



Vaccine Policy Playbook



September 2021

Getting Started With Your Vaccine Policy

As efforts to increase the numbers of those fully-vaccinated continue—and as employers seek to bring more people safely back to the workplace—employer-driven vaccination policies are making headlines. Even so, “vaccine policy” means different things to different employers. For instance, a policy may look very different for those employers in industries where remote work is possible, versus those that require interaction with the public.

Our Vaccine Playbook Policy is an essential resource in designing, communicating, and deploying your company’s vaccine policy, no matter what industry you’re in. The Playbook guides employers through types of mandates, policy creation and considerations, such as reporting, incentives, and local mandates, and perhaps most importantly, defining an accommodation strategy that reduces the risks of ADA and EEOC claims.

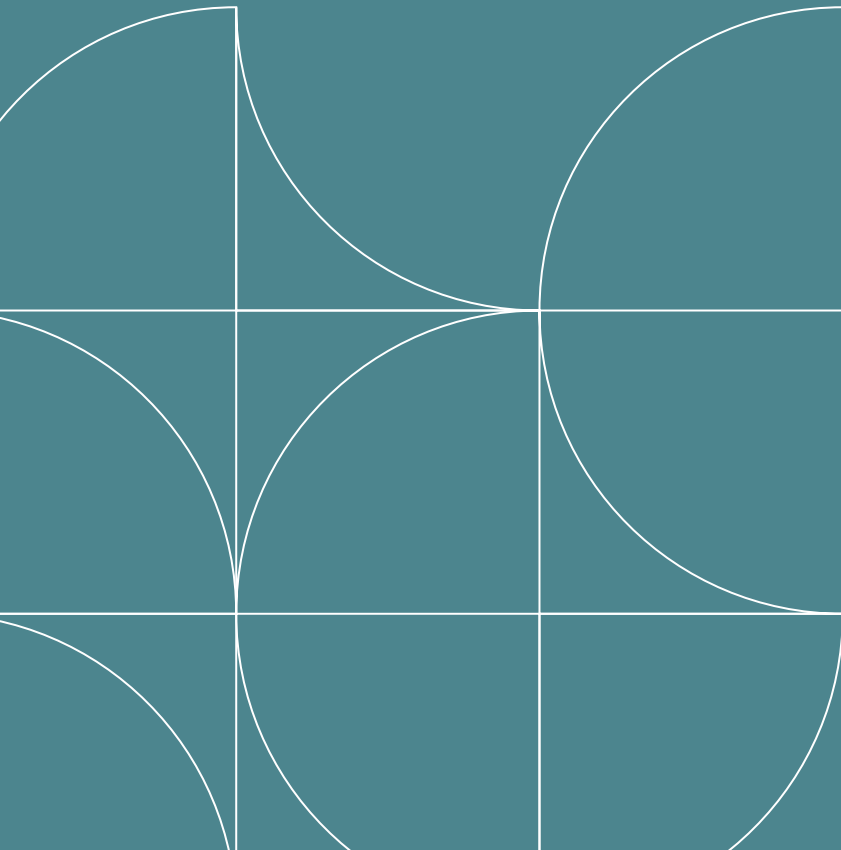


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TYPES OF VACCINE POLICIES



What Does Mandatory Mean?

While COVID-19 vaccines have proven effective at preventing severe disease, hospitalization, and death from COVID-19, the virus and its variants continue to spread in various parts of the country, particularly among unvaccinated individuals. This reality, coupled with the widespread availability of multiple vaccines, has caused employers throughout the country to consider, craft, and implement vaccination programs for their workforces.

Deciding on the type of vaccination program most appropriate for your company is an essential first step. The program's base requirements as to who must vaccinate, who is merely encouraged to vaccinate, and what steps should or must be taken by those who do not vaccinate will affect the content and tone of related communications, potential accommodation issues, how quickly the program can be implemented, and where it can be implemented.

For employers in manufacturing or public-facing sectors (e.g., hospitality, health care), working around others is what the job is all about. Many roles in these spaces can't be performed remotely. For such an employer, "everyone must be vaccinated" will mean everyone, because everyone has to be at the worksite. Maybe that employer will offer a testing option, either as an up-front alternative to vaccination or in response to an approved accommodation request, if one must be granted. For other employers, allowing employees to work remotely won't be a plausible or desirable option in lieu of vaccination or as an accommodation. That employer likely will need to assess an influx of religious and disability accommodation requests, some valid and some not.

