



FYI

COVID-19 Vaccines in the Workplace **HEALTH AND SAFETY**

Revised: February 2021

Summary:

Employers have questions about vaccines in the workplace. Can I mandate vaccines? Can I ask if my employees have been vaccinated? What are the privacy considerations? The following is an overview of vaccinations in the workplace.

Important Notice:

The information provided herein is general in nature and designed to serve as a guide to understanding. These materials are not to be construed as the rendering of legal or management advice. If the reader has a specific need or problem, the services of a competent professional should be sought to address the particular situation.

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Introduction

With COVID-19 vaccines rolling out, employers are faced with decisions around how to manage them in the workplace. As with most employment law issues, these decisions are complex and require in-depth analysis. It is also important to remember that this information is specific to COVID-19 vaccines, and other vaccines, like for the flu, fall under different guidelines.

Federal, State, and Local Guidance and Restrictions

Employers should know and understand all guidance from federal, state, and local agencies on issues relating to vaccinations and the workplace. This information will help employers determine what they may and may not do regarding vaccines and their employees.

Besides state health departments, federal agencies include the Equal Employment Opportunity Commission (EEOC), the Occupational Safety and Health Administration (OSHA), and the Centers for Disease Control and Prevention (CDC). Each agency has different authority, and it essential to understand the guidance from each.

Mandating Vaccines in the Workplace

Some employers may want to require all employees to be vaccinated before returning to the workplace. While it's possibly okay to require a vaccine, it can be problematic.

The EEOC issued guidance regarding the COVID-19 vaccine, indicating that while employers can mandate employees get the vaccine, employers must engage in the interactive process if an employee cannot get the vaccine due to religious or disability reasons.

Under the Americans with Disabilities Act (ADA), employers can have a work standard that includes "a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace." However, suppose the employer wants to discipline an employee who refuses the vaccine. In that case, the employer must be able to prove objectively that an unvaccinated employee would pose a direct threat to the workplace and employees due to a "significant risk of substantial harm to the health or safety of the individual or others." Employers must be able to enforce this in every instance. Employers should assess whether the administrative time and attention needed to evaluate each request for an accommodation is something they can manage.

Employers will be acting consistently with the ADA as long as any screening implemented is consistent with advice from the CDC and public health authorities for that type of workplace at that time. Therefore, employers should evaluate their workplace to see if mandating the vaccine would be appropriate. They should also look to the CDC and public health authorities for guidance on mandating vaccines.

In addition, the National Labor Relations Act (NLRA) provides protection for both union and non-union employees regarding protected concerted activity. This NLRA provision may protect employees' rights who engage in concerted activities with regard to a vaccination

policy, including protesting or complaining to management about a mandatory vaccination policy or simply discussing the vaccine with co-workers. Employers with unions will need to check with the union or the collective bargaining agreement before mandating vaccines.

A few other considerations in mandating a vaccine:

- Determine whether they will require it for all positions or only certain positions.
- Pay: if you are going to require the vaccine, are you going to pay employees for the time they use to get it? If you are going to pay, consider overtime for non-exempt employees.
- Enforcement: will you truly be willing to fire or discipline employees who just don't get vaccinated? At what point would you have to close a department or the business if enough employees refuse? It is important to be consistent in how you manage refusals.

HR's Role in Workplace Vaccinations

Instead of requiring a vaccine, educating employees and making it easy for them to get the vaccine may be the better strategy. HR can take a primary role in communication and education.

Communicate early and often with employees regarding the benefits, availability, and efficacy of the vaccine. Consider the following:

- Present the information in easy to understand formats, such as posters that include graphics, short newsletters, or traditional mailers.
- Tout any perks or incentives associated with getting vaccinated.
- Include links and references to applicable policies and handbook statements.
- Communicate real-world examples of the positive outcomes of vaccination.
- Share positive stories regarding co-workers' vaccination experiences (with permission).
For example:
 - An email or video regarding an executive being vaccinated; or
 - A peer's positive experiences with the vaccine, Have them discuss the process of scheduling the vaccination appointment and any side effects or other challenges.
- Explain that vaccines are free, even if it's not covered by the employer's health insurance.
- Consider making it easier for employees to get vaccinated if possible:
 - Provide vaccinations on site to make them as convenient as possible.
 - Partner with a third party to provide vaccinations off site.
 - Provide paid time off for employees to get vaccinated on their own.
 - Offer vaccines to employees' family members.

