



PROGRAM MATERIALS
Program #31110
August 16, 2021

Important COVID-19 Vaccine Considerations for Employers


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Important COVID-19 Vaccine Considerations for Employers



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Vaccines and the Workplace

- These general comments are based upon current guidance and circumstances.
- Decisions regarding these issues are typically quite fact-specific.
- Always take state and local law into account.
- This situation is very fluid and can change rapidly due to a variety of factors.
- COVID-19 vaccines are approved by FDA pursuant to ***Emergency Use Authorizations***. Employers must ***decide*** whether or not to mandate vaccines.



The Legal Landscape

- Employers must keep workplace free of recognized hazards while respecting employees' individual rights
- Most Relevant Federal Laws
 - OSHA, ADA, Title VII, HIPPA, GINA, FLSA
- EEOC Guidance:
 - Employers may require vaccines, but...
 - *Enforcement* may hinge on evaluation of “direct threat” issues or “qualification standard”
 - Giving the vaccine is not an ADA medical exam
 - Pre-Vaccine questions may implicate the ADA
 - Issues regarding vaccine incentives?

Occupational Safety & Health Administration

- No specific standard on vaccinations (yet).
- General Duty clause requires employers to maintain a workplace free of recognized hazards
- On January 29, 2021, issued detailed guidance, “**Mitigating and Preventing the Spread of COVID-19 in the Workplace**” for “***planning purposes.***”
- On May 17, 2021, issued an announcement specifically directing employers to refer to CDC guidance “on measures appropriate to protect fully vaccinated workers.” While OSHA says it is reviewing that guidance and will update its materials accordingly, this move may give employers a basis for permitting fully vaccinated employees to dispense with mask-wearing and social distancing. This development is important because OSHA – not the CDC – oversees and enforces federal workplace safety requirements.
- On June 21, 2021, OSHA issued an Emergency Temporary Standard (ETS) for Healthcare. This standard is open for public comment until August 20, 2021.
- On July 7, 2021, OSHA issued a National Emphasis Program (NEP) for COVID-19 wherein multiple healthcare, ***and non-healthcare, industries are targeted.*** This NEP spans physician/dentist offices, home health and ambulance services, hospitals, nursing/residential care facilities, etc. to full service restaurants, supermarkets, discount department stores, and correctional facilities.
- Employers should pay particular attention to compliance with OSHA’s Healthcare ETS, Recordkeeping, PPE, Respiratory Protection, and Sanitation standards, as well as the General Duty Clause.



ADA – The American with Disabilities Act

- Prohibits discrimination
- Requires “reasonable accommodation”
- Limits an employer’s rights to inquire/conduct medical exams
 - Must be job related, consistent with business necessity
 - Medical condition must pose a significant risk of substantial harm
 - Reliable, objective information must support employers’ concern
- Protects privacy of each employee’s medical information
 - *Similarly, Title VII* may require accommodation of an employee’s sincerely-held religious beliefs or practices.

Employer Responsibilities under ADA/Title VII

- EEOC (Equal Employment Opportunity Commission):
 - An employee ***may be entitled to an exemption*** from a vaccine requirement due to an ADA-covered disability or other medical circumstance
 - An employee may be exempted from a flu shot or COVID-19 vaccination requirement based on sincerely-held religious beliefs, practices, or observances
 - In either case – engage in and document communication with employee to determine whether a reasonable accommodation is needed and feasible
 - The process may be as important as the final decision
- Demonstrate consideration of possible reasonable accommodations

EEOC Guidance Regarding COVID Vaccines

- Issued on December 16, 2020.
- Employers *can require* workers to get COVID-19 vaccine.
 - **EUA** status does not negate this.
 - Consider the employee's duties and work setting.
- When may an employee be "*excluded from the workplace*" for not being vaccinated?
 - **Direct Threat** – would an unvaccinated worker pose significant risk of substantial harm, based on reasonable medical judgment, which cannot be eliminated by a workplace accommodation? This is a high standard.
 - Vaccination as safety **Qualification Standard** – requires an objective basis for the standard, historically tied to jobs protecting public safety. Standard must be job-related and consistent with business necessity.



Direct Threat

- To evaluate a possible direct threat, the employer should individually assess these factors:
 - 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.