Many other types of employers that have announced robust vaccination programs have avoided a deluge of accommodation requests by concluding that the main concern is the health and safety of those who want to work in the office, and recognizing that not everyone must be in the office. In those situations, those who object to vaccination can work remotely, and potential accommodation issues become isolated in nature.

Types of Employer Vaccination Policies

Vaccine policies generally take one of three forms. Choosing the one that is right for your organization depends on many factors. Each of the three types of policies are explained in detail below.

COMPLETE AND TOTAL MANDATE	COMPLETE BUT PARTIAL MANDATE	CONDITIONAL
Everyone across all job categories must be vaccinated	Individuals in certain job categories must be vaccinated	Vaccination is a condition of in-person work

Complete and Total Mandate

This means everybody across all job categories must be vaccinated, subject to the duty to accommodate for a disability, religious belief, and (possibly) pregnancy, as well as a carve-out for

employees in Montana. This may make sense if, before the pandemic, virtually everyone worked at the worksite (or, if employees worked remotely, it was because they traveled to visit customers or vendors). If that was the employment model before the pandemic and you've decided you must retain or return to that model to succeed, then a complete and total mandate may be the best choice: those returning to the worksite must be vaccinated, and so too must individuals who visit customers or vendors, both for their own health and safety and that of the customers and vendors they visit.

Complete But Partial Mandate

Some employers mandate that all individuals in certain job categories must be vaccinated. We are frequently asked, "can I mandate vaccination for some but not all employees?" The answer is "yes," provided you distinguish between categories and not individuals, and have a reasonable non-discriminatory basis for saying all in some categories need vaccination while others do not. Some examples help:

- *Company A* has several call centers. Most who work there are inside sales employees who make phone calls to customers and prospects. Their customer relation skills—e.g., their tone in speaking with customers, how they answer questions, how they guide the call—is monitored by supervisors who observe and listen to employees. Company A believes that in-person observation is critical for a supervisor to effectively gauge an employee's "total performance." Company A mandates that all call center employees get vaccinated. Non-supervisors need to be in the center to make calls under their supervisor's watch. And supervisors must be there to watch and listen.
- *Company B* also has call centers staffed by inside sales employees. Before the pandemic, some employees worked remotely. Having seen no real performance difference between remote and in-person workers in the past, Company B has decided that call center employees can continue working remotely for the indefinite future and need not be vaccinated. Company B has observed, however, that its outside sales have plummeted, which it attributes to fewer in-person visits to customers who have grown cautious about third-party meetings due to COVID-19. Accordingly, Company B decides all outside sales employees are to resume those visits as soon as possible and must therefore be vaccinated.
- *Company C* would like its manufacturing employees to be vaccinated, but they are union-represented. Company C is also hiring, and wants to boost total vaccination across its manufacturing workforce. It knows both from the bargaining table and the grapevine that many current employees oppose vaccination. The union is well-represented by counsel who can drag out bargaining for months, thus preventing Company C from getting to an impasse that would permit it to implement mandatory vaccination for all. Counsel for the union has mentioned it is mostly long-service employees who oppose vaccination; more junior employees are either vaccinated or don't care one way or the other. Company C proposes mandatory vaccination for all new hires, to which the union agrees.
- *Company D* is a pharmaceutical manufacturer, and believes philosophically that vaccination should be mandatory for all, because they are in the "science business" and themselves manufacture life-saving drugs. While some employees have long been essential workers and

can be subject to a mandatory vaccination, still other employees—such as those in finance or other support functions—have been working remotely and arguably could still do so. Because choosing to be unvaccinated runs counter to the Company's philosophy, Company D adopts a phased approach, insisting that essential workers get vaccinated immediately and others within the next 6 months.

- *Company E* runs a health care facility and treats elderly consumers who are at significant risk for contracting coronavirus and developing life-threatening complications from COVID-19. Local government officials have declared that all health care workers in Company E's industry must be vaccinated to promote public health. In response, Company E requires vaccination by a certain date, regardless of whether a worker works in a patient-facing role.

