby securing the productivity and continuity of the organization.

Hybrid Vaccine Policy

Depending on the industry or type of workplace, an employer may consider a hybrid policy that would require one segment of its workforce to get the COVID-19 vaccine while making it voluntary for others. For instance, an employer may require employees who have close contact with the public to get vaccinated against COVID-19 while making it voluntary for employees working in administrative offices in a separate building.

If considering a hybrid policy, have a legitimate business reason for making a distinction between the different groups of employees. In light of the risk of claims of discrimination and unequal treatment by implementing and enforcing this type of policy, perhaps consider instead a voluntary policy that strongly encourages all employees to get vaccinated against COVID-19.

No Vaccine Policy

An employer's decision not to have a COVID-19 vaccination policy conveys to employees that it does not want to take a stand on the topic. While an employer may think that this may be the easy way out since it eliminates the need to address issues relating to enforcement, accommodations, and tracking, it is possible that the absence of a policy could expose the employer to allegations that it failed to take steps to protect

the health and safety of its employees. The likelihood of employees making this assertion depends on the employees' concerns and personal views regarding the virus and perception of the employer's efforts to mitigate the risk of transmission in the workplace.

Accommodation and Discrimination Issues

The EEOC updated and expanded its [technical assistance publication](#) (Section K) to include guidance for employers on the administration of the COVID-19 vaccine. All employers are encouraged to review the EEOC's guidance.

Medical Examinations and Disability-Related Inquiries

The EEOC provides that the administration of the COVID-19 vaccine to an employee by an employer is not considered a medical examination under the ADA because they are not seeking information about an individual's impairments or current health status.

However, an employer (or a third party with whom the employer contracts to administer the vaccine) that asks any prescreening medical questions of its employees must show that these questions are job-related and consistent with business necessity. In order to demonstrate that the questions meet this standard, an employer needs to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and does not receive the vaccination will pose a direct threat to the health and safety of themselves or others.

However, the EEOC provided two scenarios in which an employer may ask disability-related screening questions without needing to satisfy the job-related and consistent with business necessity standard:

1. The employer offers the vaccine to employees on a voluntary basis, and an employee's decision to respond to the questions is also voluntary; or
2. An employee receives an employer-required vaccination from a third party that does not have a contract with the employer (e.g., pharmacy or other health care provider).

In addition, it is not a disability-related inquiry for an employer to ask its employees to show proof of receipt of a COVID-19 vaccination. However, if an employer seeks information from the employee, such as questioning why they did not receive the vaccine, it may rise to a medical inquiry under the ADA and would be subject to the job-related and consistent with business necessity standard.

Employers need to keep in mind that they must keep confidential any medical information obtained through their vaccines program. Such information should be kept separate from personnel files.

Disability-Related Accommodations

An employer may not exclude an employee from the workplace or terminate an employee solely because the employee cannot be vaccinated due to a disability. An

employer may only exclude the employee from physically entering the workplace or take certain actions if the unvaccinated employee poses a direct threat or a significant risk of substantial harm to their own health or others' that cannot be eliminated or reduced by a reasonable accommodation (e.g., remote work).

Employers should conduct an individualized assessment of the following factors in determining whether a direct threat exists:

- The duration of the risk;
- The nature and severity of the potential harm;
- The likelihood that the potential harm will occur; and
- The imminence of the potential harm.

Managers and supervisors should be aware of how to communicate with an employee who advises the employer that they have a medical condition that prevents them from receiving the COVID-19 vaccine. Once they become aware, employers must engage in the interactive process with the employee and consider whether there are any reasonable accommodations that would either eliminate or reduce the risk so that the employee does not pose a direct threat.

This may include taking the following steps:

- Obtaining documentation about the employee's disability; and
- Considering accommodation options in light of the employee's position, such as allowing the employee to telework.

Also, an employer may not be required to provide an accommodation if doing so would create an undue hardship (i.e., significant expense or difficulty to the employer's businesses operations under current circumstances). An employer must assess each accommodation request based on the individual facts and circumstances, as well as the particular job and workplace. The EEOC has acknowledged the following may be relevant considerations when conducting the undue hardship analysis with respect to the COVID-19 vaccine:

- The number of employees who have already received the COVID-19 vaccine; and
- The amount of contact with others, whose vaccination status could be unknown.

The EEOC further provides that employers may rely on Centers for Disease Control and Prevention (CDC) recommendations when determining whether an accommodation that would not pose an undue hardship is available.