Vaccination Policies

Employers may want to consider creating a vaccine policy. There are different options: policies can make vaccines mandatory or voluntary. Sample Policies can be found at the end of this FYI.

MANDATORY

Prior to a determination of whether vaccines will be mandatory, employers should:

- Ensure that such a mandate is job-related and consistent with business necessity.
- Conduct an individualized assessment of the workplace, including the potential risk of transmission and alternatives to the vaccination, to determine whether a vaccination mandate is necessary.
- Determine whether there are any state or local requirements or prohibitions with regard to employee vaccinations.

VOLUNTARY

This policy would encourage employees to receive the COVID-19 vaccination and educate them about the benefits and protections associated with the vaccine.

A policy that encourages vaccination by setting out facts based in science, law, and public health guidance will strengthen the position of an employer that is unable (or unwilling) to implement a vaccination mandate but still wishes to protect the health and safety of its employees. Rather than terminating or otherwise disciplining an employee who does not get vaccinated, an employer may require them under the policy to comply with other safety measures, e.g., wear a face covering, practice social distancing, or work remotely, if possible

Whether it is mandatory or voluntary, vaccine policies should:

- Provide a rationale for the policy. Explain the purpose of having a policy.
- Explain who is covered by the policy. Does it apply to all employees or just those who have public contact? If you will only cover certain employees, be sure you have legitimate business reasons for singling out some departments.
- Address proof of vaccination. For mandatory vaccination policies, make sure employees know who to send the proof to by title, and include contact information. Train managers so they know not to ask for any more information than the proof of vaccination, as more information may result in getting private health information. Explain to employees that proof of vaccination will be kept confidential.
- Adhere to privacy requirements. Your policy should adhere to any federal, state, or local privacy laws.
- Describe accommodation or exemption procedures. Address how the employer will engage in the interactive process. You can refer to other ADA or religious accommodation policies.
- Address pay; address how or if employees will be compensated for time spent getting vaccinated.
- Include consequences for non-compliance. You will need to be willing and able to uniformly enforce those consequences.

- Address leave and time off; determine whether employees may or must take paid time off, and what happens if employees don't have available paid time.

Sample Policies

MANDATORY POLICY (CAN BE MODIFIED TO MEET NEEDS)

COVID-19 Vaccination Policy

[Employer] is committed to protecting the health and well-being of our employees, their families, and members of our community against the coronavirus (COVID-19). This policy is based on guidance and recommendations issued by the federal Centers for Disease Control and Prevention (CDC) and other public health authorities. The COVID-19 vaccine has been determined to be a safe and effective measure for preventing COVID-19 infection.

Policy

[Employer] requires all employees to obtain and maintain up-to-date COVID-19 vaccinations, when available. [Employer] believes this is an important measure to protect the health and safety of employees, customers, clients, family members, and those who visit the workplace from COVID-19 infection.

All employees must maintain and provide written proof that they have been fully vaccinated against COVID-19 upon becoming eligible for COVID-19 vaccination. Employees must provide proof of vaccination to Human Resources. Note that employees should not provide proof of vaccination that includes any genetic information (e.g., family medical history). Any documentation received by an employee will be kept confidential to the extent required by law.

New hires must present proof of COVID-19 vaccination if vaccines are available and the employee is eligible at the time of hire.

This policy is mandatory except for employees with a documented medical and/or religious reason for not receiving the COVID-19 vaccine. The process for seeking an exemption or reasonable accommodation based on a medical and/or religious reason is addressed below.