In these examples, one employer needs all call center employees vaccinated but another does not. Nothing in the EEOC guidance, nor any law outside Montana (see discussion in Section B, below), prevents an employer from requiring vaccination of some but not all employees. The same principles apply to companies with union-represented employees. Company C would like to mandate vaccination for all, but labor law and labor relations preclude that as a practical matter. So Company C will take what it can get. Federal law allows this, and only Montana's state law currently prohibits it. By contrast, Companies D and E craft programs that are guided by philosophical, mission-driven principles, or regulatory schemes.

In general, employers looking to implement a "Complete but Partial Mandate" may have a more difficult time refusing the accommodation of "continued remote work," especially if segments of the workforce are still working remotely or if it is difficult to prove the supposition that it would be "better" if the work was performed in-person.

Conditional

This means that being vaccinated is a condition of working in the office or conducting in-person meetings, but working in the office and in-person meetings are not regularly required. Equipped with experience and lessons learned from the work-from-home boom during the pandemic, many employers either want or are willing to let portions of their workforce continue working remotely, but also want to provide in-office workspace for those who prefer to come in. Many companies also are concerned about losing office "culture," and want to encourage those willing or wanting to return to the office to be able to do so safely. Therefore, anyone who works in the office must be vaccinated. In essence, under this "conditional mandate" (sometimes referred to as a "soft mandate"), *employees* get to choose whether they want to work in the office; if so, they have to be vaccinated. By contrast, with a Complete but Partial Mandate, *the employer* decides which jobs must be performed on-site and which jobs can be performed remotely.

It is important for employers to be clear in the type of "mandatory" vaccination they are instituting, because the type and related particulars will dictate how policies are designed and announced. This decision also drives the accommodation process, not only with respect to accommodation *options*, but also with respect to establishing undue hardship.

Mandate Considerations

When choosing a mandate (or not) employers must be aware of Montana law, potential disparate impact claims, and union represented employees. Read on for more detail.

Employer Right to Mandate Everywhere Except Montana

Employers have the legal right to mandate that some or all employees be vaccinated against COVID-19 in all states where they have employees, except with respect to non-FDA approved vaccinations in Montana.¹

Montana law prohibits requiring an individual to receive a vaccine that has been approved for Emergency Use Authorization (“EUA”) only or that is undergoing safety trials. Mont. HB 702, Section 4. Now that the Pfizer vaccine has obtained full FDA approval, presumably this restriction falls away as to that vaccine, and any others that later obtain full FDA approval.

The Montana law, however, also prohibits discrimination against employees based on vaccination status. *Id.*, Section 1(b). This includes refusing employment to a person, barring a person from employment, or discriminating against a person in terms of compensation or any term, condition, or privilege of employment. This broad restriction would seem to effectively prohibit an employer from taking a “complete and total mandate” approach in Montana, because the employer cannot discharge or take other adverse action against those who refuse to be vaccinated.

It seems incongruous, to say the least, that Montana employers that are not places of public accommodation may now require patrons or customers to be vaccinated (at least with respect to the FDA-approved Pfizer vaccine), but may not do so for their own employees. Hopefully employers will see some additional clarity from Montana on these issues once more vaccines become FDA-approved.

Note that Montana’s law includes special exceptions for health care facilities; licensed nursing homes, long-term care facilities, and assisted living facilities; and certain schools and daycares. With respect to health care facilities, the Montana law provides that there’s no unlawful act if the facility: (1) asks an employee to volunteer his or her vaccination status for the purpose of determining whether the facility needs to implement reasonable accommodation measures to protect the safety of employees, patients, visitors, and others; and (2) implements such measures for employees, patients, visitors, and others who are not vaccinated.

With respect to licensed nursing homes, long-term care facilities, and assisted living facilities, the Montana law doesn’t apply during any period of time in which compliance with the law’s restrictions would result in a violation of regulations or guidance issued by the CDC or the Centers for Medicare & Medicaid Services.

¹ As discussed below, such a mandate would be subject to a duty to bargain for union-represented employees.

Risk of Mandating for Some But Not All (Union Issues Aside)

As explained above, federal law and most states permit employers to distinguish between different groups of employees in requiring COVID-19 vaccination. That assumes, of course, the distinction is not based on protected class status.

