



PROGRAM MATERIALS

Program #3159

March 15, 2021

A Shot in the Arm: The Employment and OSHA Law Implications of COVID- 19 Vaccination Programs

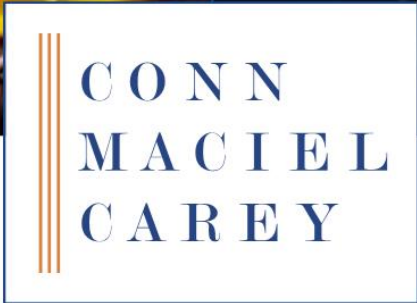
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A Shot in the Arm: What Employers Must Know About COVID Vaccination

March 2021

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ERIC J. CONN is Chair of the OSHA • Workplace Safety Practice Group at **Conn Maciel Carey**, where he focuses his practice on all aspects of occupational safety & health law:

- Represents employers in inspections, investigations & enforcement actions involving OSHA, CSB, MSHA, & EPA
- Manages investigations of catastrophic industrial workplace accidents, including explosions and chemical releases
- Handles all aspects of OSHA litigation, from criminal prosecutions to appeals of citations
- Writes and speaks regularly on safety and health law issues
- Co-Chairs the firm's COVID-19 Task Force

Fern Fleischer-Daves

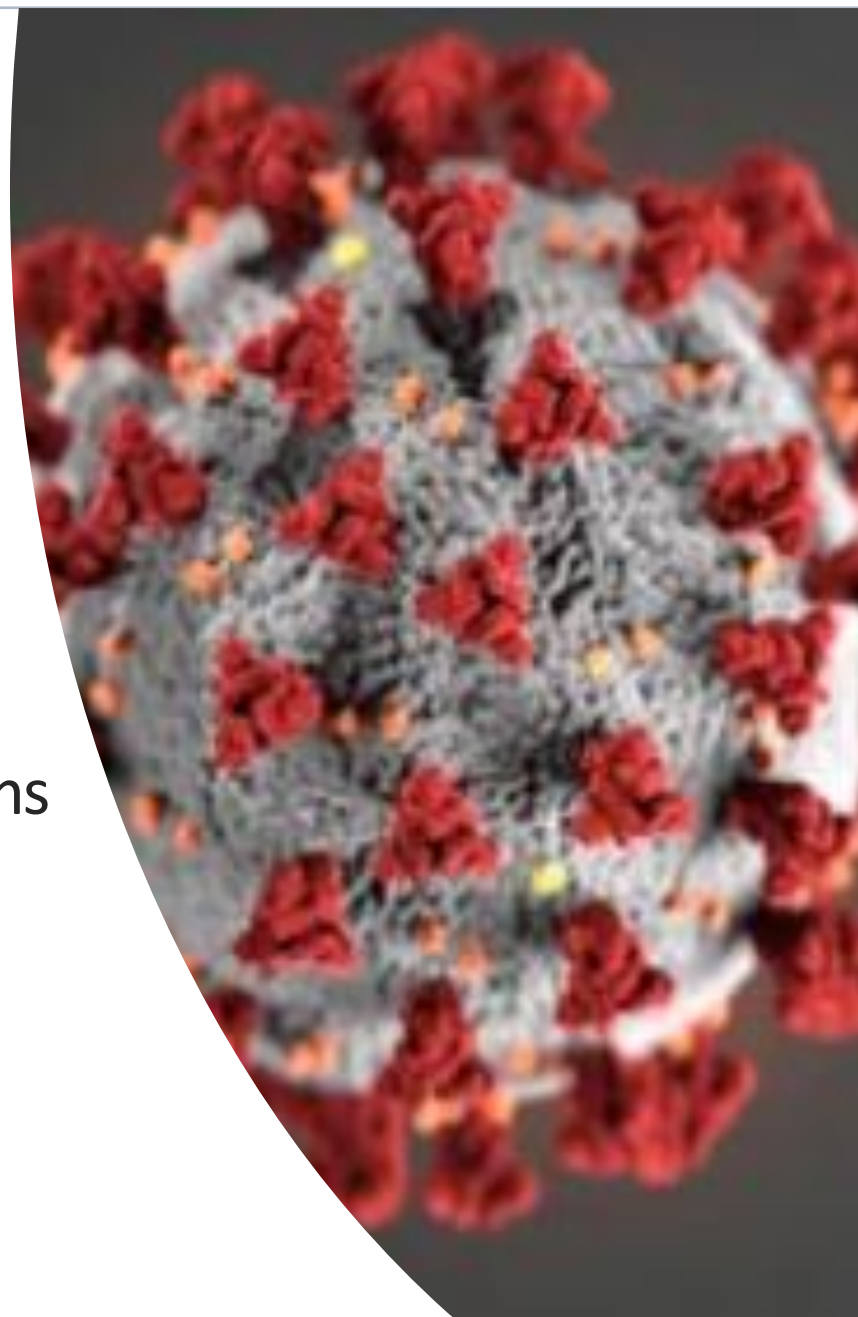
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Fern Fleischer-Daves is Of Counsel at **Conn Maciel Carey LLP** in the Firm's OSHA • Workplace Safety Practice Group:

- Advises on environmental, safety and health, and product stewardship matters
- Specializes in compliance with federal regulations promulgated by EPA, OSHA, MSHA, DOT, CPSC and FDA
- Ms. Fleischer-Daves was previously Senior Counsel at Chevron, General Counsel of the Thermostat Recycling Corporation, Assistant General Counsel to ITT Corp., and held both legal and business roles at ASARCO Incorporated

Agenda

- ✓ COVID-19 Vaccine Background
- ✓ Roll-out of Vaccine Programs
 - Educate and Encourage
 - Incentivize or Mandate?
- ✓ Implications of Vaccine Programs
 - Privacy & Confidentiality
 - ADA Accommodations
 - Refusals to Vaccinate
- ✓ What to Do After the Vaccine





COVID-19 Vaccine Background

Key Facts about COVID-19 Vaccination



Getting vaccinated
can help prevent
getting sick with
COVID-19



People who have
already gotten sick
with COVID-19 may
still benefit from
getting vaccinated



COVID-19 vaccines
cannot give you
COVID-19



COVID-19 vaccines
will not cause you to
test positive on
COVID-19 viral tests*

<https://www.cdc.gov/coronavirus/2019-ncov/vaccines/about-vaccines/vaccine-myths.html>

COVID-19 Vaccine Distribution and Initiation

Data As of 3/10/21

Total Vaccine Doses

Delivered 127,869,155

Administered 95,721,290

Learn more about the distribution of vaccines.

