

## UPDATE: The COVID-19 Vaccine Rollout: What Employers Need to Know

August 6, 2021

### Key Points

- To account for legal developments since our last FAQ concerning employer COVID-19 vaccination policies, we provide updated answers to questions and address additional questions about discrimination, wage and hour, collective bargaining, safety, privacy and general liability considerations, and offer recommendations for employee vaccination programs.
- In particular, we discuss recent guidance and opinions from the Equal Employment Opportunity Commission, the U.S. Department of Labor and the U.S. Department of Justice on various topics.

With widespread vaccine eligibility and availability in the United States, and COVID-19 case counts rising with the spread of the Delta variant of the SARS-CoV-2 virus, employers should consider whether a vaccination policy is right for their workplaces. Such policies implicate a broad range of employment laws and regulations. The following questions and answers reflect changes to regulations and updates to guidance from government agencies since the publication of our prior FAQ on April 6, 2021. We address many of the legal issues that employers should take into account as they evaluate the role of vaccinations in their return to office plans. Although we focus on federal law, employers should in all instances consider any applicable state and local laws as well. Likewise, employers considering a vaccination policy should consult with experienced counsel.

### Mandatory Vaccinations and Discrimination Concerns

#### May private employers require employees to get vaccinated for COVID-19?

In most states, subject to exceptions under antidiscrimination laws, an employer's basic right to set the terms and conditions of employment at its workplace gives it the right to require that employees receive a COVID-19 vaccine as a condition of initial or continued employment.<sup>1</sup> The U.S. Department of Justice (DOJ) recently issued an opinion stating that the Food, Drug and Cosmetic Act does not prohibit employers from mandating vaccination for COVID-19, even while such vaccinations are available only through Emergency Use Authorizations (EUA).<sup>2</sup> Further, prior to the DOJ's opinion, a

### Contact Information

If you have any questions concerning this alert, please contact:

#### Bob G. Lian

Partner

[blian@akingump.com](mailto:blian@akingump.com)

Washington D.C.

+1 202.887.4358

#### Gary M. McLaughlin

Partner

[gmclaughlin@akingump.com](mailto:gmclaughlin@akingump.com)

Los Angeles

+1 310.728.3358

#### Esther G. Lander

Partner

[elande@akingump.com](mailto:elande@akingump.com)

Washington D.C.

+1 202.887.4535

#### Lauren Helen Leyden

Partner

[lleyden@akingump.com](mailto:lleyden@akingump.com)

New York

+1 212.872.8172

#### Nathan J. Oleson

Partner

[noleson@akingump.com](mailto:noleson@akingump.com)

Washington D.C.

+1 202.887.4425

#### Brian Glenn Patterson

Partner

[bpatterson@akingump.com](mailto:bpatterson@akingump.com)

Houston

+1 713.250.2214

#### Jo-Ellyn Sakowitz Klein

Senior Counsel

[jsklein@akingump.com](mailto:jsklein@akingump.com)

Washington D.C.

+1 202.887.4220

lawsuit challenging a mandatory vaccination program was dismissed by the U.S. District Court for the Southern District of Texas.<sup>3</sup>

States may impose their own restrictions, however. In May, Montana passed a law prohibiting employment discrimination based on a person's vaccination status,<sup>4</sup> and Oregon prohibits certain private employers from mandating COVID-19 vaccinations as a condition of employment.<sup>5</sup> A number of other states have issued executive orders or passed laws prohibiting businesses from requiring customers to prove that they are vaccinated in order to access services, but have stopped short of prohibiting private employers from mandating vaccination.<sup>6</sup> Because the debate over these issues is ongoing at the state and local level, employers should assess recent legislative developments before implementing a mandatory vaccination policy in a particular jurisdiction.

In considering whether to implement a mandatory vaccination program, employers also must be mindful of the requirements of various discrimination laws that may require exceptions, such as the Americans with Disabilities Act, Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act, and similar state or local laws. These considerations are addressed below.

### **How does the Americans with Disabilities Act apply to vaccination policies?**

Under the Americans with Disabilities Act (ADA), employers may only conduct medical examinations on employees, or ask employees questions that are likely to elicit disability-related information, where the exams or questioning are "job-related and consistent with business necessity."<sup>7</sup> In guidance published in December 2020 and updated in May 2021, the Equal Employment Opportunity Commission (EEOC) stated that, although information about an employee's vaccine status is subject to the ADA's confidentiality requirements, asking employees whether they have been vaccinated, or requiring proof of vaccination, is not a medical examination within the meaning of the ADA.<sup>8</sup> Therefore, the ADA does not generally preclude employers from implementing a vaccine mandate for its workforce.

