

March 08, 2021

## COVID-19 Vaccination Planning for Employers: Questions to Consider for Policy and Practice

---

As COVID-19 vaccines become more widely accessible, and certain localities relax COVID-19 restrictions, employers hoping to ramp up on-site operations or reduce absenteeism face a new challenge: navigating employee vaccination. Employers are evaluating whether to mandate, strongly suggest or simply remain neutral regarding COVID-19 vaccinations and on-site work.

The considerations surrounding workplace vaccination programs are complex. Business justifications and accommodation issues, potential public relations and employee relations pitfalls, the impact of vaccination on workforce safety procedures, litigation risks on multiple fronts — these are just the beginning. To help piece together this business and regulatory puzzle, we have compiled a list of issues organizations should consider as they set policy and communication plans regarding on-site work and COVID-19 vaccines. We have also identified issues to consider with regard to the practical application of any such policy and the development of related communications to employees or others.

Our labor and employment attorneys continue to monitor developments from the Centers for Disease Control and Prevention (CDC), the Food and Drug Administration (FDA), the Equal Employment Opportunity Commission (EEOC) and the Occupational Safety and Health Administration (OSHA), as well as state and local authorities. We also monitor COVID-19 litigation, including claims challenging employer-mandated vaccines. As with all things COVID-19, the landscape is dynamic, and we will provide supplementary guidance on these considerations as local, federal and commercial stances on the COVID-19 vaccination evolve.

## Whether to Mandate, Encourage or Take No Position on Employee Vaccinations

Although the [EEOC's FAQ in December 2020](#) suggests that employers may mandate that employees be vaccinated, a mandatory vaccination program could be difficult to enforce without potentially violating various laws, such as the Americans with Disabilities Act (ADA) and Title VII of the Civil Rights Act of 1964. General overview considerations include the following, with some discussed in more detail in the sections that follow:

- May employers legally mandate vaccination given that the only vaccines currently available have been granted emergency use authorization but not full approval by the FDA?
- What is the business justification for mandating vaccinations, rather than just strongly encouraging them?
- May employers mandate that all employees be vaccinated, or only employees whose job duties cannot be performed remotely or make social distancing or preventive personal protective equipment (PPE) use during on-site work difficult or less effective?
- May employers require employees who must travel out of the state/country to perform their jobs to receive a vaccine, especially if airlines, airport authorities and/or localities begin to require proof of vaccination?
- What impacts will employees being vaccinated (or not) have on the employer's business beyond on-site work considerations?
- If employers mandate or strongly encourage their employees to be vaccinated, what exceptions must they make to avoid violations of the ADA (due to an employee's medical contraindication for vaccination), Title VII (due to an employee's sincerely held religious belief) or other laws that may apply?
- What types of benefits, such as paid time off (PTO) or other incentives, may employers offer to strongly encourage vaccination?
- What are the implications of offering different types of incentives, such as paying for the employee's time or travel costs for getting vaccinated versus granting additional PTO versus issuing a cash payment or equivalent such as a gift card?
- Are vaccinations sufficiently available to make mandatory vaccination feasible, or does the applicable state currently limit vaccinations to certain individuals by age, occupation, medical vulnerability or other factors?
- Should employers consider the current COVID-19 case level in the relevant geographic area when deciding whether to mandate, encourage or take no position on employee vaccinations?
- For how long should a program of mandating or encouraging vaccination remain in effect?
- If mandating vaccinations, what timing requirements/deadlines might employers impose on employees to be vaccinated?
- How should employers track whether a vaccinated employee's clearance to return to work has expired, particularly in light of questions about duration of efficacy and the capacity of current vaccines to protect against emerging variants?

- How can employers minimize the risk that a vaccine mandate will screen out/identify/discriminate against applicants or employees based on disability, religion, pregnancy, breastfeeding or other such statuses?
- Employee and public health surveys indicated that many Americans will refuse vaccination. How should an employer handle refusals to be vaccinated that are not based on protected status that supports exemption from the vaccination requirement as a reasonable accommodation?
  - What if the refusing employee is a top talent or under a contract of employment?
  - What if a significant number of employees refuse to be vaccinated?
- What consequences/action can employers take if employees do not comply with the mandatory vaccination requirement, and what type of notice of any consequences of refusal to be vaccinated should employers provide to employees?
- Even if an employer mandates vaccines to return to the workplace, to what extent are public health protections (such as mask-wearing and social distancing) still required?
- Should employers administer the vaccine, or contract with a third-party provider to do so? Or, should they leave it to their employees to get vaccinated through third parties that have not contracted with the employer, such as states/counties/cities or local pharmacies?
- Is the work site subject to a collective bargaining agreement with the union, such that bargaining is required before mandating vaccination?
- What actions can an employer take if employees protest or strike against the implementation of a mandatory vaccination policy?
- If an employer does require vaccination as a condition to on-site work, what are the legal risks of lawsuits from employees?
- If an employer does *not* require vaccination as a condition to on-site work, what are the legal risks of lawsuits from employees?