Be mindful that it is unlawful to disclose that an employee is receiving an accommodation or to retaliate against an employee for requesting an accommodation.

An employer may only exclude an employee if the employer concludes that by being unvaccinated, the employee poses a direct threat, but this does not mean the employer

may automatically terminate the worker. Before taking any actions, determine whether the employee is protected under any EEO laws or other federal, state, and local authorities. This is the same analysis as when considering physically excluding employees from a worksite due to a current COVID-19 diagnosis or symptoms. Keep in mind that some workers may be entitled to telework or be eligible to take leave under federal, state, or local law or under an employer's policies.

Religious Accommodation

If an employee indicates that they are unable to receive a COVID-19 vaccination because of a sincerely held religious belief, observance or practice, the employer must provide a reasonable accommodation. An accommodation is not reasonable if it poses an undue hardship under Title VII of the Civil Rights Act, which courts have defined as more than a *de minimis* cost or burden. Note that the threshold for undue hardship under Title VII is lower than that under the ADA.

Factors relevant to evaluating whether an accommodation would pose an undue hardship include:

- The type of workplace;
- The nature of the employee's duties;
- The cost of the accommodation in relation to the size and operating costs of the employer; and
- The number of employees who would need a particular accommodation.

Costs to be considered include not only direct monetary costs, but also the burden on the conduct of the employer's business.

An individual seeking a religious accommodation must make the employer aware of both the need for the accommodation and that it is being requested for religious reasons. If there is no feasible reasonable accommodation available, and an employee cannot receive a COVID-19 vaccine because of a sincerely held religious belief, an employer may exclude the employee from the workplace. As with a disability, this does not mean the employer may automatically terminate the worker. If the employee's position can be performed remotely, the employee may be entitled to telework.

"Religious belief" is defined broadly under Title VII and includes not only traditional organized religions but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others. An employee's belief or practice can meet the definition of "religious" under Title VII even if the employee is affiliated with a religious group that does not espouse or recognize that belief or practice, or if few or no other people adhere to it. Title VII also protects individuals who are discriminated against or need accommodation because they profess no religious beliefs.

In general, the EEOC advises employers to assume that an employee's request for a religious accommodation is based on a sincerely held religious belief. However, if an

employer has an objective basis for questioning either the religious nature or the sincerity of a belief, practice, or observance that an employee invokes as a reason preventing them from receiving a COVID-19 vaccination, the employer may make a limited inquiry into the facts and circumstances of the employee's claim that the belief or practice is religious, sincerely held, and gives rise to the inability to receive the vaccine.

Whether a practice is religious depends on the employee's motivation, and the same practice can be engaged in by one individual for religious reasons and by another person for reasons that are not religious as defined by Title VII. Social, political, or economic philosophies, as well as mere personal preferences, are not protected as religious beliefs under Title VII.

Genetic Information Nondiscrimination Act (GINA)

Title II of the Genetic Information Nondiscrimination Act (GINA) prohibits an employer from using genetic information to make decisions related to the terms, conditions, and privileges of employment and from acquiring or disclosing genetic information in most circumstances. Accordingly, an employer or a doctor working for an employer is prohibited from asking questions about the genetic information of an employee or an employee's family members.

According to the EEOC, merely administering a COVID-19 vaccine to employees or requiring employees to provide proof of COVID-19 vaccination does not implicate Title II of GINA because it does not involve the use of genetic information to make employment decisions or the acquisition or disclosure of genetic information. This is true regardless of whether the vaccine uses messenger RNA (mRNA) technology.

However, GINA prohibits employers and doctors working for them from asking pre-vaccination medical screening questions that may elicit genetic information (such as family medical history). The definition of *genetic information* under GINA includes:

- Information about an individual's genetic tests;
- Information about a family member's genetic tests;
- Information about the manifestation of disease or disorder in a family member (i.e., family medical history);
- Information about requests for or receipt of genetic services or the participation in clinical research that includes genetic services by an individual or the individual's family member; and
- Genetic information about a fetus carried by an individual or a family member or about an embryo legally held by an individual or a family member using assisted reproductive technology.

If answers to pre-vaccination medical screening questions are likely to elicit genetic information, employers that require COVID-19 vaccination can avoid violating GINA by asking employees to provide proof of vaccination rather than administering the vaccine themselves. GINA does not prohibit an employee's own health care provider from

asking questions about genetic information. In this situation, employers should warn employees not to provide genetic information as part of the proof of vaccination. The EEOC has stated that as long as an appropriate warning is provided, any genetic information the employer receives in response to a request for proof of COVID-19 vaccination will be considered inadvertent and will not violate GINA.

