

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

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Key Points:

- Vaccinations for COVID-19 are picking up steam around the country as supply increases and eligibility expands.
- Now is the time for employers to think through issues raised by employee vaccination policies and programs.
- We address key questions about mandatory and voluntary policies, including discrimination, wage and hour, collective bargaining, safety, privacy and general liability considerations, and offer recommendations for employee vaccination programs.

One year into the pandemic, the U.S. Food and Drug Administration (FDA) has issued three Emergency Use Authorizations (EUAs) for COVID-19 vaccines, with more vaccines in various stages of testing. The vaccines are shown to be effective at protecting vaccinated people against symptomatic and severe COVID-19, and, according to the U.S. Centers for Disease Control (CDC), “a growing body of evidence suggests that fully vaccinated people are less likely to have asymptomatic infection and potentially less likely to transmit SARS-CoV-2 to others.”¹ In most states, vaccine eligibility still remains restricted to certain groups. However, some states have made vaccines available to the general public, and President Biden has announced that every state will open vaccination to all adults by April 19. To that end, the federal government has arranged to purchase enough doses of the Pfizer-BioNTech and Moderna vaccines by the end of July to vaccinate 300 million individuals with the recommended priming and booster shots,² along with 100 million doses of Johnson & Johnson’s single-dose vaccine by the end of June.³ All doses purchased by the federal government are offered to recipients free of charge.

With widespread vaccine eligibility and availability on the horizon, 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 address many of the legal issues that employers should take into account as they evaluate the role of vaccinations in their return to work plans. Although we focus on federal law, employers should in all instances consider any

Contact Information

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

Gary M. McLaughlin

Partner

gmclaughlin@akingump.com

Los Angeles

+1 310.728.3358

Lauren Helen Leyden

Partner

lleyden@akingump.com

New York

+1 212.872.8172

Esther G. Lander

Partner

elande@akingump.com

Washington, D.C.

+1 202.887.4535

Nathan J. Oleson

Partner

noleson@akingump.com

Washington, D.C.

+1 202.887.4425

Robert G. Lian Jr.

Partner

blian@akingump.com

Washington, D.C.

+1 202.887.4358

Brian Glenn Patterson

Partner

bpatterson@akingump.com

Houston

+1 713.250.2214

applicable state and local laws as well. Likewise, employers considering a vaccination policy should consult with experienced counsel.

Mandatory Vaccinations and Discrimination Concerns

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

Yes, subject to exceptions under antidiscrimination laws, though employers should monitor legislative and litigation developments that could impact employer vaccination programs. At present, no laws expressly prohibit employers from mandating COVID-19 vaccinations as a condition of employment.⁴ Bills that have the effect of prohibiting employers from mandating COVID-19 vaccinations prior to full approval by the FDA have been proposed in a number of states, including Alabama, Arizona, Connecticut, Illinois, Iowa, Kansas, Kentucky, Maryland, Minnesota, New York, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas and Washington,⁵ but none have garnered significant momentum to date. Further, a New York state legislator has introduced a bill mandating vaccination if New York fails to achieve herd immunity.⁶ Additionally, at least one lawsuit has been filed challenging an employer vaccination mandate on public policy grounds while COVID-19 vaccines are administered under an EUA and not yet fully approved by the FDA.⁷

In considering whether to implement a mandatory vaccination program, employers 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 current employees, or ask current employees questions that are likely to elicit disability-related information, where the exams or questioning are “job-related and consistent with business necessity.”⁸ However, in guidance published in December 2020, the Equal Employment Opportunity Commission (EEOC) clarified that vaccine administration alone, or employers asking about or requiring proof of vaccination, is not a medical examination within the meaning of the ADA.⁹ Therefore, under the ADA, employers would generally be permitted to mandate that employees get vaccinated.

However, complications may arise to the extent an employer were to provide vaccinations on-site or otherwise contract with a third party to administer the vaccine, options that may exist as vaccinations become more widely available to the public. In order to obtain a vaccine, employees need to answer screening questions for “contraindications” to the vaccine (i.e., medical conditions that increase the risk for a serious adverse reaction).¹⁰ 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 within the meaning of the ADA. Therefore, before an employer can permissibly ask the pre-screening questions, the employer must be able to show that mandatory vaccination 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.”¹¹

Jo-Ellyn Sakowitz Klein
Senior Counsel
jsklein@akingump.com
Washington, D.C.
+1 202.887.4220