Still, complications may arise to the extent that an employer were to provide vaccinations on-site or otherwise administer a vaccination program. In order to obtain a vaccine, employees need to answer screening questions for "contraindications" (i.e., medical conditions that increase the risk for a serious adverse reaction).<sup>9</sup> According to the EEOC, while the fact that somebody has been vaccinated is not a medical inquiry, the pre-screening questions for obtaining the vaccine are medical inquiries. Therefore, if the employer is involved in administration of mandatory vaccines, the employer must be able to show that requiring employees to be vaccinated is job-related and supported by business necessity. To satisfy this standard, the EEOC's guidance states that the employer must have a "reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of [the employee] or others."<sup>10</sup> To assess the threat, employers should conduct an individualized assessment of four factors: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.

### **Contact Information**

**If you have any questions concerning this alert, please contact::**

**James C. Crowley**  
Counsel  
[jcrowley@akingump.com](mailto:jcrowley@akingump.com)  
Washington D.C.  
+1 202.87.4579

**Elizabeth England**  
Counsel  
[eengland@akingump.com](mailto:eengland@akingump.com)  
Washington D.C.  
+1 202.887.4553

**Joshua Keith Sekoski**  
Counsel  
[jsekoski@akingump.com](mailto:jsekoski@akingump.com)  
Washington D.C.  
+1 202.887.4544

**Katherine I. Heise**  
Associate  
[kheise@akingump.com](mailto:kheise@akingump.com)  
Washington, D.C.  
+1 202.887.4565

**Amanda S. McGinn**  
Associate  
[amcginn@akingump.com](mailto:amcginn@akingump.com)  
Washington D.C.  
+1 202.887.4587

**Laura Vaughn**  
Associate  
[vaughnl@akingump.com](mailto:vaughnl@akingump.com)  
Los Angeles  
+1 310.229.1026

Additionally, an employer must engage in an interactive process with employees who claim that a disability prevents them from receiving the vaccine to explore accommodation alternatives to being vaccinated. For example, the EEOC believes that remote work may be a reasonable accommodation when a direct threat justifies a mandatory vaccination policy. Employers must likewise engage in an interactive process if a vaccinated employee requests an accommodation because they suffer from a disability that presents a heightened risk of severe illness from COVID-19 despite being vaccinated.

### **How does the Pregnancy Discrimination Act apply to vaccination of employees?**

According to the Centers for Disease Control and Prevention (CDC), pregnant individuals are at increased risk for severe illness from COVID-19.<sup>11</sup> While there is limited data at this time about the safety of COVID-19 vaccines for people who are pregnant, recently leading experts in maternal health have been recommending that pregnant women become vaccinated.<sup>12</sup> Nonetheless, pregnant employees who are unwilling to receive the vaccine may seek an exception from a mandatory vaccination policy.

The federal Pregnancy Discrimination Act (PDA) generally forbids discrimination based on pregnancy with respect to any aspect of employment. This means that when an employer grants an exception to a policy for a nonpregnant employee who is similar to a pregnant employee in his or her inability to work, the employer must either grant the exception for the pregnant employee or have a legitimate and nondiscriminatory explanation for treating the pregnant employee less favorably. In the context of a mandatory vaccination policy, an employer should not treat pregnant employees less favorably than other employees seeking to be excused from a mandatory vaccine. Indeed, certain pregnancy-related medical conditions may qualify as disabilities under the ADA entitling the employee to a reasonable accommodation. The PDA does not require employers to treat pregnant employees *more* favorably, however. For example, if the employer is requiring employees with medical conditions to provide a health care provider's opinion before excusing them from the vaccine requirement, an employer may impose the same requirement on pregnant employees who do not wish to become vaccinated.

### **What if an employee objects to vaccination on religious grounds?**

Employers may need to make exceptions to mandatory vaccination policies for employees with sincerely held religious beliefs that prevent them from being vaccinated. Title VII of the Civil Rights Act of 1964 and various state laws prohibit discrimination based on religion. This protection includes requiring employers to accommodate an employee's sincerely held religious beliefs, practices or observances. Applying this standard, the EEOC's guidance explains that an employee may be entitled to a reasonable accommodation that includes excusing the employee from a mandatory vaccine requirement due to religious objections.