People Vaccinated

Total

% of Total Population

Population ≥ 18 Years of Age

% of Population ≥ 18 Years of Age

Population ≥ 65 Years of Age

% of Population ≥ 65 Years of Age

At Least One Dose

62,451,150

18.8%

62,387,489

24.4%

33,074,767

61.2%

Fully Vaccinated

32,904,161

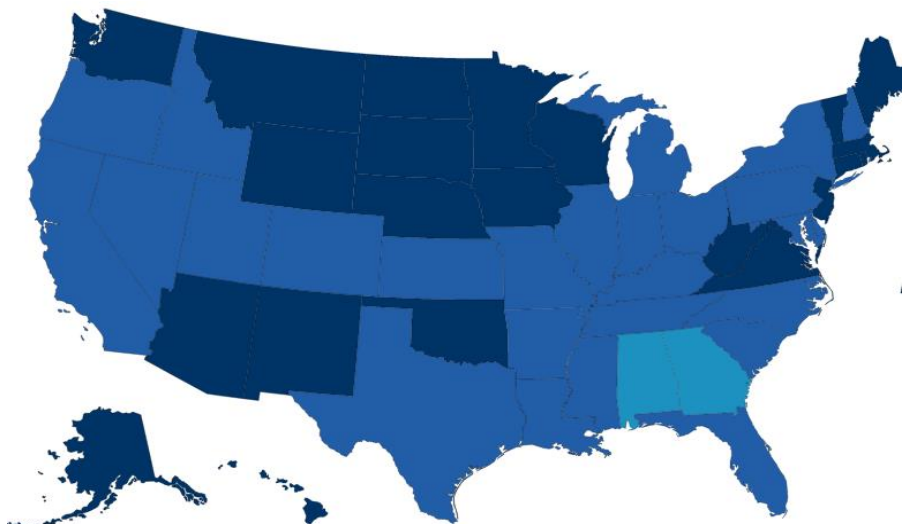
9.9%

32,880,833

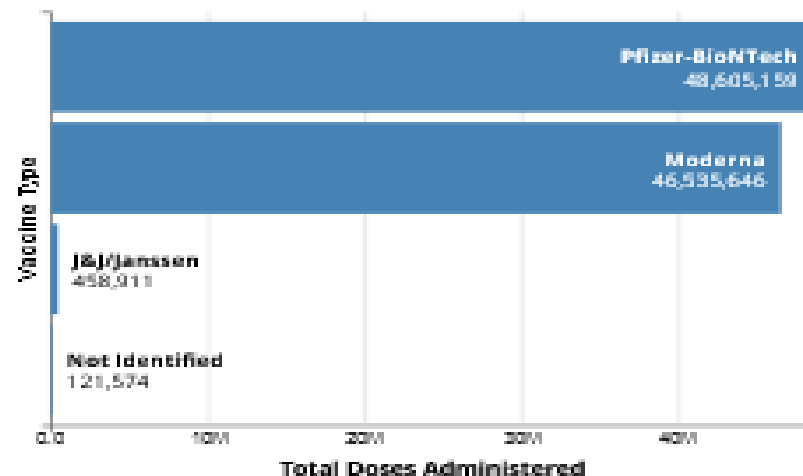
12.9%

16,811,802

31.1%



U.S. COVID-19 Vaccine Administration by Vaccine Type



Source: <https://covid.cdc.gov/covid-data-tracker/#vaccinations>

Background on COVID-19 Vaccines

- 3 vaccines approved in the U.S. (Pfizer-BioNTech, Moderna, J&J)
 - FDA Emergency Use Authorizations (EUA) in Dec. 2020 and Feb. 2021
 - Protection against symptomatic illness and severe disease
 - Side effects, allergic reactions (reporting through CDC V-safe tool)
 - Instances of individuals developing COVID-19 symptoms after vaccination
 - Insufficient data on preventing transmission to others
 - Effectiveness on variants
- US clinical trials ongoing (AstraZeneca, Novovax)
- Worldwide
 - 12 vaccines approved by at least one country
 - 90 candidates, 243 trials (22 in phase 3)

Who is Eligible for the Vaccine?

- Federal guidance established in 2020
- More than ½ of states set their own eligibility rules based on age/health/job, and most have made recent adjustments
- Distribution by the federal government to each state, then by each state to health care providers & localities
- Pharmacy chains are now receiving vaccine directly from the federal government

Current Status

- Vaccines still in short supply in most of the US
- First wave – health care workers, people 75+ years of age, public service workers & some “essential workers”
- Second wave - 65 + years of age, adults w/ pre-existing health conditions
- In some states: teachers, farm workers, grocery clerks, bus & taxi drivers, judges are eligible now
- Some states are shifting focus to age groups (in Texas 50+)
- Availability and eligibility to register for vaccination appointment can vary site to site even within the same city

Challenges to vaccine access

- Lack of internet service
- No smart phone/computer to make/confirm appointments
- No transportation to vaccination site
- Language barriers
- Hesitancy / cultural issues
- Mobility – some workers may move to a new location before getting their second shot

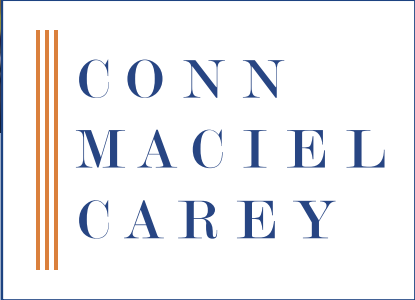
Some good news

- New technologies
- FDA approval of inexpensive and quick COVID-19 test kits for workplaces and at home
- More vaccine safety data
- Clinical trials for teenagers and children
- Canine screening in airports and crowded venues

Take-aways

- Vaccines will prevent most but not all infections
- Vaccines will reduce symptoms and deaths
- Vaccines will reduce the need for quarantines
- Insufficient data whether vaccine prevents transmission
- Vaccines do NOT change the necessity to frequently clean and disinfect, practice social distancing and hand hygiene, wear layered face covering at work and in public

Employers have an important role to play!