Safety Qualification Standard

- Not as difficult to meet as “direct threat” standard.
 - Direct threat requires establishing that threat cannot be eliminated by a reasonable accommodation.
- Objective basis for the standard, historically tied to jobs protecting public safety. Standard must be job-related and consistent with business necessity.
- Be prepared to support imposition of that standard on a job.



EEOC: Regarding Proof of Vaccination

- Seeking proof of vaccination is not a medical examination.
- Such a request, *by itself*, is unlikely to elicit disability info.
- This is not a disability-related inquiry.
- Inquiries should stop there, however.
 - Further inquiry implicates more ADA limitations/protections.
- Any medical information received must be kept confidential.
- Employee should be instructed ***not*** to provide genetic information (such as family members' medical history).



Vaccine *Pre-Screening* Questions

- CDC recommends certain pre-screening questions before administering a vaccine. If an employer requires employee to receive the vaccine from the employer or a contracted third party, these questions are subject to ADA standards for disability-related inquiries.
 - Questions must be job related and consistent with business necessity, based on reasonable belief, supported by objective evidence that an unvaccinated employee would pose a direct threat in the workplace.
 - But, these requirements are *unnecessary if...*



Those requirements are *unnecessary if*:

- Vaccination is voluntary.
 - Employee's decision to answer would also be voluntary.
 - Cannot retaliate if employee changes his mind.
- ***Or*** the employee receives vaccination from a third-party not contracted to employer (e.g., pharmacy or other healthcare provider).
- **Medical information should always be kept confidential.**



Summary Regarding Vaccine Mandates

- An employee *may* be entitled to exemption from “required” vaccines:
 - due to an ADA-covered disability or other medical circumstances
 - based on sincerely-held religious beliefs, practices, or observances
- In either case – the “interactive process” is critical
- Employer must consider reasonable accommodations
- Document communications with employee
- Employer’s rights to make medical inquiries are limited
- “Process” may be as important as the final accommodation decision
- Supervisor training is vital – avoid inadvertent medical inquiries

Vaccination Incentives – a not-so-simple alternative?

- Consider federal (and possibly state) laws to determine what incentives may be right for your workplace.
- Applicable Laws to Consider
 - ADA
 - Title VII
 - HIPPA (ACA)
 - FLSA
 - Related state or local laws



EEOC – Vaccination Incentive Guidance

- EEOC May 28 updates: COVID-19 Technical Assistance guidance provides employers with two clear options regarding incentives, drawing a key distinction based on who administers the shot:
 - **1) Unlimited Incentives:** If your employees *voluntarily provide documentation* confirming they have been vaccinated **and** got the shot on their own from a pharmacy, public health department, or other health care provider in the community, you can offer them any incentive you'd like with no apparent limitations.
 - **2) Restricted Incentives:** If *your organization (or an entity acting on your organization's behalf) administers the vaccine*, you can still offer incentives – but they cannot be so substantial in value as to be considered coercive.

EEOC – Vaccination Incentive Guidance:

Restricted Incentives

- **Who is an “agent”?**
 - EEOC guidance defines “agent” as an individual or entity having the authority to act on behalf of, or at the direction of, the employer (which could include an onsite nurse, onsite medical staff, and perhaps beyond).
 - Avoid the incentive limitation in such a situation, by keeping a wall up between you and the healthcare provider offering the vaccines – especially if you are setting up a vaccine clinic at your worksite to make it as easy as possible for your workers to get vaccinated.
 - Unnecessary entanglements could arise if you gather medical information about your employees, assist with screening questions, or include an onsite nurse or other medical staff members to aid the healthcare provider in administering the shots.
- **What is a “substantial” incentive?**
 - EEOC does not provide detail or a definition regarding what might be considered too substantial.
 - It seems “substantial” would permit you to offer incentives at some level higher than a *de minimis* amount – higher than the “water bottle or its equivalent” level typically associated with incentives – but there is no clear answer about where to draw the line.
 - Rule of thumb: the higher the value, the greater the risk your program will be seen as unnecessarily coercive.



ADA - Reasonable Accommodations

- Employers must also consider offering alternative means for an employee to earn an incentive if unable to be vaccinated due to a disability.
- Some potential options:
 - Watching a workplace COVID-19 safety video.
 - Reviewing CDC literature on how to mitigate the spread of COVID-19 in the workforce.
- Consider other creative vaccine alternatives offered by employer in the past (i.e., incentives for flu shot).