The EEOC recommends that employers assume a request for religious accommodation is legitimate unless there is an objective basis for questioning either the religious nature or sincerity of a particular belief, practice or observance. However, the Title VII standard for providing religious accommodations is not as demanding as the ADA standard. Under Title VII, an employer need not provide a religious accommodation if doing so would require the employer to bear "more than a de

minimis cost.” Costs to be considered include not only financial costs but also other burdens on the employer’s business. For example, courts have found more than a de minimis cost where an accommodation would impair workplace safety or cause coworkers to carry the accommodated employee’s share of potentially hazardous or burdensome work.<sup>13</sup> Therefore, the risk of COVID-19 exposure to coworkers or customers posed by an unvaccinated employee might exceed the de minimis cost threshold, although employers should consider whether any such cost could be mitigated through alternative accommodations, such as remote work.

### **What if an employee objects to vaccination for personal reasons unrelated to a medical condition or religious belief?**

The EEOC recognizes that “[s]ocial, political, or economic philosophies, as well as mere personal preferences, are not ‘religious’ beliefs protected by Title VII.”<sup>14</sup> Employees who have refused other types of mandatory vaccination based on personal preferences or other reasons unrelated to a medical condition or religious belief have been unsuccessful in asserting viable claims under Title VII. For example, the 3rd Circuit Court of Appeals has twice dismissed Title VII claims by employees who challenged their employer’s mandatory flu vaccination policy on the basis of strongly held personal beliefs opposing vaccination because such beliefs are not religious in nature.<sup>15</sup> It is likely that courts would analyze objections to COVID-19 vaccinations in the same manner. However, even if an employee’s objection to vaccination is not based on a disability or religious belief, an employer should thoughtfully consider the request before taking any action in response.

### **Does the Genetic Information Nondiscrimination Act apply to vaccinations of employees?**

No. Under Title II of the Genetic Information Nondiscrimination Act (GINA), employers may not (1) use genetic information to make decisions related to the terms, conditions and privileges of employment, (2) acquire genetic information except in six narrow circumstances or (3) disclose genetic information except in six narrow circumstances. The EEOC’s guidance explains that because the pre-vaccination medical screening questions that accompany receipt of any of the currently available vaccines do not ask about an employee’s genetic information, an employer may ask these questions without violating GINA.<sup>16</sup> However, as explained below, the same screening questions are viewed by the EEOC as eliciting genetic information about an employee in the form of family medical history when they are asked of the employee’s family member.

### **May employers offer employees incentives to get vaccinated?**

Yes. The restrictions in the ADA and GINA regarding medical and genetic inquiries are inapplicable when an employer’s vaccination program is voluntary. The EEOC distinguishes between incentives offered to entice employees to provide proof of vaccination from a third party and incentives offered to employees for voluntarily receiving a vaccination administered by the employer or its agent. For the former, because requesting proof of vaccination is not a disability-related inquiry, employers may offer incentives to encourage employees to provide proof that they have been vaccinated by an independent provider. Employers may also offer incentives to employees to receive a vaccination administered by the employer or its agent. However, because vaccine recipients must answer pre-vaccination disability-related screening questions, employers sponsoring their own vaccination programs may not

make an incentive “so substantial as to be coercive.”<sup>17</sup> The EEOC guidance states that “a very large incentive could make employees feel pressured to disclose protected medical information.”<sup>18</sup>

### **May employers offer employees incentives for their family members to get vaccinated?**

It depends on whether the vaccination is administered by the employer (or its agent) or an independent provider.

GINA prohibits employers from offering incentives in exchange for receipt of genetic information.<sup>19</sup> The EEOC’s guidance states that an employer that administers the vaccination would receive the family member’s answers to screening questions and would therefore receive “genetic information in the form of family medical history *of the employee*.”<sup>20</sup> Accordingly, “the employer may not offer incentives in exchange for the family member getting vaccinated.”<sup>21</sup>

By contrast, if the vaccination were administered by an independent provider, then the employer would not receive medical information about the family member, and GINA would not be implicated.

### **Does GINA permit employers to offer vaccinations to employees’ family members?**

Yes. The EEOC guidance states that, so long as the employer (a) does not require that an employee’s family members get vaccinated or punish an employee if his or her family members decide not to get vaccinated, (b) ensures that it obtains “prior, knowing, voluntary, and written authorization from the family member before the family member is asked any questions about his or her medical conditions,” and (c) ensures that all medical information obtained voluntarily from family members during the screening process is used only for purposes of providing the vaccination, is kept confidential, and is not provided to managers, supervisors, or others who make employment decisions for the employees, then GINA permits an employer to offer vaccinations to an employee’s family members.<sup>22</sup>