The following language from 29 CFR § 1635.8(b)(1)(i)(B) is not mandatory but may be used in a notice provided to employees to warn them against including genetic information with proof of vaccination:

"The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."

Pregnant Employees

Both the ADA and the Pregnancy Discrimination Act (PDA), as well as state and local laws, provide protections to pregnant employees. Under the PDA, employees affected by pregnancy, childbirth, and related medical conditions must be treated the same as other employees who are similar in their ability or inability to work. Certain pregnancy-related medical conditions may also qualify as disabilities under the ADA and be entitled to reasonable accommodations.

If an employer requires the COVID-19 vaccination and an employee expresses an inability to receive the vaccine because of pregnancy or a pregnancy-related medical condition, the employer should consider reasonable accommodations in the same way it would do so for an employee unable to receive the vaccine for another reason related to a disability. A pregnant employee may be entitled to job modifications, including remote work, changes to work schedules or assignments, or a leave of absence to the extent that these modifications would be provided for other employees who are similar in their ability or inability to work.

However, an employer cannot require pregnant employees to take more stringent precautions against COVID-19 than other employees or exclude a pregnant employee from the workplace out of concern for the health of the employee or the fetus. This applies to the employer's approach to vaccinations as well. For example, if an employer encourages but does not require its employees to receive the COVID-19 vaccine, it cannot require the vaccine for pregnant employees only.

Employee Privacy Concerns

Any workplace policies and procedures that affect employee privacy concerns should comply with all applicable laws, including provisions in state constitutions or statutes, or remedies available to employees through court claims (such as invasion of privacy tort claims).

Invasion-of-privacy claims relate to the publication of private, embarrassing information about the employee, or intrusion into the employee's personal affairs. When defending against these claims, an employer must show how its requests relating to an employee's vaccination status fall within the public interest and how the activities relate to legitimate business interests. A privacy challenge in state court regarding a voluntary vaccination program, as opposed to a mandatory one, would be more difficult for an employee to prove.

Some states, like California, require that an employer provide an employee with specific information regarding any personal information that will be collected and the business purpose for collecting such information.

Employers should consider:

- Appointing a centralized person or team to process information regarding vaccinations, including any objections (whether the objections are personal, religious, or related to a disability);
- Limiting the sharing of personally identifiable information regarding vaccinations to those with only a legitimate need to know;
- Ensuring the safe and secure storage of information related to vaccinations (e.g., vaccination forms or cards; reasonable accommodation requests), and keeping related records in accordance with applicable record retention policies and laws (e.g., ADA, the OSH Act); and
- Documenting the business reasons for any actions taken.

Additional privacy protections may be the subject of legislation in upcoming terms, so employers should remain vigilant of evolving compliance requirements in this area.

Employee Leave and Time Off Considerations

Keep in mind that employees may be entitled to protected leave to get vaccinated. Similarly, an employee may be eligible for protected leave to recover from any potential adverse reaction to a COVID-19 vaccine. For instance, the paid sick leave laws in Arizona, California, and Massachusetts allow eligible employees to take leave for preventative care, and receiving a COVID-19 vaccine may qualify. In addition, Maine and Nevada require covered employers to provide paid time off for *any* reason; no qualifying reasons are required for taking leave.

If an employer is required to provide leave, make sure eligible employees are aware that they make take paid leave to be vaccinated or to recover from illnesses related to receiving a vaccine. These communications should include:

- Which employees are eligible for leave;
- Qualifying reasons for leave (if applicable);
- Minimum leave increments;
- Accrual rates; and
- Employee notice requirements.

It is important to apply all leave policies fairly, consistently, and equally to avoid any appearance of unfair treatment and to avoid possible discrimination claims. Further, managers and supervisors should remind employees of these policies.

Even if it is not legally required or financially feasible to provide paid time off, consider offering unpaid leave to employees for their time to receive a vaccine or for their recovery from an adverse reaction. This time may ultimately be less costly to employers than finding coverage for their employees who are diagnosed with COVID-19 or need to quarantine or isolate due to exposure.

As vaccines for COVID-19 continue to be rolled out, employers should monitor legal developments that emerge, as new leave laws may be passed and existing laws, including temporary COVID-19 leave laws may be amended.

Wage and Hour Issues

Wage and hour issues could come into play with a vaccination program, including working time and expense reimbursement.