Title VII-Religious Objections

- What if employee raises a religious objection to vaccination?
 - Employer must consider an alternative means by which the employee can earn the incentive.
 - Similar to the analysis described for an ADA accommodation.
 - The standard for evaluating religion-based accommodation requests is different from ADA accommodation.



HIPPA/FLSA

- HIPPA: Requires health-contingent wellness programs, which connect incentives with health status goals, to meet certain tests.
 - Full incentive must be available to all similarly situated individuals.
 - Limits the amount of incentives that may be offered.
- FLSA: Must pay all employees for all time worked.
 - State or local wage and hour law may also create similar, or even higher, obligations.
 - FLSA is detailed and demanding regarding recording keeping and calculating employees' "regular rate."



Incentive Risk Chart

- *Educating Employees:*
Little To No Risk – Big reward?
- *Providing Paid Time Off For All Workers:*
Low Risk
- *Offering A De Minimis Incentive For Those Who Get The Vaccine:*
Low Risk
- *Providing Paid Time Off For Those Who Get the Vaccine:*
Medium Risk
- *Providing Compensation To Cover “Costs” Associated With Vaccine:*
• Medium Risk
- *Offering A Higher Value Incentive For Those Who Get The Vaccine:*
• Higher Risk

Un-masking the Vaccinated Workforce:

Regulations

- May 13 CDC Guidelines: provided specific direction to employers about if and how to proceed in developing unmasking policies and procedures.
 - Fully vaccinated people can resume activities without wearing masks or physically distancing, except where required by federal, state, local, tribal, or territorial laws, rules and regulations, including local business and workplace guidance.
 - States that some business settings may choose to continue to require masks and social distancing.
 - Those in healthcare settings, must continue to follow previous guidance on masks and social distancing *regardless* of vaccination status.
 - Fully vaccinated people can refrain from being tested or quarantining following a known exposure to a COVID-19-positive person (assuming the vaccinated person remains asymptomatic) and can be excluded from routine screening tests.
- OSHA continues to track mask/face covering requirements per the CDC for vaccinated and unvaccinated individuals.

Un-masking the Vaccinated Workforce:

Employer Options

- In light of the current state of the law, employers have three basic choices when it comes to masking policies for their workers:
 - 1) **Mask On:** maintain full masking rules
 - **Low Risk**
 - Employees are eager to return to “normal.”
 - Be thorough and clear in explaining why you are continuing with the status quo.
 - Provide managers with suggestions and direction on how to handle possible conflicts.
 - 2) **Mask or Vaccine:** require vaccinated workers to present proof of vaccination before being allowed to go mask-less
 - **Medium Risk**
 - more burdensome on employers and increases the risk of legal liability.
 - requires collection and protection of the privacy of workers’ vaccination status
 - less risky to keep a list of vaccination status rather than copies of the vaccination cards.
 - 3) **Honor System:** ask employees to follow an honor system approach.
 - **Medium Risk**
 - Use an honor system to determine who has been vaccinated and can remove their masks
 - You will still need a system for collecting and tracking who has been vaccinated.
 - Not tracking, could carry a risk of being cited for shirking your duty to maintain a workplace that is free from recognized hazards.
 - Some employees may claim to be fully vaccinated when in fact they are not and increase the likelihood of unvaccinated employees being exposed to each other without safeguards in place, thus potentially increasing infection rates in the workplace.



Final Thoughts

- Anticipate issues, questions and pushback from some employees
- Develop an overall stance regarding vaccine-related issues
- Develop policies and communications aligned with this decision
- Educate employees
- Keep up to date with new developments -- work with your counsel
- **REMEMBER**: Just because an employee gets vaccinated, no automatic exemption from masking requirements



Other Legal Considerations

- State and local laws
 - Unlikely to protect “anti-vaxxers” from a workplace requirement
 - May protect employees from adverse action for “lawful off-duty activities”
- Vaccine Prioritization
- Vaccine Registration/Tracking
 - - i.e., Vaccine Administration Management System (VAMS)
- Employee rights under Section 7 of the NLRA to engage in PCA
 - “protected concerted activities”
- Collective bargaining agreements

Helpful Resources

- EEOC.gov
- CDC.gov
- OSHA.gov
- HHS.gov





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Thank You!

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