## Responding to Requests for Accommodation — The EEOC FAQ

- Does COVID-19 exposure risk pose a “direct threat” due to a “significant risk of substantial harm” to the health and safety of the employee or others “that cannot be eliminated or reduced by a reasonable accommodation,” such that exclusion from the workplace of unvaccinated individuals is defensible, factoring in the duration of the risk, the nature and severity of potential harm, and the likelihood and imminence of potential harm?
  - If an employer answers “yes” to this question, does that create risk of being deemed noncompliant with

## OSHA safety standards?

- Should employers take into account prior workplace exposure incidents in doing this analysis?
- How should employers conduct an individualized assessment applying factors identified by the EEOC in determining whether an unvaccinated employee would pose a direct threat?
- Should the direct threat assessment be done on a job-by-job basis?
- Do employers need to provide accommodations to pregnant or breastfeeding employees who do not get vaccinated?
- How does an employer determine if someone has a legitimate faith-based reason for refusing the vaccine? How is “religion” defined for purposes of an accommodation?
- How can employers appropriately distinguish objections based on protected status versus for other personal reasons, which could range from political views to skepticism regarding efficacy to fear of side effects?
- What inquiries can be made, and documentation required, to verify an employee’s faith-based objections or medical inability to be vaccinated? At what point can employers take steps toward verification?
- What documentation should be used regarding the accommodation process?
- What reasonable, effective alternative safety measures might an employer offer as a “reasonable accommodation” of a disability or sincerely held religious belief? Are the current public health measures used in workplaces sufficient to mitigate or eliminate the threat in lieu of vaccination (e.g., mask-wearing, social distancing, barriers, remote work)?
- For how long must an accommodation be provided, and when should the accommodation be revisited?
- If social distancing and compliance with other OSHA and CDC prevention guidelines have resulted in no on-site workplace exposure incidents, what else (if anything) might justify exclusion of individuals from the workplace if they refuse to be vaccinated?
- If an employer determines that an employee who cannot be vaccinated based on a protected status poses a direct threat at the work site, may the employer exclude the employee from the workplace or terminate the employee’s employment?
- While vaccination itself is not a medical examination, what steps should employers take to ensure that they are not triggering the ADA’s provision on disability-related inquiries, including as to prevaccination medical screening questions?
- In addition to disability accommodations under the ADA and religious accommodations under Title VII, what other considerations should employers evaluate in mandating or encouraging that their employees be vaccinated? Does the Family and Medical Leave Act (FMLA) apply? What about paid sick leave laws?

# Whether and How to Verify Vaccination Status

- May employers ask employees if they have been vaccinated and/or require proof of vaccination?
- How can employers that are not mandating vaccination ask for proof of vaccination while refraining from asking follow-up questions (such as simply “why not?”) that could elicit unwanted or impermissible information about protected status such as disability, religion or pregnancy?
- What type of proof of vaccination may employers request?
- Should the employer track what type of vaccination was administered, when vaccination was received and potential expiration of antibody protection?
- Can employers ask if an employee is antibody positive?
- Should and may employers require a second round of vaccination after antibody protection expires? When will protections expire?
- What guidance or training should HR, supervisors and managers receive to request information and respond to questions appropriately?
- How will employers maintain vaccination records in a confidential manner that complies with recordkeeping requirements under the ADA and any applicable privacy laws?

## What About Offering On-Site COVID-19 Vaccinations?

- What are the legal risks associated with offering on-site vaccination?
- Does the ADA apply, particularly if the prescreening questions ask for medical information?
- Is the Genetic Information Nondiscrimination Act (GINA) implicated if there are questions about family history/genetic conditions?
- Is there a way to offer on-site vaccination to employees and NOT trigger ADA issues?
- Does ADA applicability vary based on whether the vaccine is mandated or voluntary as a condition of return to on-site work?
- What are the risks of inadvertent disclosure of medical information and how can employers protect against that disclosure?
- What if the vaccine is not yet widely accessible, should employers still consider an on-site vaccination program for employees?
- What are the risks if an employer contracts with a third party to administer the vaccine on-site?