James C. Crowley
Counsel
jcrowley@akingump.com
Washington, D.C.
+1 202.887.4579

Elizabeth England
Counsel
eeengland@akingump.com
Washington, D.C.
+1 202.887.4553

Amanda S. McGinn
Associate
amcginn@akingump.com
Washington, D.C.
+1 202.887.4587

Laura Vaughn
Associate
vaughnl@akingump.com
Los Angeles
+1 310.229.1026

Joshua Keith Sekoski
Counsel
jsekoski@akingump.com
Washington, D.C.
+1 202.887.4544

The EEOC suggests two alternatives that would allow employers to implement vaccination programs without having to demonstrate that non-vaccinated employees pose a “direct threat.” First, employers may implement strictly voluntary vaccine programs. So long as the employer makes vaccines available to employees on a voluntary basis, and thus employees’ decision to answer the pre-screening questions is likewise voluntary, the ADA’s restrictions on medical inquiries and exams are not implicated. Second, an employer can require that employees receive vaccines from a public vaccination site, or a health care provider, without employer involvement.

The EEOC’s guidance further explains that requiring workers to offer proof that they have received a COVID-19 vaccine is permissible because an employee who refuses to do so may have reasons for not being vaccinated that are entirely unrelated to a disability. However, the EEOC’s guidance also cautions employers that, to avoid ADA implications, they may want to warn employees not to include any medical information when submitting vaccination proof.

What exceptions to a mandatory vaccination policy must be made under the ADA?

Employers may need to make exceptions to mandatory vaccination policies for employees with disabilities that prevent them from being vaccinated. The EEOC’s guidance on this issue explains that, consistent with the ADA, an employer may mandate COVID-19 vaccines as a safety-based job qualification as long as the employer can demonstrate that unvaccinated employees would pose a direct threat to the health and safety of the employee or others. However, the employer still must engage in an interactive process with employees who claim that a disability prevents them from receiving the vaccine, both to explore accommodation alternatives such as remote work and, in the absence of a viable accommodation, to ensure that a “direct threat” supports excluding the disabled employees from the workplace.¹² In the case of the latter, the EEOC states that 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.

The EEOC guidance further suggests that an unvaccinated employee who could infect others in the workplace would likely qualify as a “direct threat.” But an employer must still conduct an individualized determination of the four factors above to assess the risk and degree of the potential harm before reaching that conclusion. For example, an employer may be unable to establish that an employee poses a direct threat to others at the worksite where the employee’s workspace is isolated, the employer has not had issues with workplace outbreaks, and the employer is in compliance with all CDC recommended safety measures.

Finally, even when a direct threat justifies excluding unvaccinated employees from the worksite, the EEOC reiterates that an employer cannot automatically terminate the employee and must consider teleworking as a reasonable accommodation, as well as ensure compliance with paid or unpaid leave protections under federal, state and local laws. The EEOC’s guidance likewise explains that consideration must be given to the effectiveness of remote work arrangements during the pandemic because “the temporary telework experience could be relevant to considering the renewed request. In this situation, for example, the period of providing telework because of the COVID-19 pandemic could serve as a trial period that showed whether or not this employee

with a disability could satisfactorily perform all essential functions while working remotely, and the employer should consider any new requests in light of this information.”

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

According to the CDC, pregnant individuals are at increased risk for severe illness from COVID-19, and there is limited data at this time about the safety of COVID-19 vaccines for people who are pregnant.¹³ The federal Pregnancy Discrimination Act (PDA) generally forbids discrimination based on pregnancy with respect to any aspect of employment. The PDA requires an employer to provide the same benefits of employment to pregnant employees that it provides to all other employees with similar abilities or inabilities to work. This means that an employer who grants accommodations to other, nonpregnant employees with similar inabilities to work must either do so for pregnant employees or have a legitimate and nondiscriminatory explanation for treating pregnant employees less favorably. Therefore, an employer’s refusal to excuse a pregnant employee from a vaccination requirement could give rise to a claim under the PDA if nonpregnant employees are excused from the requirement. Certain pregnancy-related medical conditions may also qualify as disabilities under the ADA and be entitled to reasonable accommodations.

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.¹⁴ 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.”¹⁵ 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 Third 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.¹⁶ 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 GINA apply to employee vaccinations?