Working Time

The federal Fair Labor Standards Act (FLSA) generally requires that employers pay employees for any time they spend in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and [its] business."

More specifically, FLSA regulations require employees to be paid for time spent waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when they are working.

It is not clear whether COVID-19 vaccinations constitute *medical attention* under the FLSA. But even if vaccinations are not counted as working time under the medical-attention regulation, it is likely they would qualify under the broader "physical or mental exertion" standard.

As a result, employers that require employees to get vaccinated will almost certainly need to pay nonexempt employees their hourly wage and, potentially, overtime, for:

- Time spent waiting to get vaccinated;
- Time spent getting vaccinated; and
- Time spent after getting vaccinated waiting to determine there was no immediate adverse reaction.

If vaccinations are not provided at the worksite, employers may also need to compensate employees for the time they spend traveling to and, potentially, from the vaccination site.

On the other hand, if an employer simply encourages rather than requires employees to get vaccinated and leaves it up to employees to decide when and how to get the vaccine, then they probably will not have to pay them for that time.

Expense Reimbursement

The safest course of action is to cover any employee expenses associated with vaccinations. Doing so will help the employer to not only shield itself from liability, but also to maximize the number of employees who get vaccinated.

Employers that consider having employees cover some or all of the costs of vaccination should:

- Be sure deductions from pay do not reduce employees' pay below the minimum wage (and any overtime owed); and
- Review state and local laws that may require employers to bear the cost of vaccinations as a business expense.

For example, the California labor code requires employers to indemnify employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of their duties, or of their obedience to the directions of the employer. A mandatory vaccination program would almost certainly fall under this requirement. It is not clear, however, whether a voluntary vaccination program would be covered. For example, if a vaccination program were not mandatory but strongly encouraged, then an employee might have a case they were obeying the employer's directions in getting vaccinated and have grounds to seek reimbursement.

Workers' Compensation Issues

In general, if an employer mandates COVID-19 vaccination for its employees, an injury or illness resulting from the vaccine, such as an allergic reaction, is likely to be considered work-related and compensable. There is also a possibility that a vaccine-related injury or illness could be considered work-related if an employee's job involves heightened risk of COVID-19 exposure, even if the employer does not mandate the vaccination.

However, an employer should balance the risk of a small number of workers' compensation claims related to the COVID-19 vaccine against the risk of workers' compensation claims from employees who contract COVID-19 on the job. States have

adopted a variety of measures pertaining to workers' compensation for COVID-19 cases, some of which include a rebuttable presumption that certain workers who contract COVID-19 did so on the job and are entitled to workers' compensation. In some cases, an employer can rebut the presumption of an occupational cause for a COVID-19 case by showing that its policies adhered to all applicable public health guidelines, including recommendations for vaccination.

Employers may wish to consult with their workers' compensation carriers for guidance in formulating a vaccination policy and determining how to handle any cases of adverse reactions to the vaccine.

Objections and Refusals to Get Vaccinated

An employee may object to being vaccinated based on reasons that are not covered under [Title VII \(a sincerely held religious belief\)](#) or the [ADA \(disability considerations\)](#). Often, these objections are based on personal opinions or preferences, such as:

- Mistrust of a vaccine, based on shortened research and development time and innovative methodology, or based on the employee's prior negative experience with a relatively new vaccine;
- The fact that the vaccine is approved only for emergency use and has not received full approval by the Food and Drug Administration (FDA);
- Concern regarding adverse reactions to the vaccine, such as for those with severe food allergies; or
- Personal choice based on social or political beliefs, such as a view that COVID-19 may not be a particularly virulent strain and, therefore, the vaccine may not be necessary.

Whether employees have complied with COVID-related health and safety measures in the past may give employers a good indication of how they may react to a policy mandating or encouraging vaccinations. See [Account for Past Employee Compliance with Health and Safety Protocols](#).

Responding to Objections and Refusals

Employers have a variety of options when responding to employee objections on vaccination, from engaging in encouragement and education initiatives to instituting a vaccine mandate that is enforced with disciplinary measures.

While an employer may take different steps when responding to individual employee objections, it is important for the employer to act consistently and fairly. For example, if one employee was terminated for failure to get vaccinated, but another was allowed to work remotely on a full-time basis, the employer may face a discrimination claim.

An employer should carefully consider any vaccination mandates that may result in mass terminations for cause. If employees do not comply with a mandatory vaccination policy, employers may explore discipline based on the employee's violation of a work

rule or policy; however, employers must be prepared to follow through consistently. This may make sense for an employer in a particular industry, such as healthcare, but not in others.

