

# Opening the Doors: Return-to-Workplace Considerations During COVID-19

## Part Nine: Advanced Vaccine Considerations for the U.S. Workplace

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Employment

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Whether a company is an essential business that has operated throughout the pandemic or is expecting to reopen in the coming months, a number of challenges must be addressed in order to provide a safe environment in which employees can work, while at the same time mitigating risk and restoring operations.

This nine-part series examines the most challenging issues faced by employers that are planning to reopen or continue productive operations:

1. Navigating the Legal Risk of Return ([Part One](#))
2. Considering Screening Measures for Employees Returning to Work ([Part Two](#))
3. General Workplace Safety Precautions ([Part Three](#))
4. Accommodating Special Circumstances ([Part Four](#))
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### Legal and Practical Considerations

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As we have [previously advised](#), and as confirmed in [guidance](#) issued by the Equal Employment Opportunity Commission (EEOC) in December, employers in the U.S. are permitted to require that employees be vaccinated, provided that they make certain accommodations for employees who are unable to receive the vaccine due to a disability or sincerely held religious belief. Implementing a vaccine requirement, however, leads to other questions about how to appropriately address those employees who are entitled to accommodations, whether vaccinated employees can be treated differently from unvaccinated employees, and related issues. Key questions concerning workplace COVID-19 vaccine policies are addressed below.

## How Should Employers Decide Whether to Require Employees to Be Vaccinated?



Employers may want to consider surveying their workforce to determine whether the vast majority of employees have been or intend to be vaccinated; if so, a vaccination requirement may not be necessary. Although to date many employers have encouraged, but not required, vaccination, more employers are considering a requirement as they anticipate bringing employees back into the workplace. Employers that mandate vaccination should have a policy and procedure in place to handle accommodation requests, and should consider whether employees who simply refuse to be vaccinated—other than for a religious or health-related reason—will be placed on leave or have their

employment terminated. If employees who cannot or will not be vaccinated are permitted to continue working remotely on a full-time basis, this may diminish the incentive to receive the vaccine.

## How Should Employers Address Accommodation Requests for Medical or Religious Reasons?

Employers are permitted to seek reasonable supporting evidence from employees who request accommodations and exceptions from the vaccine requirement. For employees with health concerns, employers may seek a certification from a health care provider that the employee is unable to safely obtain a vaccine for medical reasons. For employees with religious concerns, employers can make a limited inquiry into the employee's claim that the belief or practice at issue is religious and sincerely held, including seeking a self-attestation concerning how the vaccine requirement conflicts with a sincerely held religious belief. However, employers typically cannot ask for "proof" from a third party (such as a church pastor) concerning an employee's religious beliefs. For guidance on handling religious accommodations, see the recent [EEOC Compliance Manual on Religious Discrimination](#).

Accommodations should be tailored to the circumstances and needs of the individual and employer, and are not necessary if they would pose an undue hardship pursuant to the Americans with Disabilities Act (ADA) or Title VII of the Civil Rights Act. If there is no reasonable accommodation possible, for example because the employee cannot be isolated from others and would pose a direct threat to health and safety, the EEOC Guidance advises that the employer could exclude the employee from the workplace. However, employers should be careful that accommodations, to the fullest extent possible, permit employees to effectively perform their jobs and do not put them at a disadvantage in performing job duties as compared with vaccinated peers. Note that several states, including [California](#) and [New Jersey](#), have recently issued guidance to employers that is consistent with the EEOC Guidance.

## Does State Law Prevent Employers from Mandating the Vaccine for Employees?

A growing number of states are considering legislation that would bar employers from making vaccines mandatory or requesting proof of vaccination, and prohibit discrimination and retaliation against individuals who refuse vaccination for any reason. Bills are pending in Maryland, New York, Pennsylvania, South Carolina, and Texas, among other states, although it is unclear whether most will actually become law. Note, however, that Montana recently enacted a law making it unlawful for an employer to discriminate in employment based on vaccination status, and Florida passed a bill prohibiting retailers from requiring proof of vaccination from customers, which could be expanded to include employers. Employers that have or are considering mandatory vaccine policies will need to pay close attention to state law developments.

## What if Employees Refuse to Receive the Vaccine?

If an employee refuses to take the vaccine for reasons other than disability or religious belief, federal law generally does not prohibit employers from preventing that employee from entering the worksite, disciplining the employee, or even terminating employment. Most states' laws also would not prevent

such action, but as noted above, employers should be aware of pending legislation in their states that could provide protections to employees who refuse the vaccine.

Also, employers should not attempt to prevent workers from discussing their vaccine-related concerns or retaliate against them for opposing the vaccination policy. The National Labor Relations Act (NLRA) prevents employers from infringing upon workers' protected concerted activities, which could include efforts to oppose mandatory vaccination policies and express workplace safety concerns.



### **Can Employers Treat Workers Differently Based on Vaccination Status?**

Probably. In light of recent [guidance](#) from the CDC and other health authorities, employers may be able to ease certain health and safety restrictions for fully vaccinated workers (such as in-office mask requirements), provided that any actions are also consistent with state and local laws and health orders.

However, any differences in treatment between vaccinated and unvaccinated employees will need to be carefully considered in light of potential discrimination against employees who are unvaccinated due to disability or religious beliefs, as well as any additional limitations or requirements under state and local laws. The EEOC has indicated it is reviewing its own guidance in light of the CDC developments.