Requests for Exemptions as a Reasonable Accommodation **[OPTION 1]**

An employee or job applicant (i) who is disabled, pregnant, nursing, or who has a qualifying medical condition that contraindicates a COVID-19 vaccination, or (ii) who objects to being vaccinated on the basis of a sincerely held religious belief, observance, or practice may request an exemption from this vaccination policy. All requests should be directed to Human Resources.

[Employer] will engage in an interactive process to determine if an exemption as a reasonable accommodation may be appropriate. This process will involve exchanging information about the reasons for the request (e.g., information regarding the disability) and identifying appropriate workplace accommodations (e.g., remote work, if possible).

An exemption as a reasonable accommodation may be provided so long as it does not cause an undue hardship for the organization or pose a direct threat to others' health and safety.

This determination will be made on a case-by-case basis. Any medical information concerning an employee's or job applicant's limitations and/or reasonable accommodation needs will be kept in strict confidence in compliance with applicable federal, state, and local laws. Please refer to our reasonable accommodation procedure for further information. Employees and job applicants may request an exemption as a reasonable accommodation without fear of retaliation.

Requests for Exemptions [OPTION 2]

If there is a reason you cannot receive the vaccination contact [TITLE].

An exemption as a reasonable accommodation may be provided so long as it does not cause an undue hardship for the organization or pose a direct threat to others' health and safety. This determination will be made on a case-by-case basis. Any medical information concerning an employee's or job applicant's limitations and/or reasonable accommodation needs will be kept in strict confidence in compliance with applicable federal, state, and local laws. Please refer to our reasonable accommodation procedure for further information. Employees and job applicants may request an exemption as a reasonable accommodation without fear of retaliation.

[Add for non-exempt hourly employees]:

Compensation

Employees will be paid their hourly rate (and overtime, as applicable) for the time spent waiting and getting the COVID-19 vaccination, as well as for the waiting time after receiving the vaccine to monitor for an adverse reaction to the vaccine. If an employee receives a vaccine at a location separate from work, the employee will be also be compensated for the time traveling to and from the vaccination site.]

Non-compliance

An employee who does not provide proof that they have been fully vaccinated for COVID-19 (e.g., received two doses) after becoming eligible under the state's vaccine distribution plan will be considered non-compliant with this policy. Non-compliance will not be tolerated.

This provision does not apply to an employee who has been provided an exemption as a reasonable accommodation for a disability or a sincerely held religious belief. In the event that an employee is unable to receive a vaccine due to factors outside of their control (e.g., lack of vaccine supply), contact Human Resources.

(Warning: This mandatory vaccination policy may not be used in Oregon, which prohibits an employer from requiring an employee to get vaccinated as a condition of employment unless that immunization is required by federal or state law, rule or regulation)

VOLUNTARY POLICY (CAN BE MODIFIED TO MEET NEEDS)

COVID-19 Vaccination Policy

[Employer] is committed to protecting the health and well-being of our employees, their families, and members of our community against the coronavirus (COVID-19). This policy is based on guidance and recommendations issued by the federal Centers for Disease Control and Prevention (CDC), and other public health authorities. The COVID-19 vaccine has been determined to be a safe and effective measure for preventing COVID-19 infection.

Policy

[Employer] strongly encourages all employees to obtain and maintain up-to-date COVID-19 vaccinations. [Employer] believes this is an important measure to protect the health and safety of employees, customers, clients, family members, and those who visit the workplace from COVID-19 infection.

Employees may provide proof to Human Resources that they have been fully vaccinated against COVID-19. Note that employees should not provide proof of vaccination that includes any genetic information (e.g., family medical history). Any documentation received by an employee will be kept confidential to the extent required by law.

[Add for non-exempt hourly employees:

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Employees will be paid their hourly rate (and overtime, as applicable) for the time spent waiting and getting the COVID-19 vaccination, as well as for the waiting time after receiving the vaccine to monitor for an adverse reaction to the vaccine. If an employee receives a vaccine at a location separate from work, the employee will also be compensated for traveling to and from the vaccination site.]