An important consideration that must be taken into account includes employee relations. Requiring employees to be vaccinated, and then terminating those who do not comply, may contribute to employee turnover if the move is perceived to be unnecessary or unfair. For example, if other measures, such as remote work or social distancing, have kept the workplace safe, then a vaccination mandate may appear to an employee (and, consequently, to any court reviewing an employee's claim) as unwarranted and arbitrary.

National Labor Relations Act (NLRA) Protected Activity

Employees who resist receiving a vaccination (whether for safety concerns or other employment-related issues) may claim protection under the National Labor Relations Act (NLRA), which protects the rights of all employees (including nonunionized employees) to engage in concerted activity regarding the terms and conditions of their employment.

Section 7 of the NLRA protects certain concerted activity regarding working conditions, which could include protests or other group action (such as a strike, work slow-down or petitioning) regarding an employer's vaccination policy or program. Employees may engage in concerted activity to protest either against a mandated vaccination policy or in favor of the mandate. For instance, some employees may refuse to return to work until all employees have received the COVID-19 vaccine. See *also* [National Labor Relations Act/Unions](#).

What to Include in a Policy

Rationale

A COVID-19 vaccination policy should state the employer's position, whether it is requiring employees to get the vaccine or encouraging them to do so. In addition, a mandatory and hybrid policy should detail the reason(s) a vaccination mandate is job-related and consistent with business necessity, e.g., protecting employees with direct contact with patients.

Provide support for the position taken and base it in fact. For example, explain how the policy follows current public health guidance and/or complies with state or local law. Communicating the reasons for implementing the policy may preemptively answer and assuage some questions and concerns. It also conveys that the employer is seeking to protect the health and safety of its employees, as well as their families. Also, by providing the rationale for a particular position, it would prove difficult for employees to feign ignorance or put forth a reason for not complying.

Coverage

Explicitly state who is covered under the policy. For example, does the policy cover all employees? Those qualified as essential workers by state or local authorities?

Employees with direct contact with the public? Be specific about who is covered and why. Also, if certain employees are excluded from the policy, explain the reasons for why they are not covered.

Additionally, consult the state vaccination distribution plan(s), as it will affect when coverage for employees is "triggered." This is especially important for mandatory and hybrid policies. The timeline and descriptions of each group as outlined by the state plan should be addressed in the policy to inform employees when they become eligible for the vaccine and, therefore, covered by the policy.

If there are employees working remotely, address how/if they are covered under a vaccination policy. If they are excluded from a mandatory vaccination policy, ensure that the basis for the exclusion is detailed in the policy, e.g., no contact with the public or fellow employees.

Proof and Tracking of Employee Vaccinations

For mandatory and hybrid policies, address how employees will prove that they have received a COVID-19 vaccination. According to EEOC guidance, requesting proof that the employee has been vaccinated is permissible under the ADA, as it is not likely to elicit information about a disability and therefore is not a disability-related inquiry. However, subsequent questions may run the risk of eliciting information about a disability and would be subject to the pertinent ADA standard that they be "job-related and consistent with business necessity."

Be sure to address how employees are to submit proof of vaccination. Include a contact name and details (e.g., mailing address, email address, fax number) for the person/department responsible for tracking employees' vaccinations. Also, address:

- Whether employees are to submit proof after each dose or after they have been fully vaccinated;
- When proof must be submitted based on the state vaccination distribution plan and the employee's eligibility to receive the vaccine; and
- Whom to contact with any questions.

It is also important to state that proof of an employee's vaccination will be kept confidential in accordance with the ADA.

Accommodation/Exemption Procedure

A mandatory vaccination policy must state an employee's right to request an accommodation or exemption based on a [disability under the ADA](#) or a [sincerely held religious belief under Title VII](#). Address how the employer will engage in the interactive process to determine:

- If a reasonable accommodation may be provided; and
- If there is an undue hardship for the employer, under either the ADA or Title VII;

It is also important to specify:

- Whom to contact to request a reasonable accommodation, e.g., Human Resources;
- How to submit the request, e.g., mailing or email address;
- Where to access any forms that must be completed; and
- Whom to contact with any questions or concerns.

The policy should also address that an employee may request a reasonable accommodation or exemption without fear of retaliation.