### **What protections do employees have for raising concerns about an employer’s vaccination program?**

The National Labor Relations Act (NLRA) protects both union and nonunion employees from interference with broadly defined “concerted activities.” Concerted activity may include expressing concerns about workplace safety, circulating a petition asking for greater safety protections or discussing vaccinations in connection with work. The NLRA generally prohibits employers from terminating, disciplining, threatening or coercing employees who engage or refuse to engage in such actions unless an employer can establish a countervailing interest, such as the safety of other workers or customers. Boycotting or protesting a mandatory vaccination policy may be considered “concerted activity” under the NLRA. However, the National Labor Relations Board (NLRB) has signaled that it may be permissible in some circumstances for employers to place employees on leave, or take other adverse actions, until they comply with such a policy.<sup>23</sup>

Employee protests regarding vaccination also may raise retaliation concerns. For example, prior guidance from the Occupational Safety and Health Administration

(OSHA) states that if an employee refuses to get a vaccine due to a reasonable belief that he or she has a medical condition creating a real danger of serious illness or death (e.g., a serious reaction to the vaccine), that employee may be protected as a whistleblower under Section 11(c) of the Occupational Safety and Health Act.

Employees may likewise be protected from retaliation under discrimination laws for raising concerns about a vaccination program because of medical conditions, religion, or other protected status. However, these claims generally require that the employer take adverse action “because of” protected activity, and thus employees may not be able to assert retaliation claims under Title VII, the ADA or GINA if the employer applies its vaccination policy consistently to all employees.

## **Wage and Hour Considerations**

### **Must employers pay for mandatory vaccinations?**

Not under federal law, but perhaps under a particular state’s law. Currently, all COVID-19 vaccines are being purchased by the federal government and provided to the public free of charge. That is expected to remain the case for the time being. Yet even if this changes, and employees were to incur a charge to obtain a vaccine, federal law would not require employers to pay for mandated vaccinations (unless, potentially, if the cost of vaccination would cause the employee’s wages to drop below the federal minimum wage, as discussed below). However, some states’ laws may require that employers pay, or reimburse employees, for the cost of mandatory vaccinations. For example, California law requires that employers reimburse employees for all necessary and reasonable business expenses, which would likely apply to the cost of mandatory vaccinations.

### **Are employees entitled to reimbursement for mileage or transportation costs incurred in getting vaccinated?**

Generally, no. Under the Fair Labor Standards Act (FLSA), employers are not generally required to reimburse employees for business expenses. One exception is that an employer must reimburse nonexempt employees for the cost of “tools of the trade” provided by the employee “which will be used in or are specifically required for the performance of the employee’s particular work” if failure to do so would reduce pay below the minimum or overtime wages required by the statute.<sup>24</sup> For example, nonexempt delivery drivers may be entitled to reimbursement for vehicle expenses incurred in making deliveries, if their pay minus the vehicle expenses would otherwise fall below minimum wage. However, trips for vaccination would generally be isolated, infrequent events. Therefore, even if obtaining a mandatory vaccination were deemed to be a work task, isolated use by an employee of his or her personal vehicle in getting vaccinated likely would not make the vehicle a “tool of the trade” within the meaning of the regulations and, therefore, should not require reimbursement. Further, for employees earning significantly above minimum wage, it is unlikely that such trips for vaccination would cause their wages to drop below minimum wage in any event.

Several states, however, have broader requirements to reimburse employees for business expenses, including transportation costs. For example, California requires an employer to indemnify an employee “for all necessary expenditures or losses incurred . . . in direct consequence of the discharge of his or her duties, or his or her obedience to the directions of the employer . . . .”<sup>25</sup> In Massachusetts, if an employee who



regularly works at a fixed location is required to report to a different location, or if an employee is directed to travel from one place to another during the course of his or her work day, the employee must be reimbursed for associated transportation expenses.<sup>26</sup> In Illinois, expenses “required of the employee in the discharge of employment duties and that inure to the primary benefit of the employer” generally must be reimbursed.<sup>27</sup> Employers considering a mandatory vaccination policy should carefully review the laws in the states where they operate to determine what associated costs, if any, must be reimbursed.

Under either the FLSA or state law, reimbursement likely would not be required for expenses incurred by employees obtaining vaccinations pursuant to an employer’s *voluntary* policy.

### **Must employees be paid for time spent getting vaccinated?**

The FLSA is unclear as to whether employees must be compensated for time getting vaccinated. The U.S. Department of Labor (DOL) has not expressly opined on whether time spent obtaining a vaccine is compensable. However, the DOL interprets the FLSA as requiring that, whenever an employer imposes “special tests, requirements or conditions” that an employee must meet (such as physical examinations, fingerprinting and drug testing), “time he or she spends traveling to and from the tests, waiting for and undergoing these tests, or meeting the requirements is probably hours worked,” regardless of whether such activities occur during the employee’s normal working hours.<sup>28</sup> If the employer mandates vaccination, employees may argue it is a “special requirement” similar to drug testing and should be compensated.<sup>29</sup> By contrast, voluntary vaccination that occurs outside of normal working hours or away from the employer’s premises would not be compensable under the FLSA.