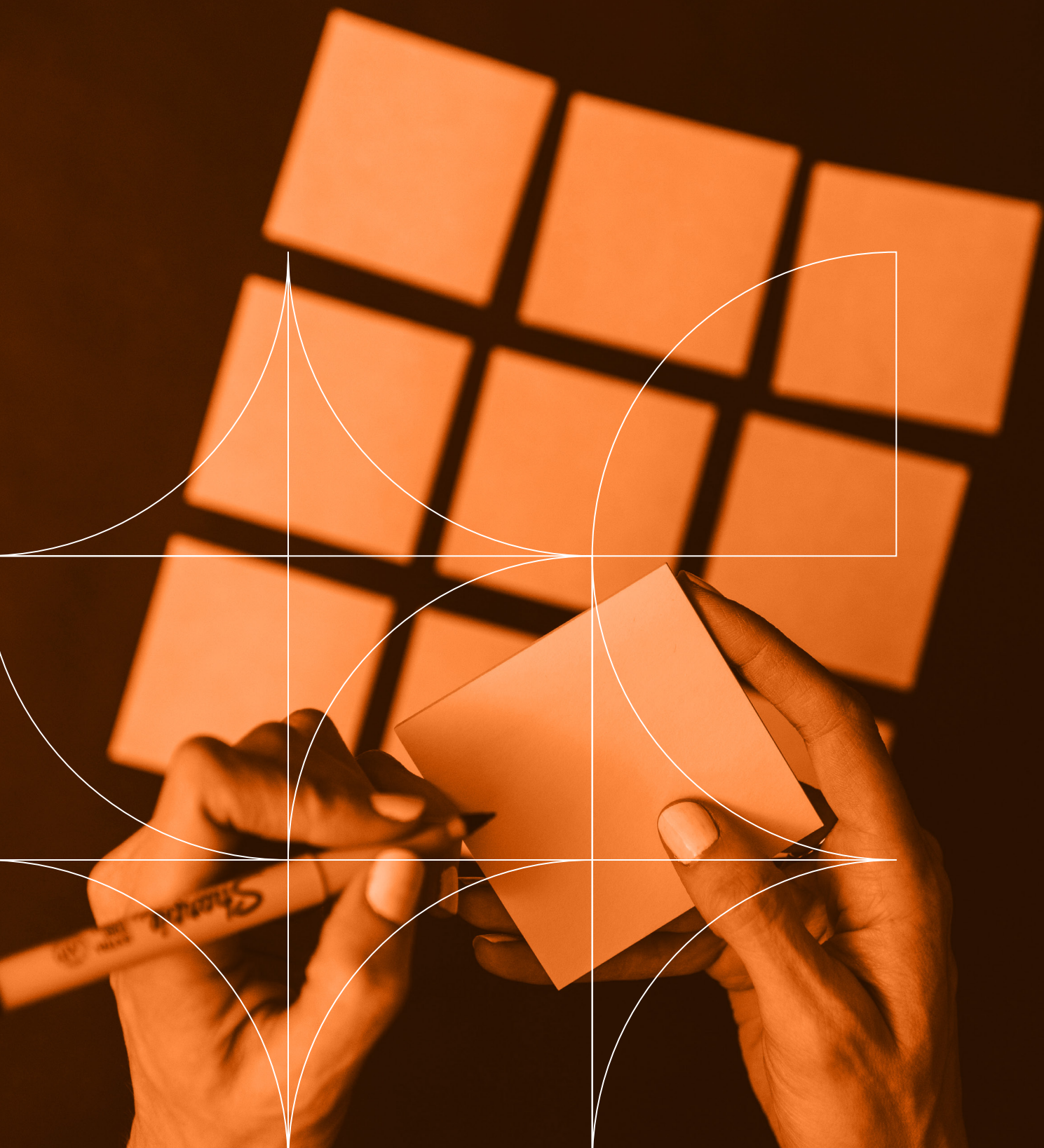
Employers must be mindful of possible disparate impact claims when drawing distinctions between employee populations. In its recently updated COVID-19 Technical Assistance guidance, the EEOC states that employers with a vaccine mandate may expose themselves to allegations that the mandate disparately impacts—or disproportionately excludes—employees based on their race, color, religion, sex, or national origin under Title VII (or age under ADEA). That could happen if a company mandates vaccination for manufacturing sites but not office locations, for example, if it turns out that manufacturing sites have a comparatively larger percentage of Black or Hispanic employees than the office location. The EEOC guidance further reminds employers that because some individuals or demographic groups may face greater barriers to getting vaccinated than others, some protected class members could be adversely impacted by vaccine requirements. We recommend being mindful of vaccine availability when crafting your policy.