Standing Up a Workplace Vaccine Program

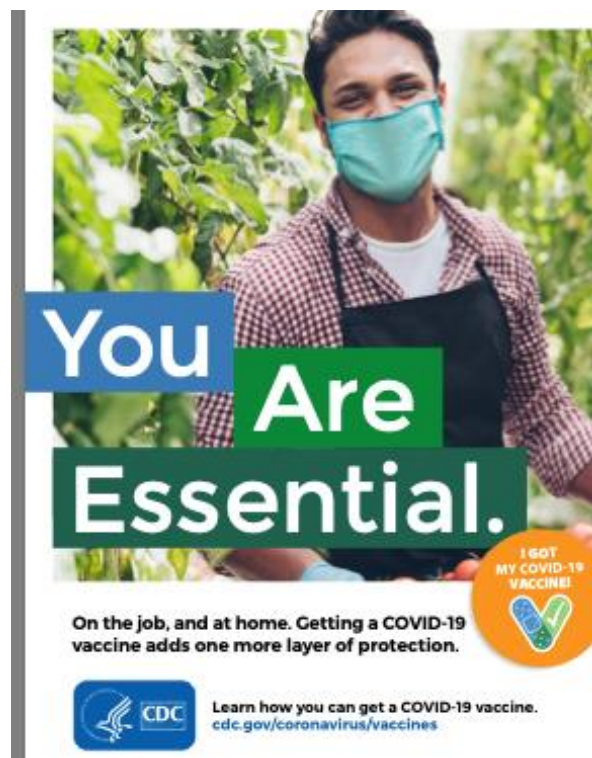
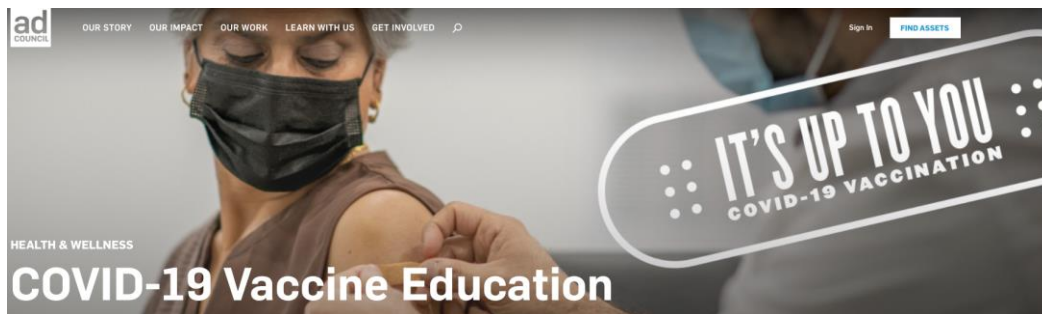
Employer Strategies for COVID-19 Vaccinations

Four Approaches:

1. Encourage (educate, recommend)
2. Facilitate (administer vaccines on-site or near work)
3. Incentivize (provide benefit for getting vaccinated)
4. Mandate (make it a condition of employment)

How Employers Can Encourage Vaccination

- Educate
 - communications plan to combat vaccine hesitancy with reliable information
 - dispel myths and misinformation
- Recommend
 - company leaders are trusted voices
 - engage with community leaders



How Employers Can Facilitate Vaccinations

- Help your employees make vaccination appointments
- Partner with local health department, pharmacy
 - 3rd party provider to administer vaccines at worksite or nearby
 - Apply to state to become an authorized vaccination site
- Allow flextime for vaccination appointments
- Allow time off to recover from adverse reaction

Encourage vs. Incentivize

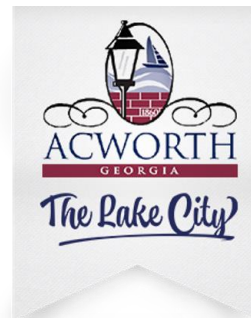
- President Biden's Day 1 OSHA Executive Order

Employers should make COVID-19 vaccine available “at no cost”

- EEOC proposed rulemaking under Trump Administration – Health Plan Wellness Program Incentives should be “*de minimis*”
- 2/1/21 - Coalition of 40 business groups including the US Chamber of Commerce requested EEOC to clarify this issue
- New guidance is expected soon

Vaccination Incentives

Extra PTO, Cash, Gift Cards



DOLLAR GENERAL



TRADER JOE'S

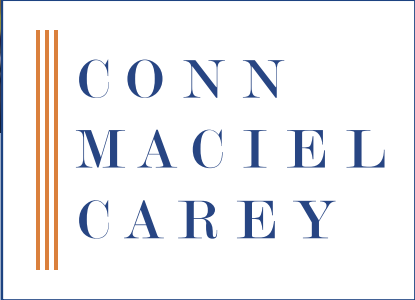
Can employers mandate vaccines?