# Wage-and-Hour Considerations

- Under what circumstances must an employer pay employees for time spent to be vaccinated? Does it make a difference whether the vaccination is received during normal working hours?
- Should and must an employer that mandates vaccination reimburse employees for the cost of travel to and from a vaccination site, such as mileage, parking or public transportation costs?
- Should and must employers that mandate vaccination pay employees for time spent making vaccination appointments?
- When do vaccine-related incentive payments need to be factored into the regular rate of pay for nonexempt employees for purposes of determining overtime pay compensation?
- What should an employer do if an employee who received the vaccine per the employer's requirement then reports serious side effects that require treatment or time off work?
  - Must or should the employer provide PTO to the employee without charging the employee's PTO bank?
- Are these considerations the same when the employer encourages, but does not require, employees to be vaccinated?
- Do any state or local laws or regulations apply and provide different and additional employee protections beyond those under federal law such as the Fair Labor Standards Act (FLSA)?

## Applicability of Paid Sick/Safe Leave

The CDC encourages employers to offer paid sick leave to employees who are obtaining vaccination in the community.

- Are any employees working (or teleworking) in a state, county or city that provides job-protected PTO to receive the vaccine? Are those laws triggered or is the time covered by existing company PTO or sick leave policies?
- If an employee suffers from an adverse reaction to the vaccine, are paid sick leave benefits available?
- What benefits are available to employees who have already exhausted paid sick leave or PTO and miss work due to an adverse reaction to the vaccine?

## Payment for Health Care Visits Concerning the COVID-19 Vaccine

- Although the vaccine is currently provided free of cost to the employee, should or must an employer pay for

an employee's health care provider visit if the employee wants to consult the health care provider for advice on whether the employee should get the vaccine?

- Is the answer to this question different if the vaccine is mandated versus voluntary?

## Impact of Vaccine on COVID-19 Protocols

### OSHA and CDC Compliance — Social Distancing and Face Masks

- Do vaccinations impact current COVID-19 safety protocols in light of recommendations by OSHA, the CDC, and various state and local authorities?
- How should employers address noncompliance with COVID-19 safety protocols by vaccinated employees?

### Quarantine Period (Recent CDC Updates)

- What is the appropriate quarantine period for an employee who has been partly or fully vaccinated and subsequently exposed to COVID-19?
- What response is appropriate if a vaccinated employee is exposed to COVID-19 at work and demands to quarantine (with or without pay)?

### Updates to Close Contact Letters/Exposure Notifications

- Should employers update their contact tracing and/or exposure notification practices as a result of vaccinations? If so, how?
- Given that someone who has recently received a vaccine may experience COVID-19 symptoms and could either simply be experiencing side effects from the vaccine, or could actually be COVID-19 positive since the vaccine would not yet be fully effective, what should be the quarantine and close contact protocol if it is unclear whether the employee is experiencing general side effects of the COVID-19 vaccine or actual symptoms of COVID-19?

## OSHA Considerations

- Do applicable OSHA standards require or permit employers to mandate that employees receive vaccinations? Does the fact that the vaccines are brought to market under the FDA's emergency use authority impact an employer's ability to mandate vaccinations?
- Has or will OSHA issue any guidance for employers on mandatory vaccinations?
- Does OSHA require employers to properly inform employees of the benefits of COVID-19 vaccines?
- Can employers require that employees who work in close quarters with the public be vaccinated? What

about those who are not able to socially distance from other employees? What about first responders?

- Does OSHA require that employers pay for vaccinations for certain workers?
- What is the impact of vaccinations on employers' obligations to require masks and/or social distancing and other environmental safeguards where possible?

## State Law Developments

In addition to vaccine guidance issued by the CDC, OSHA and the EEOC, employers must also be mindful of applicable state laws and regulations. At least 10 states have proposed legislation designed to prevent private employers from mandating COVID-19 vaccinations as a condition of employment. Other states, such as New York, are considering allowing the state health department to enforce vaccinations among healthy adults if the vaccination rate is not deemed sufficient to lower the infection rate to an acceptable level.

- Does applicable state law limit a private employer's ability to mandate or encourage vaccination as a condition of employment?
- Does applicable state law mandate that workers in certain jobs or industries (i.e., health care workers or other essential workers) receive the vaccine?
- What state laws and regulations require employers to provide accommodation for reasons beyond what federal law requires? (Oregon's exemption for philosophical beliefs is one such example.)
- Does applicable state law provide immunity from coronavirus-related claims? If so, for what types of claims is there immunity?
- What vaccine guidance have state agencies (such as California's Department of Fair Employment and Housing (DFEH) or New York's DOL) provided to employers?
- In addition to federal laws such as Title VII and the ADA, how do state and city laws apply to discrimination and accommodation concerns?