Wage and Hour Issues

A policy, regardless of whether it mandates or encourages vaccination, should address [compensation \(or lack thereof\)](#) and [employee expenses](#) associated with an employee's vaccination. Be transparent on whether employees will be compensated for the time spent getting vaccinated as well as reimbursement of expenses. In addition to the federal Fair Labor and Standards Act (FLSA), state and local laws may apply, so ensure that the policy language and compensation practices comply.

Noncompliance

As with any workplace policy, it is important to address actions taken for noncompliance, especially given the particular likelihood that your [employees may object to or refuse the vaccine](#). The fact that disciplinary measures may be taken against an employee who violates a vaccination mandate should be communicated to all employees at the time the policy is implemented. This will put everyone on notice that noncompliance will not be tolerated.

Distribution of Policy

Once a policy is prepared, distribute it to all employees covered under the policy, either electronically or by printed copy. Consider also posting the policy on an intranet site and/or in places accessible to employees, such as where mandatory workplace posters are hung. However, if employees do not have access to a computer, distribute the policy by other means, e.g., by mail.

Distribution of the policy will serve as notice to employees of the employer's position on COVID-19 vaccinations. It is good practice to have employees acknowledge that they have received a copy of the policy.

Keep Informed

As with everything relating to COVID-19, the issues revolving around vaccinations and an employer's place in this landscape is fluid. Monitor federal, state, and local law, guidance and updates relating, but not limited, to:

- Rights of employers to mandate COVID-19 vaccinations;

- Compliance obligations relating to COVID-19 vaccinations;
- State vaccine-distribution plans, including eligibility timeline;
- State vaccine availability;
- Laws relating to mandate exceptions and restrictions;
- Health care coverage and wellness programs;
- Workers' compensation;
- Health and safety protocols; and
- Industry-specific regulations and guidance.

As the vaccination rollout continues, employers should expect additional information and guidance from government agencies to assist in determining and communicating their approach on vaccinations. As with any workplace policy, ensure that any new and updated policies or programs are timely communicated to all affected employees.



Appendix A: Checklist for Employers Planning COVID-19 Vaccinations

Review Federal, State, and Local Law and Guidance

- Determine what is legally permissible or prohibited as it relates to an employer's ability to implement a vaccination policy.
 - If operating in multiple jurisdictions, determine the differences in legal authority for each jurisdiction.
- Review recommendations and guidance from the federal Centers for Disease Control and Prevention (CDC) and other public health authorities.
- Consult industry-specific regulations for vaccination requirements for certain industries and employees.

Consult State Vaccine Distribution Plan

- Determine which industries and/or employees are eligible to receive a COVID-19 vaccine and which distribution phase they fall in.
- Monitor for changes to the state distribution plan based on vaccine supply availability.
 - Adjust workplace policies and plans based on changes to state distribution plan.

Conduct a Hazard Assessment

- Conduct a hazard assessment to identify whether employees have increased risk of exposure to COVID-19 at work (e.g., health care workers with direct patient contact, grocery cashiers).
 - Do employees have close contact with each other, visitors, or customers?
 - Can social distancing of at least six feet be maintained between employees or employees and customers/visitors?
 - If not, can solid barriers (e.g., plexiglass barriers) be installed?
 - Are employees able to wear the appropriate personal protective equipment (PPE)?

Determine Position to Take on Employee Vaccinations

- Consider whether to mandate, encourage, or remain silent on employee vaccinations.
- Consider various factors including:
 - Do employees have increased risk of exposure to COVID-19 at work?
 - Would a vaccine policy apply to all employees? If not, why?
 - Do employees work onsite, remotely, or both?
 - Are employees likely to comply with a vaccination mandate?

- Consider past compliance with COVID-related health and safety protocols.
- Determine how to handle noncompliance.
- How would employees prove they have been vaccinated against COVID-19?
 - Determine how to track each employee's vaccination status, including number of doses received.
 - Warn employees not to present documentation that includes genetic information, as this raises issues under the Genetic Information Nondiscrimination Act.
- Are employees represented by a union?
 - If considering a vaccination mandate, consult the current collective bargaining agreement (CBA) and discuss with union representative.
- Consider how to handle requests for exemptions if mandating COVID-19 vaccinations.
 - Implement a process for employees to request an exemption, e.g., request form to be completed.
 - Determine the basis of the exemption request.
 - Is the request based on a disability protected under the Americans with Disabilities Act (ADA) or a sincerely held religious belief protected under Title VII of the Civil Rights Act of 1964?
 - Is the request based on concerns over the safety of the vaccine or a political or ideological belief?
 - Designate a person or team to handle requests for exemptions.
 - Engage in the interactive process with the employee.
 - Consider reasonable accommodations for the employee (e.g., remote work, isolated work, masked work plus physical distancing).
 - Do not retaliate against an employee for requesting an exemption.
- Take into account leave considerations for time taken to get vaccinated and/or as a result of an adverse reaction from the vaccine.
- Review wage and hour considerations if mandating or encouraging vaccinations.