### **How Does the FDA Status of the Vaccines Impact Vaccination Policies?**

The vaccines currently distributed in the U.S. have received FDA clearance under the streamlined "emergency use authorization" (EUA) process but have not received full FDA approval. [FDA rules](#) provide that recipients of an EUA vaccine must be informed that they "have the option to accept or refuse the vaccine." Although most commentators think this requirement does not prevent employers from making vaccination a condition of entering the workplace, at least two lawsuits have been filed against employers asserting that mandatory vaccine policies violate the federal statute governing EUA approval.

While the EEOC Guidance does not address the extent to which (if any) the vaccines' EUA status could restrict employers from mandating vaccination, some states are attempting to address the issue. For example, a pending Illinois bill would, if passed, prohibit employers from requiring employees to demonstrate that they have received a vaccine that is only EUA-authorized.

### **Can Employers Incentivize Employees to Take the Vaccine?**

If an employer is rewarding employees who simply provide proof of vaccination by a third party, the employer may provide incentives of any kind or value, such as extra days off or gift cards. However, if employers or their contractors administer the vaccine, then employers are currently advised to provide only modest incentives, because of the current legal uncertainty, under the ADA and the Genetic Information Nondiscrimination Act (GINA), over the permissible value of such incentives. The EEOC is expected to issue updated guidance addressing the extent to which employers may incentivize employees to participate in wellness programs, including vaccination programs.

### **Are There Any Other Legal Obligations Associated with Implementing a Mandatory Vaccination Program in the U.S.?**

The Occupational Safety and Health Administration (OSHA) previously had issued guidance requiring employers that mandate vaccination to record adverse reactions to the vaccine on the employer's OSHA Form 300 log. The agency has now reversed course, stating in updated [guidance](#) that it does not want to discourage vaccination efforts and therefore will not require recording of side effects from the COVID-19 vaccination through May 2022. However, the 22 states with approved OSHA state plans could impose more stringent requirements. Separately, there are also considerations for

employers under ERISA if the mandatory program will be administered by the employer or an employer's contractor on an ongoing basis.

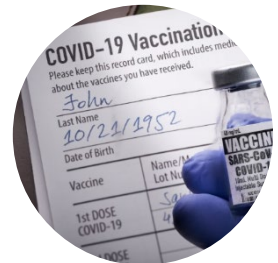
### **Must Employers Pay for Time Spent Receiving the Vaccine?**

Employers that implement a mandatory vaccination policy may be obligated under state or local law to compensate employees for time spent receiving the vaccine. For example, [California](#) requires employers that mandate vaccinations to pay for the time it takes for vaccination, including travel time. A recent Chicago [ordinance](#) requires employers that mandate vaccination to compensate employees for up to four hours per dose for vaccination during regular work hours. Also, some states and cities have enacted or revised paid sick leave laws that cover time off for COVID-19 vaccination, including [California](#) and [New York](#).

President Biden recently asked (but has not required) employers to offer workers paid time off to receive and recover from the vaccine. The Administration further announced that employers with fewer than 500 employees can claim a tax credit to offset the costs of providing pay for time spent taking or recovering from a COVID-19 vaccine between April 1 and September 30, 2021.

### **May Employers Require That Employees Provide Proof of Vaccination?**

Yes, unless state or local laws provide otherwise. The EEOC Guidance states that requesting proof of receipt of vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry prohibited under the ADA. However, employers should avoid collecting other information that elicits information related to disability, religious, or genetic information, including through follow-up questions or by obtaining over-inclusive health records. Employers should simply ask for the type of information found on a Vaccination Record Card: type of vaccine, dates of doses, and where the vaccine was received. Generally, employees should be asked to provide this information to Human Resources personnel who have been trained on how to handle such information, rather than to the employee's supervisor.



Employers that request proof should consider only recording vaccination status (i.e., fully vaccinated or not), rather than retaining a copy of the vaccination record. Vaccination dates may also be recorded as needed for determining paid leave entitlements or calculating compensation owed for time spent receiving the vaccine. Although not considered medical information under the ADA, employers are advised to treat vaccine-related information as confidential.

### **Are There Any Liability Protections for Employers?**

The federal Public Readiness and Emergency Preparedness Act (PREP Act) provides broad (but not absolute) immunity from tort claims arising from the distribution, administration, or use of a "covered countermeasure," which includes EUA vaccines. The PREP Act may protect "covered persons" (which include individuals or entities that manufacture, distribute, administer, prescribe, or use the vaccines) who lawfully administer COVID-19 vaccines against personal injury or property damage claims in connection with administering the vaccine. Employers that host clinics for the administration of the COVID-19 vaccine may be entitled to this immunity. Employees may also file workers' compensation claims for injuries sustained as a result of receiving an employer-required vaccine.

## **Final Considerations**

The COVID-19 vaccine rollout has generated numerous legal considerations and potential risks, and the health and legal guidance around vaccines in the workplace continues to evolve. Employers that have vaccination programs in place or are considering adopting one should ensure that their policies and procedures—including continued measures to promote workplace safety and health—comply with the latest requirements and recommendations from federal, state, and local authorities.

## Employment

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