## Impact of Vaccine Accessibility

States are making their own prioritization decisions regarding vaccine allocations.

- What is the applicable definition of an "essential business" that would allow some or all employees to receive priority access to the vaccine?
- Should employers implement a vaccine policy before COVID-19 vaccines are generally open to the public?
- How should a vaccine policy account for various vaccine availability issues, some of which are tied to an



employee's age, medical condition (e.g., priority for immunosuppressed employees) or work location?

## Possible Workers' Compensation Claims Related to Vaccines

- If vaccination is mandatory, would any adverse reactions to the vaccine become work-related illnesses or injuries, and will the employer's workers' compensation insurer provide coverage?
- If vaccination is encouraged, will workers' compensation exclusivity provisions preclude tort liability if an employee experiences an adverse reaction?

## Corporate Culture/Employee Relations/PR Implications

- How does the employer's position on employee vaccination align with its company culture?
- What message will be conveyed to employees in support of vaccination?
- Who should communicate the messaging, and when?
- What resources are available to help educate employees about the vaccines?
- How will the employer address employee concerns about adverse reactions? Should employers provide an FAQ-type document to employees?
- What sources should employers rely on when speaking about vaccine efficacy?
- Are front-line supervisors prepared to address employee concerns?
- Should organizational leaders be vaccinated to demonstrate confidence in the vaccine, and how will that be communicated to employees in an inspiring way for employees at all organizational levels?
- Should employers offer, coordinate or encourage vaccination of employee family members?
- In what ways might a mandatory vaccine policy impact employers' corporate diversity and inclusion initiatives?
  - Would a vaccine mandate screen out disabled and pregnant employees at a disproportionately higher rate?
  - Reports from groups such as the NAACP, UnidosUS and the COVID Collaborative indicate that Black and Latinx Americans remain skeptical of the safety or efficacy of the vaccine. What should be considered to protect against losing employees of color in disproportionate numbers because of an employer-mandated vaccine policy?
  - How can employers strike a balance with messaging in a way that communicates their commitment to workforce safety while supporting protected groups and acknowledging the historical roots of medical

distrust?

## Union/Labor Relations Issues Related to Mandatory Vaccinations

- Are employee vaccinations a mandatory subject of bargaining?
- Can an employer unilaterally implement a mandatory vaccination policy without collective bargaining?
- Under what circumstances can an employer claim a union has “waived” its right to bargain employee vaccinations under an existing collective bargaining agreement?
- If a collective bargaining agreement allows an employer to mandate vaccinations, what obligation does an employer have to bargain over the “effects” of mandated vaccinations?
- Does an employer have to bargain with an incumbent union before offering employee vaccination incentives?
- Are there any “safety” or “exigent circumstances” exceptions which apply to an employer’s general duty to engage in decisional or effects bargaining?
- Can union and/or nonunion employees strike or engage in other protected concerted activity in response to an employer’s implementation of a mandatory vaccination requirement?
- What are the labor relations implications of implementing different vaccination requirements for union and nonunion employees?
- Might an employer’s announcement of a mandatory vaccination policy cause employees to seek union representation?

## Vaccine-Related Policies

- What language should be included in a mandatory vaccination policy?
- Does an employer that is encouraging, but not mandating, employee vaccination need a policy? If so, what language should be included in that policy?
- How should an employer time the rollout of a vaccination policy? Is it best to roll out a policy early, and then update the policy as more specifics are known, or to wait until detailed information can be provided?
- What existing policies, such as a COVID-19 paid leave policy, may need to be modified to address employee vaccinations?

## Impact on Business Travel and Immigration

- Are countries requiring proof of vaccination, or a negative antibody test, for international travel? How does that impact business travel for U.S. and non-U.S. workforces?
- Some areas of the world might be at higher risk either due to outbreaks or lower availability of the COVID-19 vaccine. Should employees traveling to those locations for business be required to have a vaccine due to the possible direct threat to their health?
- Is proof of COVID-19 vaccination now required for green card applications?
- Might an employee have to quarantine when traveling between different states or countries even though the employee has received a COVID-19 vaccine?
- What if an employee's job duties require frequent air travel (either domestic or international)?
- What if an employee's job duties require on-site visitation to a location that mandates proof of vaccination for all visitors?