No, so long as the vaccinations are voluntary, or are not administered by the employer or a third party engaged by the employer. 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 confirms that vaccination for COVID-19 itself does not implicate GINA, even if the vaccine uses messenger RNA (mRNA) technology, as the Pfizer and Moderna vaccines do. mRNA vaccines work by introducing an RNA sequence into the body, which then triggers instructions for the body's cells to generate proteins to create an immune response to a virus.¹⁷ By contrast, Johnson & Johnson's vaccine utilizes "viral vector" technology that uses a modified, harmless version of a virus as a carrier to deliver immunity instructions to cells in the body.¹⁸ Although the EEOC has not specifically opined whether the technology of the Johnson & Johnson vaccine by itself implicates GINA, it is unlikely that it would, given that viral vector vaccines do not rely on genetic information.¹⁹

As with the ADA, an employer's administration of the vaccine may implicate GINA if pre-vaccine screening questions elicit genetic information (e.g., family medical history information) pursuant to an employer's mandatory vaccination policy. However, like the analysis under the ADA, such pre-screening questions would not implicate GINA if the employer's policy is voluntary and thus the decision to answer pre-screening questions is voluntary as well. Such questions would also not implicate GINA if asked by an independent provider. Therefore, employers can avoid the risk of violating GINA by simply asking employees to provide proof of vaccination or by adopting a voluntary policy. Of course, regardless of whether an employer's program is mandatory or voluntary, GINA is not implicated where pre-screening questionnaires, such as the CDC's model questionnaire, contain no questions regarding family medical history.²⁰

May employers offer employees incentives to get vaccinated?

Yes, with limitations. As explained above, the restrictions in the ADA and GINA regarding medical and genetic inquiries are inapplicable when an employer's vaccination program is completely voluntary. Whether a vaccination program is considered truly voluntary, however, will depend upon the nature and scope of the awards or incentives that are tied to participating in the program.

In January, before the change in presidential administration, the EEOC proposed new regulations under the ADA and GINA that interpreted a "voluntary" wellness program as a program where the employer offers no more than a de minimis incentive, such as a water bottle, to encourage employee participation, reasoning that incentives cannot

be so attractive that they have the effect of coercing an employee into providing information protected by the ADA or GINA.²¹ However, the EEOC's proposed rule was withdrawn in compliance with the Biden-Harris administration's freezing of all pending rulemaking by the previous administration,²² and the EEOC has not announced if or when employers should expect further guidance on wellness programs.

In light of the legal uncertainty under the ADA and GINA surrounding employer options for offering incentives tied to wellness programs, on February 1, a number of associations—including the U.S. Chamber of Commerce, the Society for Human Resource Management and others—wrote a letter to Charlotte Burrows, the newly appointed chair of the EEOC, urging “the EEOC to issue guidance providing clarification on the extent to which employers may offer their employees incentives to vaccinate.”²³ As of publication, the EEOC has not issued any such guidance.

If the employer is not involved in administering vaccines (directly or indirectly by using a third party), then the EEOC's wellness rule—if and when it is issued—likely would not come into play. Asking employees whether they have been vaccinated, and/or offering incentives for such vaccinations, likely would not involve a “medical exam” or disability-related inquiry, and thus would not implicate the ADA. However, the ADA requires employers to provide reasonable accommodations that allow employees with disabilities to participate equally in wellness initiatives, including eligibility for incentives, regardless of whether the initiative is covered by the EEOC's wellness rule. Therefore, the employer would still need to engage in the ADA interactive process and provide reasonable accommodations to the extent doing so would enable employees with disabilities to participate in the incentive and would not cause an undue burden.

Given the uncertainty in this area, employers are wise to be cautious with respect to vaccination incentives until the EEOC publishes guidance. One potential option to incentivize vaccination would be to offer paid time off to allow employees who choose to be vaccinated adequate time to make vaccination appointments, become vaccinated, and recover from potential side effects without worrying about missed work. Paid time off reasonably offered to keep employees who choose to be vaccinated whole is likely to be considered a de minimis incentive, and persons with disabilities who cannot get vaccinated for medical reasons would not need to devote time to making vaccination appointments, becoming vaccinated, and recovering from potential vaccine side effects.

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, refusing to participate in or protesting a mandatory vaccination program (or a lack thereof), 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. Additionally, prior guidance from 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.

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 in light of the federal government's purchase of enough vaccine for 300 million individuals. 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.²⁴ 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, likely would 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 . . ." ²⁵ 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.²⁶ 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.²⁷

Such laws may very well require reimbursement for mileage and other associated costs of getting vaccinated. Employers considering a mandatory vaccination policy should review the laws in the states where they operate carefully.