State laws may also require compensation for time spent getting vaccinated. Similar to the FLSA, state laws may be interpreted to treat time spent getting mandatory vaccinations as compensable hours worked. In addition, states can mandate paid time off for vaccination, whether voluntary or mandatory. For example, New York now requires all private employers to provide up to four hours of paid leave for each COVID-19 injection,<sup>30</sup> and California has expanded its COVID-19 supplemental paid sick leave law to include vaccination appointments.<sup>31</sup>

Finally, OSHA has issued an Emergency Temporary Standard (ETS) that applies to work settings where employees provide health care, or health care support, services as defined in the ETS. The ETS requires that covered employees receive “reasonable time and paid leave (e.g., paid sick leave, administrative leave) . . . for vaccination and any side effects experienced following vaccination.”<sup>32</sup>

### **Are employees entitled to time off because of an adverse reaction to, or side effect of, a vaccine?**

It depends. OSHA’s ETS requires covered employers to provide paid leave for recovery from vaccination side effects.<sup>33</sup> California’s COVID-19 supplemental paid sick leave law now includes time spent recovering from vaccine side effects that prevent the employee from working.<sup>34</sup> In the absence of a similar state or local law applicable to an employer not covered by OSHA’s ETS, if an employee becomes vaccinated voluntarily outside of the workplace without employer involvement, then a vaccine side

effect likely could be treated in the same manner as any other non-COVID-19-related illness for purposes of applicable paid or unpaid time off.

If, however, vaccination was mandated by, or obtained at the direction of, the employer, then an employee who needs time off from work to recover may be entitled to the same rights and protections as an employee injured on the job.

### **Under the FLSA, must the value of vaccination incentives be included in the regular rate when calculating overtime pay?**

Probably not. The DOL has published guidance in which it takes the position that vaccination incentives are payments “in the nature of gifts for special occasions” that may be excluded from the regular rate.<sup>35</sup> State law may vary.

## **Collective Bargaining Considerations**

### **Is a vaccination program subject to collective bargaining in a unionized workplace?**

Probably. If employees are represented by a union, the NLRA requires their employer to bargain with the union over the terms and conditions of employment. Although the NLRB has not weighed in on COVID-19 vaccination policies specifically, employers of unionized workforces have been required to bargain over similar policies, such as employer-subsidized flu vaccinations and flu prevention.<sup>36</sup> With new requirements that federal employees and onsite contractors (many of whom belong to a union) attest to their vaccination status, the NLRB may excuse private employers from bargaining vaccination programs in the future. However, for the time being, an employer in a union environment still should expect to bargain a COVID-19 vaccination policy, unless the union has waived the duty to bargain. Waiver can take many forms. For instance, a collective bargaining agreement may specifically authorize the employer to implement reasonable workplace safety rules without bargaining or contain a broad management rights clause that could be interpreted to provide such authority.

Even if the union waived bargaining over a mandatory vaccination program, the employer still may be required to provide the union notice and an opportunity to bargain the effects of the program on employees, such as whether employees will receive time off to get the vaccine, who will administer the vaccine and consequences for employees who refuse the vaccine.

### **Are there exceptions to the duty to bargain because of the pandemic?**

Maybe. In the latter half of 2020, the Division of Advice (part of the NLRB’s Office of General Counsel) issued nonbinding guidance addressing the duty of employers to bargain over policies related to the pandemic. The Division acknowledged that employers may unilaterally implement changes to the terms and conditions of employment so long as their actions are reasonably related to an emergency, but they must negotiate the effects of their actions prior to implementing the changes.<sup>37</sup>

The NLRB’s new General Counsel is expected to rescind this guidance, and it is not yet clear whether new guidance will excuse vaccination programs from the duty to bargain. While the NLRB may ultimately view the Delta variant as an emergency that supersedes the duty to bargain a vaccination policy, employers in union environments should expect to bargain such policies for the time being.