- Yes, employers can mandate vaccines....but should they?
COVID-19 vaccine is emergency-use authorized, so mandate may be riskier
- It is common for employers in some industries (e.g., healthcare) to make certain vaccinations a condition of employment for safety of their workforce and the public
- Many executives responded to recent surveys indicating they are considering mandating the COVID vaccine, but few have
- Some state legislatures are considering legislation to encourage or prevent employers from mandating COVID-19 vaccinations
- Unions in many sectors have publicly objected to vaccine mandates

Can employers mandate the COVID-19 vaccine?

EEOC Guidance (12/16/20) says YES IF

- employer has a process for employees to request an exemption for medical and religious reasons
- employer conducts individual assessment of accommodations for declining employee
- employer complies with ADA, Title VII, ADEA, GINA, state laws
 - *inquiries re: vaccination status and pre-screening for vaccine administration must be job-related & consistent w/ business necessity*
 - *reasonable belief (based on objective evidence) that employee who does not answer questions and therefore does not get vaccinated will pose a direct threat to health or safety of her /himself or others*



Practical Implications of a Vaccination Program

Considerations

- The vaccine is already paid for by the US government, but some providers are charging an administration fee. Will your company's health plan cover that cost? If the employee is uninsured, will the employer reimburse that cost?
- Will you cover employee's out of pocket expenses to get the vaccine (transportation to the vaccination site or childcare)?
- Can employee to take time off from regularly scheduled work hours for vaccination appointment? Is flex-time an option?
- Can employee to take time off if they have a negative reaction and can't work the day after the vaccination? Will that be paid, unpaid, vacation time?

Vaccination Employment Policy

- Customize to your business needs
- Statement on compliance with non-discrimination laws
- Confidentiality and recordkeeping
- Mandatory or non-mandatory?
- Applicability
 - all employees or only certain high-risk jobs
 - family members? contractors?
- Incentives (amount, acceptable proof)
- Process for requesting religious or medical exemption
- Criteria for granting accommodations after declination

ADA Accommodations

- **Question:** If my company requires vaccination and my employee refuses the vaccine b/c of a disability, what can I do?
- **Answer:** You can exclude the employee from the workplace only if she poses a direct threat to the health of others, which cannot be eliminated/reduced by reasonable accommodation.
 - Direct threat standard is a high bar and requires an individualized assessment based upon 4 factors
 - Must consider potential accommodations given nature of workforce and employee's position
 - May rely on CDC recommendations to determine accommodation options



Religious Accommodations

- **Question:** If my company requires vaccination and my employee refuses to be vaccinated because of religious practice or belief, what can I do?
- **Answer:** You must conduct the same analysis as described for an employee with a disability.
 - You must provide a reasonable accommodation, unless it would pose and undue hardship under Title VII
 - Undue Hardship is “more than *de minimis* cost/burden on the employer”
 - Per EEOC, employers should ordinarily assume employee’s request for accommodation is based on “sincerely held religious belief” *unless* objective basis to question religious nature or sincerity

Responding to Accommodation Request

- Train managers to recognize a request for an accommodation
- Provide standard forms and a process for workers to formally notify the employer of a request for a medical or religious exemption to a vaccine mandate
- Conduct an individualized assessment to determine whether a direct threat exists from a worker who refuses to be vaccinated, considering these 4 factors:
 - duration of the risk
 - nature and severity of the potential harm
 - likelihood that the potential harm will occur; and
 - imminence of the potential harm

Responding to Accommodation Request

- Engage in a flexible, interactive process to identify workplace accommodation options that do not constitute an undue hardship to the employer
- Document any situation where there is an undue hardship
- Remind managers and supervisors that it is unlawful to:
 - Disclose that employee is receiving a reasonable accommodation
 - Retaliate against an employee for requesting an accommodation
- Seek legal advice before deciding whether to terminate an employee for refusing the vaccine