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.

Do employees need to be paid for time spent getting vaccinated?

Whether time spent by an employee getting vaccinated must be treated as compensable under the FLSA likely depends on when the vaccination occurs and whether vaccination is mandated by the employer. 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.²⁸ Vaccination is arguably a “special requirement” that the DOL would treat similarly to drug testing and require compensation if the vaccination were mandatory.²⁹ 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.

If the vaccination occurs on the employer’s premises at a time when the employee would otherwise be working, the DOL may view such time as compensable, even if vaccination is voluntary.³⁰

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,³¹ and California has expanded its COVID-19 supplemental paid sick leave law to include vaccination appointments.³²

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

It depends. California’s COVID-19 supplemental paid sick leave law now includes time spent recovering from vaccine side effects that prevent the employee from working.³³ In the absence of a similar state or local law, if an employee becomes vaccinated voluntarily outside of the workplace without employer involvement, then an employee’s entitlement to paid or unpaid time off to recover from an adverse reaction or side effect would likely be treated as any other non-COVID-19 related illness for purposes of any applicable paid or unpaid time off.

If, however, the 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, including potentially workers’ compensation or leave under the employer’s policies.

Should the value of vaccination incentives be included in the regular rate when calculating overtime pay?

Perhaps. The FLSA requires that all remuneration be included in a nonexempt employee's regular rate for purposes of calculating overtime compensation unless the remuneration is expressly excluded by the statute.³⁴ Paid time off is excludable from the regular rate, but other nondiscretionary incentives (such as cash or gift cards) intended to induce employees to do something such as obtain a vaccine are not expressly listed. However, in December 2019, the DOL issued revised regulations concerning exclusions from the regular rate in which it provided additional, specific examples of payments that may be excluded.³⁵ An employer hoping to avoid inclusion of vaccination incentives in the regular rate should evaluate whether its incentive program would satisfy the requirements for exclusion found in one of these regulations. Unless the program satisfies a regulation, the value of incentives or prizes offered through the program should likely be included in the regular rate, which would in turn increase the overtime rate of pay during the applicable time period. The same may be true under various state laws.

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 National Labor Relations Board (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.³⁶ Thus, an employer in a union environment almost certainly would be required to bargain over a compulsory 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 mandatory subjects of bargaining so long as their actions are reasonably related to the emergency situation, but they must negotiate over both the decision (to the extent there is a decisional bargaining obligation, as discussed in response to the previous question) and its effects within a reasonable time thereafter.³⁷

It is not clear whether the Board would view implementation of a vaccination policy in a similar manner, especially given the foreseeability of vaccines and vaccination programs. Employers should also anticipate relevant policy changes under the new Acting General Counsel, who is expected to rescind or modify much of his predecessor's guidance. Thus, employers should consider engaging with their employees' representatives in advance to avoid delays or disputes in implementing a vaccination policy.

COVID-19 Safety Regulations

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

Yes. For the time being, employers should continue to implement other safety measures. Although the current evidence suggests that COVID-19 vaccines are effective at keeping recipients from getting sick, the evidence is less clear as to how long vaccine protection lasts, whether the vaccine protects against variants and to what extent a vaccinated individual may transmit the virus to others.³⁸ Additionally, non-employees who are not vaccinated may be at the workplace. For these reasons, it is advisable for vaccinated employees to still wear face coverings and remain physically distant from others where possible.³⁹

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. To date, most such laws continue to apply, regardless of the level of vaccination among an employer's workforce.⁴⁰ Akin Gump maintains an up-to-date [tracker](#) of such laws 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

Are there any authorization obligations with respect to employee vaccinations?

Yes. Authorization for use or disclosure of employee vaccination information may be required under the Health Insurance Portability and Accountability Act (as amended and including its implementing regulations, HIPAA)⁴¹ or state law. HIPAA restricts use and disclosure of certain individually identifiable health information but generally does not apply to employers. However, HIPAA does apply to employer-sponsored group health plans, meaning employers 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 that is subject to HIPAA to administer vaccines, employees must generally complete a HIPAA-compliant authorization to allow the provider to release information about vaccine status to the employer (unless an exception applies). States may impose additional authorization requirements. Notably, HIPAA and state authorization requirements may differ. An employer should ensure that its form suffices in all applicable jurisdictions.