## COVID-19 Safety Regulations

### **If my employees get vaccinated, are other safety measures such as masks and social distancing still needed?**

It depends on the state of the pandemic in the areas where employees work and the activities occurring at the particular workplace. In response to spread of the Delta variant, on July 27, the CDC again updated its guidance concerning whether fully vaccinated individuals should wear masks indoors in public. The CDC currently recommends that fully vaccinated individuals wear masks indoors in public when “in an area of substantial or high transmission.”<sup>38</sup> The CDC provides information about the level of community transmission by county.<sup>39</sup> Previously, the CDC had advised that fully vaccinated people could “resume activities without wearing a mask or physically distancing, except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance.” In response, on June 10, OSHA updated its guidance on mitigating and preventing the spread of COVID-19 in the workplace to advise that unless otherwise required by law, “most employers no longer need to take steps to protect their fully vaccinated workers who are not otherwise at-risk from COVID-19 exposure.”<sup>40</sup> Employees “otherwise at-risk” include those with immunocompromising conditions.<sup>41</sup> OSHA has yet to update its guidance in light of the CDC’s revised recommendations for fully vaccinated individuals. Protective measures, including masks and social distancing, should be maintained for employees who are not fully vaccinated.<sup>42</sup>

For employers covered by OSHA’s COVID-19 ETS, otherwise applicable personal protective equipment (PPE) and physical distancing and barrier requirements do not apply to fully vaccinated employees “[i]n well-defined areas where there is no reasonable expectation that any person with suspected or confirmed COVID-19 will be present.”<sup>43</sup> If those conditions are not satisfied, then an employer must provide, and fully vaccinated employees must use, PPE under the same circumstances as other employees, and, like other employees, fully vaccinated employees must be separated from all other people by at least six feet (or as far apart as is feasible).<sup>44</sup> If six feet of separation is not feasible, then the employer must install cleanable or disposable solid barriers at each fixed work location outside of direct patient care areas or resident rooms, unless it is not feasible to do so.<sup>45</sup>

Employers should also consult applicable state and local laws and orders, which may require an employer to implement specific safety measures to control the spread of the virus in the workplace. Akin Gump maintains an up-to-date [tracker](#) of such laws and orders in the firm’s COVID-19 resource center. In addition, employers should continue to pay close attention to the recommendations of the CDC and other official public health sources for the most up-to-date guidance on how to control the spread of the virus in the workplace.

## Privacy Issues

### **Does HIPAA apply to employee vaccinations?**

Potentially. Authorization for use or disclosure of employee vaccination information may be required under the Health Insurance Portability and Accountability Act (HIPAA). HIPAA restricts use and disclosure of certain individually identifiable health information. It generally does not apply to employers. However, HIPAA does apply to

employer-sponsored group health plans, meaning employers may still need to contend with HIPAA. If vaccines are offered as a benefit through a group health plan, employees should be asked to complete a HIPAA-compliant authorization permitting the plan to notify the employer that the employee has received the vaccine. Likewise, to the extent an employer contracts with a third-party health care provider to administer vaccines, employees must generally complete a HIPAA-compliant authorization to allow the provider to release information about vaccine status to the employer.

Once information about employee vaccination status is in the employer's possession, HIPAA no longer applies to the employer and its maintenance of such information.

### **Must an employee's vaccination status be kept confidential?**

There is conflicting authority. In December 2020, the EEOC released guidance clarifying that an employer's request for an employee's vaccination status was not a disability-related inquiry and that COVID-19 vaccination itself is not a medical examination. Thus, a request by an employer for vaccination status does not implicate the ADA.

In its updated guidance, the EEOC takes the position that the ADA's confidentiality requirement applies to information about an employee's vaccination status, regardless of how such information is obtained.<sup>46</sup> However, the EEOC's position is at odds with case law holding that the ADA's confidentiality provisions apply only to information obtained through a disability-related inquiry or medical examination.<sup>47</sup>

### **Employer Liability for Vaccination Programs**

#### **Do any federal or state laws protect employers from liability if they mandate vaccination or offer a COVID-19 vaccine to their employees?**

We are not aware of any state laws that expressly provide immunity to employers who mandate the vaccine. However, on the federal level, the Public Readiness and Emergency Preparedness Act ("PREP Act") authorizes the Secretary of the Department of Health and Human Services (HHS) to issue declarations that provide immunity from liability under federal and state law to "covered persons" for claims of "loss caused by, arising out of, relating to, or resulting from" the administration or use of "covered countermeasures" to diseases, threats and conditions.<sup>48</sup> The Secretary has issued a COVID-19 PREP Act declaration that covers countermeasures to the virus, including the COVID-19 vaccine. Covered persons under the COVID-19 PREP Act declaration include "program planners," which HHS has clarified includes private sector employers that carry out programs "with respect to the administration, dispensing, distribution, provision, or use of a security countermeasure or a qualified pandemic or epidemic product." Accordingly, a health care employer or a private employer that provides a "facility to administer or use" the COVID-19 vaccine could have immunity under the law. While private workplace vaccination clinics are still not generally an option for employers, as vaccination supplies increase employers may have the opportunity to offer vaccines to their workers. It is unclear whether PREP Act immunity would extend to a private employer sponsoring a vaccination clinic run by a third-party vendor. The PREP Act does not provide immunity to employers who simply mandate or encourage employees to get vaccinated on their own without employer involvement (e.g., at a public vaccination site or from their own health care provider).