Refusal of Vaccination – No Accommodation

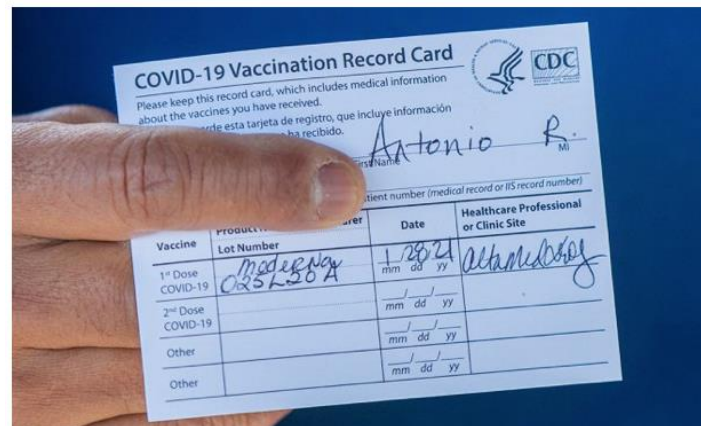
- **Question:** If my company cannot provide a reasonable accommodation to an employee who refuses the vaccine due to disability or religion, can I terminate the employee?
- **Answer:** You may be able to exclude the employee from the workplace, but that does not mean you can automatically terminate him/her.
 - If employee can work from home, s/he likely is entitled to that accommodation so long as it does not create an undue hardship.
 - Employee may also be entitled to leave under fed/state law or employer's own policies before termination is permitted



Privacy Considerations

- You may ask employees to provide documentation from a healthcare provider or pharmacy showing the date the vaccine was administered
- Under the ADA, such information is a confidential medical record, and should be kept separately from the personnel file
- Do not disclose a particular employee's vaccination status to co-workers

Proof of Vaccination in the US



- Vaccination certificates
- Vaccination passports for travel, access to large venues
- *High risk of fraud*



Covid-19 Vaccination Record Card  

Please keep this record card, which includes medical information about the vaccines you have received
Por favor, guarde esta tarjeta de registro, que incluye información médica sobre las vacunas que ha recibido

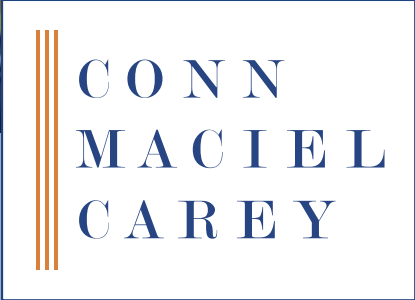
Last Name: First Name: MI:
 DOB: Patient Number:

| Vaccine | Product Name / Manufacturer Lot Number | Date | Healthcare Professional or Clinic Site |
|----------------------|---|------------|---|
| 1 st Dose | Moderna 004M20A | 01/27/2021 | Christopher Ponzika  |
| 2 nd Dose | Moderna 012a21a | 02/25/2021 | Ashlyn Covington  |

Powered By Cureminder

Digital proof of negative COVID-19 test and/or vaccination status

- WHO and UN recommendations – slow down
- Israel, UK, EU, Thailand - moving forward
- Int'l Air Travel Association TRAVELPASS - test phase
- Existing apps: Apple Health Records, MyChart
- New Tools:
 - The Los Angeles Wallet
 - The Commons Project: CommonHealth / CommonPass



After the Vaccination

After The Vaccination...