Once information about employee vaccination status is in the employer's possession, HIPAA no longer applies. Instead, employers are subject to the ADA's confidentiality

provisions (discussed below) and applicable state privacy laws. For instance, California's Confidentiality of Medical Information Act (CMIA)⁴² generally restricts employers from using, disclosing or knowingly permitting the disclosure of medical information that the employer possesses pertaining to its employees without the employee's CMIA-compliant authorization.

How should records of employee vaccinations be maintained?

Employee medical information obtained in the course of a vaccination program, such as proof of vaccination and responses to pre-screening inquiries, is subject to the ADA's confidentiality requirements, regardless of whether it is obtained through a mandatory or voluntary program. Such information must be collected on separate forms from other employment information and stored separately from the employee's ordinary personnel file. If maintained electronically, employee medical information should be subject to appropriate security safeguards for electronic records (e.g., password-protection or encryption). The ADA permits disclosure of employee medical information only in limited circumstances to supervisors and managers, first aid and safety personnel, and government officials investigating compliance with the ADA. State law may also mandate security safeguards.

Must the identities of employees who have or have not been vaccinated be kept confidential?

Yes. Asking an employee if he or she has been vaccinated, or requesting proof of vaccination, is not a disability-related inquiry. However, EEOC guidance states that an employer's confidentiality obligations under the ADA extend beyond information obtained through a disability-related inquiry, including to medical information that is voluntarily disclosed by the employee. Aside from the ADA, certain state laws may require employers to safeguard employee vaccination status.⁴³ Therefore, employers should avoid disclosing an individual's vaccination status beyond those who have a need to know.

May I disclose to customers, visitors or the public information about the vaccination status of employees?

Generally no. The ADA prohibits employers from disclosing an employee's medical information to a customer, visitor or the public. However, statistical information about those who have been vaccinated, without any employee-identifying information, is not confidential medical information and may be disclosed. Therefore, for example, the ADA would not prohibit employers from disclosing or publicizing that "all of its employees have been vaccinated," without identifying individual employees.

Employer Liability for Vaccination Programs

Do any federal or state laws protect employers that mandate or offer the vaccine from liability?

To date, 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.⁴⁴ 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).

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:

1. Assess the potential impact of workforce vaccination on your business. What impact would vaccination of your workforce have on your operations? Would it enable employees to work more safely and effectively? Would certain worksites or positions benefit from vaccination more than others?
2. 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.
3. 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.
4. 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.
5. 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.

¹ See <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html>.

² See <https://www.washingtonpost.com/health/2021/02/11/vaccine-supply-biden/>.

³ See *id.*

⁴ An executive order in Florida states that COVID-19 vaccines “will not be mandated” and prohibits businesses “from requiring patrons or customers to provide any documentation certifying COVID-19 vaccination or post-transmission recovery to gain access to, entry upon, or service from the business.” Conspicuously, the executive order does not expressly prohibit employers from requiring employees to be vaccinated. See <https://www.flgov.com/wp-content/uploads/2021/04/EO-21-81.pdf>. Texas has a similar order. See https://gov.texas.gov/uploads/files/press/EO-GA-35_private_health_information_protection_vaccines.pdf.

⁵ See <http://alisondb.legislature.state.al.us/ALISON/SearchableInstruments/2021RS/PrintFiles/HB214-int.pdf> (Alabama); https://custom.statenet.com/public/resources.cgi?id=ID:bill:AZ2021000S1648&ciq=ncsl&client_md=202875d30d06911324e00a3a4fb9fa6f&mode=current_text (Arizona); <https://www.cga.ct.gov/2021/TOB/H/PDF/2021HB-05402-R00-HB.PDF> (Connecticut); <https://www.ilga.gov/legislation/102/HB/10200HB3682.htm> (Illinois); <https://www.legis.iowa.gov/publications/search/document?fq=id:1211141&q=vaccine> (Iowa); http://www.kslegislature.org/li/b2021_22/measures/sb213/ (Kansas); https://apps.legislature.ky.gov/recorddocuments/bill/21RS/sb98/orig_bill.pdf (Kentucky); <https://mgaleg.maryland.gov/2021rs/bills/noln/hb/fhb1171.pdf> (Maryland); <https://www.revisor.mn.gov/bills/bill.php?view=chrono&b=House&f=HF41&ssn=7&y=2020> (Minnesota); <https://www.nmlegis.gov/Sessions/21%20Regular/bills/senate/SB0408.pdf> (New Mexico); https://assembly.state.ny.us/leg/?default_fld=&bn=A04602&term=2021&Summary=Y&Actions=Y&Text=Y&Committee%26nbspVotes=Y&Floor%26nbspVotes=Y#A04602 (New York); http://webserver1.lsb.state.ok.us/cf_pdf/2021-22%20INT/SB/SB765%20INT.PDF (Oklahoma); <https://www.legis.state.pa.us/cfdocs/billInfo/billInfo.cfm?sYear=2021&sInd=0&body=H&type=B&bn=262> (Pennsylvania); <http://webserver.rilin.state.ri.us/BillText21/HouseText21/H5989.pdf> (Rhode Island); https://www.scstatehouse.gov/sess124_2021-2022/bills/3511.htm (South Carolina); <https://sdlegislature.gov/Session/Bill/22360/214789> (South Dakota); <https://capitol.texas.gov/BillLookup/history.aspx?LegSess=87R&Bill=HB1687> (Texas); <http://lawfilesexp.leg.wa.gov/biennium/2021-22/Pdf/Bills/House%20Bills/1305.pdf?q=20210301095325> (Washington).