OSHA recently stated that it will not require an employer to record worker side effects from a COVID-19 vaccine through May 2022, whether or not the employer mandates the vaccine.<sup>49</sup>

## Recommendations for Employee Vaccination Programs

The state of the pandemic, and the state of vaccination in the United States and globally, is rapidly evolving. A plan for workforce vaccination or timetable for returning employees to a particular workplace must be sensitive to these changes and how they impact an employer's workforce and business. This is not a situation where a single vaccination program will be appropriate for all employers. To the contrary, the complex interactions between federal, state and local laws—in combination with rapidly changing circumstances and the specific needs of each business's workforce, customers and operations—necessitate that employers carefully consider potential vaccination programs in consultation with counsel. Nonetheless, the following are considerations and features that are generally advisable for COVID-19 vaccination programs:

- I. Assess the potential impact of a vaccination policy on your business. What impact would such a policy have on your operations? Would it enable employees to work more safely and effectively? Would certain worksites or positions benefit from a policy more than others?
- II. Assess the potential reception to different policies by your employees, customers, visitors, business partners and the public. In creating a policy, give thoughtful consideration to feedback on the policy, including objections.
- III. Analyze the laws, regulations and orders applicable to your program to better understand your options and obligations in implementing a program, including state and local laws applicable where your employees work.
- IV. Create a written policy. A written policy will help ensure that employees understand the policy and that the policy is applied consistently. Such a policy should clearly define the positions or locations to which the policy applies, your requirements of affected employees and the consequences of not satisfying those requirements. The policy should also include information about the bases on which an employee may request an accommodation and the process for doing so.
- V. Create a process for educating employees about the policy and inviting feedback, including for employee objections to the policy to be received, thoughtfully considered and appropriately addressed.

<sup>1</sup> As explained below, an employer's vaccination program is likely subject to collective bargaining in a unionized workplace, and the terms of a collective bargaining agreement could restrict an employer's ability to mandate vaccination.

<sup>2</sup> See *Whether Section 564 of the Food, Drug, and Cosmetic Act Prohibits Entities from Requiring the Use of a Vaccine Subject to an Emergency Use Authorization*, Memorandum Opinion for the Deputy Counsel to the President (July 6, 2021), <https://www.justice.gov/olc/file/1415446/download>.

<sup>3</sup> See *Jennifer Bridges v. Houston Methodist Hosp.*, Case 4:21-cv-01774, Doc. 18 (S.D. Tex. June 12, 2021).

<sup>4</sup> See <https://leg.mt.gov/bills/2021/billpdf/HB0702.pdf>.

<sup>5</sup> See <https://www.oregon.gov/boli/workers/Pages/covid-vaccine.aspx> (explaining that, under Oregon law, people licensed or certified to provide health care and employees of a health care facility, a licensed health care provider, or a clinical laboratory may not be subject to mandatory vaccination).

<sup>6</sup> See, e.g., Alabama <https://legiscan.com/AL/text/SB267/2021>, Arizona [https://azgovernor.gov/sites/default/files/eo\\_2021-09.pdf](https://azgovernor.gov/sites/default/files/eo_2021-09.pdf), Florida <https://www.flgov.com/wp-content/uploads/2021/04/EO-21-81.pdf>, Iowa <https://www.legis.iowa.gov/legislation/BillBook?ba=HF%20889&ga=89>, and Texas [https://gov.texas.gov/uploads/files/press/EO-GA-35\\_private\\_health\\_information\\_protection\\_vaccines.pdf](https://gov.texas.gov/uploads/files/press/EO-GA-35_private_health_information_protection_vaccines.pdf).

<sup>7</sup> Prior to making a conditional job offer to an applicant, medical exams and disability-related inquiries are generally prohibited. After making an offer but before employment begins, an employer may make disability-related inquiries and conduct medical examinations, regardless of whether they are related to the job, as long as it does so for all entering employees in the same job category.

<sup>8</sup> For more information on the opinions and guidance attributed to the EEOC in this FAQ, see <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

<sup>9</sup> See <https://www.cdc.gov/vaccines/hcp/acip-recs/general-recs/contraindications.html>.

<sup>10</sup> See <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

<sup>11</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/pregnancy.html>.