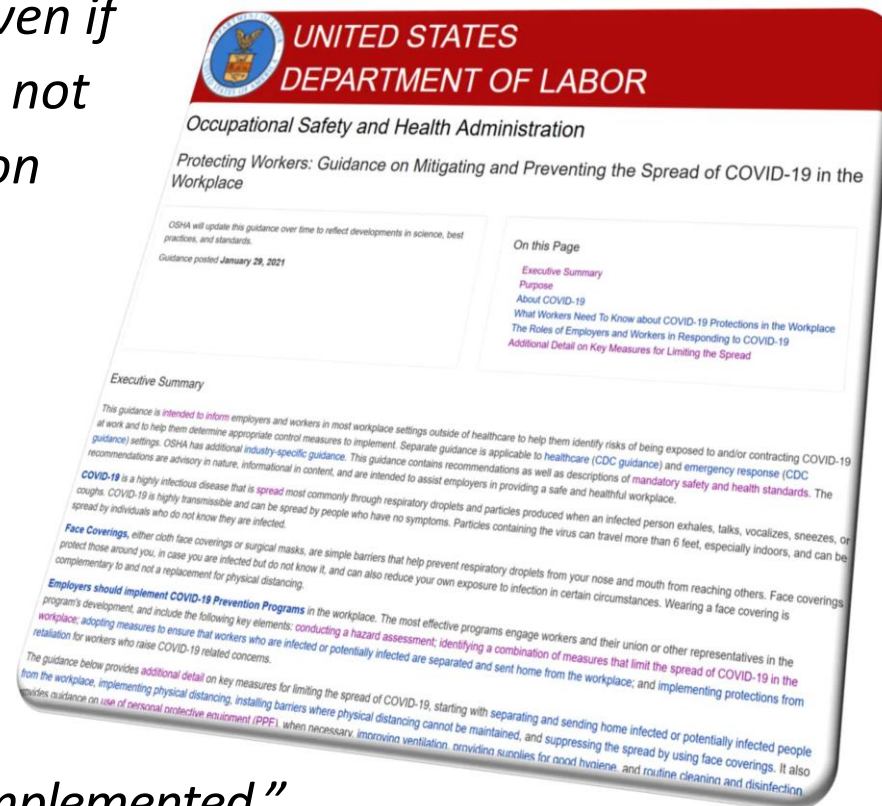
Pres. Biden's OSHA Issued New COVID-19 Guidance:

"It is important to wear a face covering and remain physically distant from co-workers and customers even if you have been vaccinated b/c it is not known at this time how vaccination affects transmissibility."

Cal/OSHA Issued this FAQ about its COVID-19 ETS:

"Q: Must the ETS still be followed for vaccinated persons?"

A: For now, all prevention measures must continue to be implemented."



After the Vaccination...

- **Question:** If my company requires vaccination and my employee has an adverse/allergic reaction to the vaccine, is that recordable on my OSHA 300 Log?
- **Answer: Likely YES, *if*** the vaccine is required and the reaction meets one of the general criteria for recording under 29 C.F.R. 1904.7 (i.e., it results in medical treatment beyond 1st aid or days away from work, etc.)
- Even if the vaccine is not employer-mandated, a reaction could still be recordable if the vaccine is necessary to perform job duties (e.g., to fly for work)

Cal/OSHA Form 300 (Rev. 7/2007) Appendix A
Log of Work-Related Injuries and Illnesses

Attention: This form contains information relating to employee health and must be used in a manner that protects the confidentiality of employees to the extent possible while the information is being used for occupational safety and health purposes. See CCR Title 8, 14300.25(b)(3)-(10).

Year 20 Department of Industrial Relations
Division of Occupational Safety and Health

You must record information about every work-related death and about every work-related injury or illness that involves loss of consciousness, restricted work activity or job transfer, days away from work, or medical treatment beyond first aid. You must also record significant work-related injuries and illnesses that are diagnosed by a physician or licensed health care professional. You must also record work-related injuries and illnesses that meet any of the specific recording criteria listed in CCR Title 8, Section 14300.8 through 14300.12. Fees free to use two lines for a single case if you need so. You must complete an Injury and Illness Incident Report (Cal/OSHA Form 301) or equivalent form for each injury or illness recorded on this form. If you're not sure whether a case is recordable, call your local Cal/OSHA office for help.

| Identify the person | | Describe the case | | Classify the case | | | | | | |
|---------------------|------------------------|------------------------------------|---|---|---|---------------------------------|---------------------------------|--------------------------|--------------------------|-------------------------|
| (A) Case no. | (B) Employee's name | (C) Job title (e.g., Millin) | (D) Date of injury or onset of illness | (E) Where the event occurred (e.g., Loading dock north end) | (F) Describe injury or illness, parts of body affected, and object/substance that directly injured or made person ill (e.g., Second degree burn on right forearm from acetylene arc.) | | | | | |
| | | operator | | | (G) Days away from work | (H) Job transfer or restriction | (I) Other recordable events (L) | (K) Days away from work | (L) Days away from work | (M) Injury type |
| | | operator | | | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | (1) (2) (3) (4) (5) (6) |
| | | operator | | | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | <input type="checkbox"/> | All other illnesses |