Prepare and Implement Vaccination Policy

- Designate a person or team to draft the vaccination policy and carry out defined roles, e.g., monitoring latest legal and public health developments.
- Include the following in a policy:
 - Rationale;
 - Who is covered under the policy (e.g., all employees, contractors);

- How employees are to present proof of vaccinations (to be included in mandatory policies);
- Exemption procedure (to be included in mandatory policies);
- Compensation for time spent and expenses relating to getting vaccinated; and
- Noncompliance provision (to be included in mandatory policies).
- Apply the policy in a non-discriminatory and consistent manner.
- Distribute the vaccination policy to all those covered under the policy, either electronically or by printed copy.
 - If employees do not have access to a computer, distribute the policy by other means (e.g., by mail).

Determine Whether to Provide Incentives

- Consider whether incentives would encourage employees to get vaccinated or make it easier to comply with a mandate. Incentives may include:
 - Covering the cost of the vaccine if not covered by health insurance or the government;
 - Arranging for onsite or offsite vaccination with a third party, e.g., health care provider, pharmacy);
 - Providing paid time to receive the vaccine; or
 - Offering a bonus for getting vaccinated.
- Consider the workplace culture to determine whether incentives would make a difference and, if so, which ones.
- Ensure that an incentive program does not discriminate against employees who are exempt from vaccinations (e.g., employees declining a vaccine due to an ADA-protected disability or a sincerely held religious belief).
- Consult with your benefits coordinator regarding any potential implementation requirements and/or impact on benefits.

Communicate Position on COVID-19 Vaccines

- Develop a communications campaign to:
 - Educate employees about the benefits of vaccination against COVID-19;
 - Communicate the company's wish to protect employees, families, and visitors from contracting COVID-19; and
 - Address common questions and concerns.
- Communicate company's policy on employee vaccination, if any.
- Ensure communications are based on public health guidance and recommendations.

- Utilize company communications (e.g., newsletters, emails, social media, posters) regularly to provide updates on the company's position as well as on the latest guidance from the CDC and other public health agencies.
- Determine communication tools based on the location of the workforce, e.g., remote vs. onsite.
 - For remote employees, consider direct mailers or emails.
- Designate a person or team to be responsible for answering vaccine-related concerns and questions.

Maintain COVID-19 Health and Safety Protocols

- Keep health and safety measures in place, including:
 - Face coverings;
 - Social distancing;
 - Proper hand hygiene;
 - Screenings (e.g., temperature screenings, symptom questionnaires); and
 - Remote work, if possible.
- Inform employees that the measures are still necessary and will continue until public health officials determine the population has reached the appropriate mass vaccination rate.
- Advise employees that they must continue to adhere to health and safety measures even after receiving the vaccine.

Stay Current on Latest Vaccine-Related Developments

- Monitor latest guidance and recommendations from public health agencies.
- Keep up to date on state vaccine distribution plans and processes.
- Watch for new or updated laws or regulations on the federal, state, and local level that affect an employer's role in vaccinations.
- Update workplace policies and communications accordingly.
- If operating in multiple jurisdictions, monitor each jurisdiction's latest vaccine-related updates and adjust policies accordingly.

Appendix B: Employer FAQ's About COVID-19 Vaccinations

1. May employers require employees to get vaccinated?

Generally, yes. Employers may require employees to get vaccinated as long as the vaccination is job-related and consistent with business necessity. The EEOC updated its [Pandemic Preparedness in the Workplace Guidance](#) (Section K) to address COVID-19 vaccinations and whether employers may mandate them. According to the EEOC, employers may require employees to get vaccinated because the vaccination is not considered a "medical examination" that would be prohibited under the Americans with Disabilities Act (ADA). Employers, however, must consider employees' reasonable accommodation and exemption requests on the basis of a disability under the ADA or a sincerely held religious belief under Title VII. There may also be other legal challenges to a mandatory vaccination program. In addition, if you have unionized employees, be sure to consult the collective bargaining agreement before mandating vaccines.