Even if employees could demonstrate a statistically significant disparate impact on a protected group, the employer can successfully defend any disparate impact claim by demonstrating the vaccine requirement is job-related and consistent with business necessity. This may be difficult as to positions performed remotely during the pandemic. (Why can't those employees continue working from home and remain unvaccinated?) Thus, an across-the-board mandate that everyone come into the physical workplace and be fully vaccinated may be difficult for some employers to defend if applied enterprise-wide, especially if based on a philosophic view or on the assumption that culture or productivity would improve by having everyone return. Instead, a company may need to demonstrate job-relatedness and business necessity by position or by geographic site.

Special Considerations as to Union-Represented Employees

If a vaccine mandate provides for discipline or discharge of union-represented employees who remain unvaccinated absent an approved accommodation, it is almost certainly a mandatory subject of bargaining. *Johnson v. Bateman Co.*, 295 NLRB 180, 193 (1989) (any form of mandatory drug testing is a mandatory subject of bargaining). The only exceptions to this are (i) a broad management rights clause allowing the employer to implement health and safety rules of its choosing, or (ii) waiver by the union based on its prior acquiescence to the employer having repeatedly implemented similar requirements. The duty to bargain, of course, extends only to union-represented employees. Don't assume that the union will necessarily put up barriers in negotiations—unions take seriously the health of their members. Many unions have regularly published fact sheets regarding COVID-19 designed to persuade their ranks that vaccination is safe and effective.

DESIGNING A VACCINE POLICY



Designing a Vaccine Policy

Employers instituting a vaccine policy of any type need to explain the vaccination requirements and consequences of non-compliance within that policy. If a “Complete and Total” or “Complete but Partial” mandate is chosen, that will affect whether the policy must address legally required accommodations for disability and religion.

Under a conditional or soft mandate, accommodation should *generally* be a non-issue: those who for medical reasons should not receive the vaccine, or who object on religious grounds, can work remotely and remain unvaccinated. Even then, however, it's conceivable that accommodation issues will arise. For example, employees who work remotely 90% of the time may need to attend in-person meetings or onsite events on occasion. Whether such employees must be vaccinated should be evaluated case-by-case.

As for whether even to address accommodations in a conditional mandate policy, we recommend saying something concise, e.g., “We do not anticipate disability or religious-based requests for accommodation, because those with disability or religious-related concerns about vaccination may work remotely. Nonetheless, any employee needing accommodation in relation to this policy should contact [INSERT CONTACT PERSON]”.

In situations where an employer seeks to impose either a “complete and total” or “complete but partial” mandate, meaning at least some current employees must be vaccinated as a condition of continued employment, consider the following:

Statement of Policy

Given the policy nuances described above and extensive misinformation circulating about COVID-19 vaccines and vaccine mandates in social media and elsewhere, policies should make clear exactly what is required of whom by when. If a policy applies only to employees in certain locations or positions, it should say so. If it applies to everyone everywhere, with exceptions only to the extent required by law, it should say so.

Other Required Features

While few issues surrounding employment decisions pertaining to the pandemic and vaccination are “one size fits all,” we generally advise that a written policy address several critical points:

- **Accommodations.** A policy should make clear that accommodations will be granted as required by law, and that employees with a disability or religious-based objection may request an exception or other accommodations. The policy should provide that eligible employees' requests will be granted absent undue hardship to the company or direct threat to the health and safety of the employee or others. While the EEOC's Technical Assistance guidance does not say a policy must say the above, it does make clear an employer must *do* the above. Nonetheless, the policy should contain a statement to the above effects, addressing both religion and disability. This shows the employer is aware of its obligations, and avoids the argument that the policy discouraged requests for accommodation by not referencing them.