## Employee Benefit Plan Considerations

### Affordable Care Act (ACA), ERISA and Internal Revenue Code Compliance

- Is an employer's payment for employees' vaccinations the provision of "medical care" under ERISA and the Internal Revenue Code?
- Is the employer offering the vaccine only to employees covered under the employer's group health plan?
- If the employer offers the vaccine to employees without regard to their enrollment in the employer's group health plan, is the coverage exempt from the ACA's market reform mandates (e.g., by being offered under an excepted benefit employee assistance program, or through an on-site clinic, or under another exception)?
- What special considerations, if any, apply to offering Consolidated Omnibus Budget Reconciliation Act (COBRA) coverage and complying with ERISA's reporting and disclosure requirements?

### Wellness Programs and Incentives

- Does an employer offering an incentive to employees who are vaccinated have to offer a reasonable accommodation to an employee who is not vaccinated due to disability (under the ADA) or a sincerely held religious belief (under Title VII), to allow such employees to earn the incentive? How would the employer accommodate the employee?
- For vaccines and/or incentives provided under a group health plan, has the employer considered the Health Insurance Portability and Accountability Act (HIPAA) wellness program regulations? Is the vaccine program considered a participatory program or activity-based program, and what steps should an employer take if it wants to encourage vaccination but not have the vaccinations covered as a participatory program? Does the

wellness program comply with any de minimis incentive limits and other requirements under the regulations?

- For an employer-provided vaccine program with an incentive, has the employer considered the ADA wellness program regulations? Is the program “voluntary” under the ADA wellness program regulations, and what steps should an employer take to ensure the vaccinations are considered voluntary under the regulations? What are the special considerations regarding the amount of any incentive, absent clear EEOC guidance?
- Is the incentive taxable to employees?
- If the program influences employees to get the vaccine by providing an incentive, and it ends up causing side effects or other issues for the employees, what is the employer’s liability?

We will continue to update this planning guide in line with federal, state and local developments, and to address the practical, on-the-ground challenges faced by employers. We also continue to provide insights via our [LaborSphere blog](#) and the [labor and employment section of the Coronavirus Resource Center](#).

## MEET THE AUTHORS



Lynne Anne Anderson

Partner

---

+1 973 549 7140  
Florham Park  
[lynne.anderson@faegredrinker.com](mailto:lynne.anderson@faegredrinker.com)

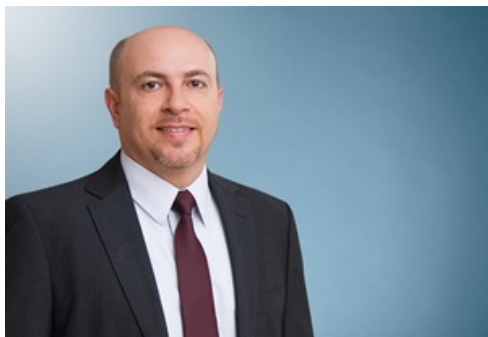


Jeffrey S. Beck

Partner

---

+1 317 237 8329  
Indianapolis  
[jeffrey.beck@faegredrinker.com](mailto:jeffrey.beck@faegredrinker.com)



## Pascal Benyamini

Partner

---

+1 310 203 4050

Los Angeles

pascal.benyamini@faegredrinker.com



## Stephanie Dodge Gournis

Partner

---

+1 312 569 1327

Chicago

stephanie.gournis@faegredrinker.com



## Susan W. Kline

Partner

---

+1 317 237 1059

Indianapolis

susan.kline@faegredrinker.com



## Elaine M. Kumpula

Partner

---

+1 612 766 8967

Minneapolis

elaine.kumpula@faegredrinker.com



Daniel G. Prokott

Partner

---

+1 612 766 7713

Minneapolis

daniel.prokott@faegredrinker.com



Rhiannon C. Beckendorf

Counsel

---

+1 612 766 7635

Minneapolis

rhiannon.beckendorf@faegredrinker.com



Rebekah Ramirez

Counsel

---

+1 317 237 8230

Indianapolis

rebekah.ramirez@faegredrinker.com



Dawn E. Sellstrom

Counsel

---

+1 312 569 1324

Chicago

dawn.sellstrom@faegredrinker.com



Angela N. Johnson

Associate

---

+1 317 237 1033  
Indianapolis  
angela.johnson@faegredrinker.com



Alexa E. Miller

Associate

---

+1 973 549 7122  
Florham Park  
alexa.miller@faegredrinker.com



Andres F. Puerta

Associate

---

+1 973 549 7265  
Florham Park  
andres.puerta@faegredrinker.com



Taylor L. Haran

Associate

---

+1 312 212 2268  
Chicago  
taylor.haran@faegredrinker.com

## Services and Industries

Labor & Employment

Workforce Safety

HR Compliance, Training & Transactions

Immigration

## Related Topics

Coronavirus Resource: Labor and Employment

Coronavirus Resources