New CDC Guidance (3/8/21) for Fully Vaccinated People*

- Continue to wear masks & physical distance in public
- 2 weeks+ after fully vaccinated (after 2nd dose of Pfizer/Moderna or the only dose of J&J), you may:
 - visit indoors w/out masks w/ others who are fully vaccinated
 - visit unvaccinated household (if low risk)
 - **exempt from quarantine and testing after a close contact exposure (unless experiencing symptoms)**

** Not applicable in healthcare settings*

Liability Risks with Vaccines

- Liability shield for entities that arrange for vaccination programs under Federal PREP Act
- Workers' compensation claims
- Shareholder suits for allegedly misleading statements about COVID-19 risks in SEC disclosures
- OSHA enforcement priorities
- Federal OSHA emergency standard *COMING SOON!*

Conn Maciel Carey COVID-19 Task Force Resources

COVID-19 TASK FORCE

As employers around the country grapple with the employment law and workplace safety implications of the 2019 Novel Coronavirus, "COVID-19," Conn Maciel Carey has formed a multi-disciplinary legal and regulatory task force comprised of our dedicated Workplace Safety, Labor and Employment Law, and Litigation attorneys to help our clients across all industries manage the multitude of pandemic-related issues employers are facing and prepare for potential litigation that is around the corner. We have produced a comprehensive database of resources to guide employers through this uncharted territory and the unique workplace challenges presented by the presence of a new health hazard in our nation's workplaces.

Members of CMC's COVID-19 Task Force

| | | | |
|--|---|--|---|
| Eric J. Conn OSHA Chair | Kara M. Maciel Labor and Employment Chair | Bryan A. Carey Partner | Nicholas W. Scala MSHA Chair |
| Kate M. McMahon OSHA Partner | Jordan B. Schwartz Labor and Employment Partner | Andrew J. Sommer Cal/OSHA and Employment Partner | Aaron R. Gelb OSHA and Employment Partner |
| Amanda Strains-Walker OSHA Partner | Mark M. Trapp Labor and Employment Partner | Lindsay A. DiSalvo Associate | Megan S. Shaked Associate |



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LITIGATION



WORKPLACE SAFETY

COVID-19 FAQs for Employers

As the COVID-19 Pandemic continues to evolve, we have created an [extensive index of frequently asked questions](#) about HR, employment, and MSHA/OSHA related regulatory developments and guidance from federal agencies and the CDC. Conn Maciel Carey's COVID-19 Task Force will be updating our list of FAQs frequently, but please reach out to us for the most up to date information.



COVID-19 FAQs for Employers

- [Employee Layoffs & Reduced Working Schedules](#)
- [The CARES Act](#)
- [Vacation, Paid Time Off & Sick Leave](#)
- [OSHA Recordkeeping and Reporting of COVID-19 Cases](#)
- [Temperature Checks for Employees](#)
- [Personal Protective Equipment](#)
- [Preventing Exposure in the Workplace](#)
- [Annual Physical Requirements](#)
- [Space Restrictions in Retail](#)
- [On-Site Inspection Activities](#)
- [Employer-Employee Confidentiality](#)
- [Emergency Infectious Disease Rule / NEP](#)
- [Offer Letters & Flexible Start Dates](#)
- [Employer Liability](#)

COVID-19 OSHA Recordkeeping and Reporting Resource Guide

CMC's COVID-19 Task Force has prepared a series of resources to assist employers in assessing whether a COVID-19 diagnosis for one of its employees is reportable to OSHA and/or recordable on the company's OSHA 300 Log, and if so, "how to" record it on the log. The toolkit includes a COVID-19 OSHA Reporting Flow Chart, a COVID-19 OSHA Recording Flow Chart, a one-pager on "How to record" COVID-19 cases on the log, and a detailed "Work-Relatedness Questionnaire." For more information about the OSHA recordkeeping and reporting implications of COVID-19, [read this detailed article](#).



Check out our OSHA blogs:

the **OSHA DEFENSE** report



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the **CAL/OSHA DEFENSE** report

CAL/OSHA Updates from Conn Maciel Carey's national OSHA Practice Group



QUESTIONS?