- **Process.** To whom should accommodation requests be addressed? It is in the employer's best interest to have accommodation requests channeled to a few trained professionals instead of scattered across the country in the hands of dozens of managers. The company should designate someone or a small group within HR that knows how to handle and document accommodation requests to drive the workflow. The policy should identify these individuals and provide their contact information. Consider also relying on existing expertise within leave administration teams for disability analyses, and seeking advice from spiritual advisors as needed when assessing objections citing religion.
- **Non-compliance.** Consequences of non-compliance should be spelled out. For example, will testing (or masking) be an available alternative for those who will not get vaccinated but are not entitled to accommodation? Assuming not, you will need to decide whether to progressively discipline those who don't comply or proceed immediately to termination (subject to any state or local leave laws entitling the employee to limited time off related to vaccination). This is a judgment call to be made based on corporate culture, employee relations concerns (including retention and recruitment in a tight labor market), and the message you want to send via the policy. One alternative to immediate discharge would be a week's suspension for the non-compliant employee to learn more about vaccination and perhaps reconsider their refusal to get vaccinated. If you generally use progressive discipline, another option is to follow those steps, and then ultimately terminate if non-compliance persists. This also gives the individual time to consider her or his actions.
- **Timing.** Policies should inform employees how long they have to act and what constitutes compliance. Many will receive a two-shot vaccine and will not be considered "fully vaccinated" until 14 days *after* the second shot. The recommended time between injections is 21 days for Pfizer-BioNTech and 28 days for Moderna, followed by the 14-day waiting period. See www.cdc.gov ("COVID-19: When You've Been Fully Vaccinated"). Employees should be able to get vaccinated quickly in most areas of the country. But be reasonable and give employees plenty of time to get that first shot, and build in time to allow for the second shot and the subsequent waiting period. We recommend providing between 45 and 60 days from when the policy is announced. Once the employee has completed the vaccination regimen and reported vaccination status (see below), the employee is in compliance under the policy.

Optional Features.

Other appropriate topics you may want to address in the policy include:

- **Rationale.** Employees will want to know why the company is implementing a vaccine mandate now. A strong policy statement and announcement should help avoid a lot of questions. Reasons may include the delta variant, relatively low vaccination rates in areas where the company has facilities (while wanting to treat employees consistently across facilities), the need for employees who have been working remotely to return to the worksite, the recent FDA-approval of the Pfizer vaccine and direct urging by the Biden Administration that private employers mandate vaccination, philosophical or business-related conviction to contributing to reducing the spread of the virus, or other reasons.

- **Alternatives.** Will testing be permitted as an alternative to vaccination, apart from requests for disability or religious-based accommodation?
- **The Cost of Testing.** If so, will the company pay for such testing when it is not an accommodation for a legitimate disability or religious-based exception?
- **Paid Time.** Will the company pay for time spent getting vaccinated outside work hours, or provide employees extra paid time off to get vaccinated during work hours? As explained below, these are questions you must be prepared to answer. Whether to address them up front in the policy is optional.

Employers opting for a “complete and total mandate” approach can download a [sample mandatory vaccination policy here](#).

ANNOUNCING YOUR VACCINE POLICY



Announcing the Vaccine Policy

As with virtually any employment policy, leadership starts at the top. A mandatory vaccination policy will be controversial, probably offensive to some. Anyone skeptical of either the policy or vaccines generally needs to know this edict comes from the top, and that it is an edict—not an aspiration. Leadership, in turn, must face out as supportive of and committed to the organization's policy decision.

Accordingly, the policy should be announced by the CEO or its equivalent at the given organization. As explained above, employees will want to know why the company is implementing its program *now*, as opposed to two months ago or two months from now. An ideal announcement will succinctly answer that question, in addition to signaling your intentions regarding testing and masking (although accommodation under the ADA or Title VII should be determined case-by-case), such as: “Employees entitled to accommodation **may** be required to undergo testing as part of their accommodation.” The messaging is critical to get right because it likely will be the focus of intense employee discussion, both inside and outside of the workplace, and for some employers could garner media attention.