<sup>12</sup> See *id.*; <https://www.cnn.com/2021/07/30/health/pregnant-covid-vaccine-recommendation-wellness/index.html>.

<sup>13</sup> See <https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace>.

<sup>14</sup> See *id.*

<sup>15</sup> See *Fallon v. Mercy Catholic Medical Center*, 877 F.3d 487 (3d Cir. 2017) (dismissing the claims of a psychiatric crisis intake worker who refused to comply with his employer's mandatory flu vaccination policy because of strong personal beliefs); *Brown v. Children's Hosp. of Phila.*, 794 Fed. Appx. 226 (3d Cir. 2020) (holding that a hospital employee's opposition to flu vaccination because of her "holistic health lifestyle" was not religious in nature).

<sup>16</sup> See <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

<sup>17</sup> See *id.*

<sup>18</sup> *Id.*

<sup>19</sup> See *id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> See NLRB General Counsel Memorandum 20-14, available at <https://www.nlr.gov/guidance/memos-research/general-counsel-memos>.

<sup>24</sup> See 29 C.F.R. § 531.35.

<sup>25</sup> See Cal. Lab. Code § 2802.

<sup>26</sup> See 454 Mass. Code Regs. 27.04(4)(b), (d).

<sup>27</sup> See 820 Ill. Comp. Stat. 115/9.5(b).

<sup>28</sup> See <https://webapps.dol.gov/elaws/whd/flsa/hoursworked/screenEr13.asp>; see also *Borne v. AAY Security LLC*, No. 1:17-CV-510, 2019 WL 5394010, at \*5 (E.D. Tex. Oct. 21, 2019) (DOL determined that drug testing time was compensable).

<sup>29</sup> The same is likely true in states with laws that mirror the FLSA and could also be true in states with wage and hour laws that diverge from the FLSA.

<sup>30</sup> See <https://legislation.nysenate.gov/pdf/bills/2021/S2588A>.

<sup>31</sup> See [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=202120220SB95](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB95).

<sup>32</sup> See 29 C.F.R. § 1910.502(m).

<sup>33</sup> See *id.*

<sup>34</sup> See [https://leginfo.ca.gov/faces/billTextClient.xhtml?bill\\_id=202120220SB95](https://leginfo.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB95).

<sup>35</sup> See <https://www.dol.gov/agencies/whd/flsa/pandemic#23>.

<sup>36</sup> See *Virginia Mason Hosp.*, 357 NLRB 564 (2011); *Keeler Die Cast*, 327 NLRB 585, 589 (1999).

<sup>37</sup> See, e.g., *Mercy Health Partners*, 07-CA-258220, Advice Closing Email dated Aug. 11, 2020, <https://www.nlr.gov/sites/default/files/attachments/pages/node-6409/07-ca-25822008-11-20.pdf>; see also *Kiro, Inc.*, 317 NLRB 1325, 1327 (1995) (“An employer has an obligation to give a union notice and an opportunity to bargain about the effects on unit employees of a managerial decision even if it has no obligation to bargain about the decision itself.”).

<sup>38</sup> See <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html>.

<sup>39</sup> See <https://covid.cdc.gov/covid-data-tracker/#county-view>.

<sup>40</sup> See [https://www.osha.gov/coronavirus/safework?utm\\_medium=Email&utm\\_source=SFMC&utm\\_campaign=&utm\\_content=](https://www.osha.gov/coronavirus/safework?utm_medium=Email&utm_source=SFMC&utm_campaign=&utm_content=).

<sup>41</sup> See *id.*

<sup>42</sup> See *id.*

<sup>43</sup> See 29 C.F.R. § 1910.502(a)(4).

<sup>44</sup> See *id.* at § 1910.502(f), (h).

<sup>[45]</sup> *Id.* at § 1910.502(i).

<sup>[46]</sup> See <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

<sup>[47]</sup> See, e.g., *EEOC v. Thrivent*, 700 F.3d 1044 (7th Cir. 2012); *Franklin v. City of Slidell*, 936 F. Supp. 2d 691 (E.D. La. 2013); *Heston v. Underwriters Lab., Inc.*, 297 F. Supp. 2d 840 (M.D.N.C. 2003).

<sup>[48]</sup> The term “loss” means any type of loss, including (i) death; (ii) physical, mental or emotional injury, illness, disability or condition; (iii) fear of physical, mental or emotional injury, illness, disability or condition, including any need for medical monitoring; and (iv) loss of or damage to property, including business interruption loss. However, immunity under the PREP Act does not extend to claims involving “willful misconduct.”

<sup>[49]</sup> See <https://www.osha.gov/coronavirus/faqs#vaccine>.

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