⁶ See <https://www.nysenate.gov/legislation/bills/2019/a11179>.

⁷ See *Isaac Legaretta et al. v. Fernando Macias et al.*, Case 2:21-cv-00179-MV-GBW (D.N.M. filed Feb. 28, 2021). According to the plaintiff’s complaint, he is employed at a detention center in Doña Ana County in New Mexico and is subject to a directive issued by the Doña Ana County Manager’s Office requiring all first responders in the county, including “detention officers and other staff who have face-to-face contact with inmates,” to get vaccinated as a condition of employment “unless a reasonable accommodation is approved.” See *id.* at Dkt. No. 1 (Complaint) ¶ 3, Exhibit A. He contends that the FDCA demonstrates a public policy against mandatory vaccination and that if he “were to be terminated for refusing a vaccine which federal law requires *not* to be mandated, it would be a retaliatory discharge under New Mexico law.” See *id.* ¶ 15. As of publication, the case is pending and no decision on the merits has been issued.

⁸ 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.

⁹ 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>.

¹⁰ See <https://www.cdc.gov/vaccines/hcp/acip-recs/general-recs/contraindications.html>.

¹¹ See <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

¹² The guidance suggests the Job Accommodation Network website as a source of potential accommodations, <https://askjan.org/>.

¹³ See <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/pregnancy.html>.

¹⁴ See <https://www.eeoc.gov/laws/guidance/questions-and-answers-religious-discrimination-workplace>.

¹⁵ See *id.*

¹⁶ 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).

¹⁷ See <https://www.cdc.gov/vaccines/covid-19/hcp/mrna-vaccine-basics.html>.

¹⁸ See <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/different-vaccines/viralvector.html>.

¹⁹ See <https://www.stamfordhealth.org/healthflash-blog/infectious-disease/johnson--johnson-covid-19-vaccine/>.

²⁰ See <https://www.cdc.gov/vaccines/covid-19/downloads/pre-vaccination-screening-form.pdf>.

²¹ See *id.*

²² See <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/>.

²³ See <https://aboutblaw.com/VnJ>.

²⁴ See 29 C.F.R. § 531.35.

²⁵ See Cal. Lab. Code § 2802.

²⁶ See 454 Mass. Code Regs. 27.04(4)(b), (d).

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

²⁸ 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).

²⁹ 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.

³⁰ See 29 C.F.R. § 785.43 ("Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he is working constitutes hours worked.").

³¹ See <https://legislation.nysenate.gov/pdf/bills/2021/S2588A>.

³² See https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=202120220SB95.

³³ See *id.*

³⁴ See 29 U.S.C. § 207(e).

³⁵ See <https://www.govinfo.gov/content/pkg/FR-2019-12-16/pdf/2019-26447.pdf>.

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

³⁷ 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>.

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

³⁹ See <https://www.osha.gov/coronavirus/safework>.

⁴⁰ An exception is found in Anchorage, Alaska, which has relaxed its mask mandate in the workplace for vaccinated individuals who are separated from the public and unvaccinated coworkers. See <https://www.muni.org/covid-19/documents/eo13v4.pdf>.

⁴¹ See 45 C.F.R. pts. 160, 162, and 164.

⁴² See Cal. Civ. Code § 56 *et seq.*

⁴³ See <https://www.eeoc.gov/laws/guidance/enforcement-guidance-disability-related-inquiries-and-medical-examinations-employees>.

⁴⁴ 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.”

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