2. What should be included in a vaccination policy?

A vaccination policy should explain the employer's position, whether it is requiring employees to get the vaccine or advising them that it is voluntary. If the employer is mandating that employees get vaccinated, then the policy should state why getting the COVID vaccination is job-related and consistent with business necessity. Employers should consider providing insight regarding their reasoning, e.g., they are following public health guidance and/or striving to protect employees and customers against COVID-19. This can help assuage employee concerns and questions.

All policies should also be explicit about who is covered under the policy, e.g., all employees. Importantly, the policy must include the process for submitting requests for exemptions/reasonable accommodations based on a disability or a sincerely held religious belief, and the fact that medical information submitted will be kept confidential in accordance with the ADA.

Employers that choose to have employees submit proof of vaccination should address the type of proof required (e.g., date and time but not medical or genetic information) and where the proof should be submitted. The consequences for refusing to get vaccinated, e.g., exclusion from the workplace, should also be addressed in the policy.

3. May an employer require proof of vaccination from an employee?

Yes. According to the EEOC, an employer may request proof from an employee that they have been vaccinated against COVID-19 as long as the request is not likely to elicit information about a disability. However, employers should be aware that subsequent questions may run the risk of eliciting information about a disability that would be prohibited under the ADA.

4. What may an employer do if it cannot exempt or provide a reasonable accommodation to an employee who requests one based on a disability or sincerely held belief or practice?

Under these circumstances, an employer may exclude the employee from the workplace, according to the EEOC. However, it does not mean the employer may automatically terminate the worker. An employer would have to determine whether any other rights apply under applicable EEO laws or federal, state, and local authorities.

5. Where should employers store an employee's medical information relating to the COVID-19 vaccine?

Employers must comply with the ADA and store an employee's medical information, including that relating to COVID-19 and/or vaccines, in the employee's medical files. An employee's medical file must be kept separate from their personnel files.

6. May an employer terminate an employee who refuses to get vaccinated?

Generally, employees in the private sector are at-will and may be terminated for any lawful cause, including noncompliance with a mandatory vaccination policy. However, employers should note that they may not retaliate against employees who 1) refuse vaccination based on a reasonable belief that their medical condition creates a real danger of serious illness (potential ADA retaliation and/or OSHA whistleblower claim) or 2) who object on religious grounds (potential Title VII retaliation claim). Other federal, state, or local laws may apply. For example, employers should determine whether their state has an antiretaliation law that would prohibit adverse employment action against an employee who refuses to comply with a workplace practice they believe poses a serious health risk.

Employers should also be aware that employees who engage in discussions or other activity relating to their resisting or refusing to get vaccinated may be protected under Section 7 of the National Labor Relations Act.

7. What may an employer do if an employee resists getting vaccinated?

Even though employees in the private sector are typically at-will and therefore may be terminated for any lawful cause, an employer should nonetheless tread carefully if confronted with an employee who resists or outright refuses to get vaccinated.

For instance, an employee may object to getting vaccinated due to a medical condition, a disability, or a sincerely held religious belief. An employee may then request a reasonable accommodation on the basis of a disability under the ADA (or applicable state laws) or a sincerely held religious belief under Title VII. At that point, employers must engage in the interactive process. If no accommodation is possible, then the employer may exclude that employee from the workplace.

Also, an employee may raise concerns or fears about the safety of COVID vaccines, most likely due to the fast development timelines. Employers should also be prepared for this type of objection as some may have personal thoughts or beliefs about the vaccine and the virus, in general. This division among the workforce may lead to

employee discussions and other “protected concerted activity” that falls under Section 7 of the National Labor Relations Act.

If an employer determines that a number of its employees may resist getting a COVID vaccine, it may want to consider having a voluntary policy rather than a compulsory one. Otherwise, it may be faced with excluding or terminating a large segment of its workforce for noncompliance. That will undoubtedly endanger the ability for the business to continue operating effectively as well as breed division in the workplace.

8. Should an employer relax its health and safety protocols (e.g., face mask requirements, social distancing measures) after its employees have been vaccinated?

No. According to the CDC, everyone should continue to adhere to safety and health measures to limit the transmission of COVID-19, including wearing face coverings, hand washing frequently, and social distancing. The CDC notes that experts still need to understand the protection that the vaccines provide before the CDC revises its guidance on safety measures. Additional factors, including how many people get vaccinated and how the virus is transmitted in communities, will also affect whether federal, state, and local health agencies recommend the relaxation of health and safety measures.