As with most new employment practices, well-crafted communication neither starts nor ends with the initial announcement. The same stakeholders who etch the framework for a company's vaccination program—likely a mix of the C-suite and senior directors or managers in areas such as operations, HR, and PR—should have input on how the program will be communicated to employees. The communication plan should thoughtfully account for, at a minimum:

- When will the program be announced, and by whom. (As noted, this should ideally be the CEO or its functional equivalent.)
- How, and to whom, will employees raise questions or concerns? Stated differently, who will be authorized to speak to employees on the company's behalf about the policy?
- What guidance will those authorized individuals be provided to help them answer questions consistently, and in line with the organization's intent?
- What guidance will be provided to front-line managers who are likely to receive questions about the program? If the organization doesn't want these individuals answering questions about the program's particulars, it should provide them advance instruction on how to escalate a question. If there are certain questions it trusts these individuals to answer, it should consider providing them a FAQ.
- How will employees be instructed to handle any press inquiries? Ideally, there should be a single, clearly identified point of contact for this.

Additionally, it's important to think ahead about how you will deal with employees who object to vaccination but are not legally entitled to accommodation. Some employers may choose to make clear that those employees **must** be tested twice weekly at designated or undesignated times. The reason is not to provide options or have employees tested, but rather to encourage vaccination. Testing is inconvenient and not a fun experience, and to have to get tested during work, or outside work hours thereby limiting employees' personal time, interferes with other activities. While employers may well have

to pay employees for their time and expense associated with testing (see below), the strategy is to encourage more vaccination, to discourage baseless accommodation requests, and to make those simply disinclined to get vaccinated change their minds.

POLICY CONSIDERATIONS



Policy Considerations

Vaccination Status Reporting

Private employers can require that employees provide proof of their vaccination status (although as noted, employers should exercise caution in Montana given the prohibition on mandates for some vaccines, and the protection around vaccination status). The EEOC has confirmed that asking an employee about their vaccination status is not a disability-related inquiry under the ADA. Because proof of vaccination is not a disability-based inquiry, the EEOC has said that requesting (or requiring) such proof does not violate the ADA. See *Technical Assistance* at K.9. Nor does it violate HIPAA limits on medical inquiries in that private employers as such are not subject to HIPAA privacy rules.

All of that said, the EEOC and others have advised that employers should request only necessary information as to vaccination status, namely the information on the vaccination card. For example, the CDC has said:

If an employer requires employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own health care provider, the employer cannot mandate that the employee provide any medical information as part of their proof.

www.cdc.gov/coronavirus/2019-ncov/vaccines/toolkits/essential-workers.html (updated July 29, 2021).

If, however, the employer goes beyond the necessary minimum and asks an unvaccinated employee why she was unvaccinated, the answer could reveal information regarding a disability, thus making that extra question disability-related and quite possibly ADA-prohibited unless the question is job related and consistent with business necessity. *Technical Assistance* at K.7. As a best practice, employers requiring proof of vaccination should include on the form to be completed: “Do not provide medical or other information of any kind beyond what is expressly requested on this form.”

Acceptable Types of Proof

As for what may constitute appropriate proof of vaccination, three types exist:

CARD	NOTE	ATTESTATION
The vaccination record card or a copy of it	A health care provider’s letter or note	An attestation by the employee

Whatever the form of proof, it should contain the same content as the CDC’s sample vaccination card: The type of vaccine received, the date of vaccination (or dates if the employee received a two-shot vaccine), and where the individual was vaccinated.

Subject to the above, any jurisdiction requiring proof of vaccination (which various states do as to health care employees, and Puerto Rico does as to private employers more generally) will accept the vaccination card, a copy thereof, or a doctor’s note. Some jurisdictions that mandate health

care workers be vaccinated will accept an employee attestation, e.g., California, whereas others will not, e.g., Washington State. These proof of vaccination requirements do not apply to most private employers, however, so the question remains: Is there a recommended nationwide approach to requiring proof? The answer (regrettably) is “it depends.” In our experience, none of the three approaches is more or less susceptible to forgery. Accordingly, for a workforce (or part thereof) that bristles against any mandate and places a premium on medical privacy, allowing employee attestations makes sense. Conversely, if neither of those conditions is uniquely applicable to the workforce in question, we see no reason to allow attestations as a third method of proof. The exception would be California (and any other states) that expressly permit attestation by employees subject to mandatory vaccination. In those jurisdictions, the state has expressly authorized and thus approved attestation. Though that approval is inapplicable to most private employers, a company or company operation in those states should follow the state’s example and permit attestations. Download a [sample attestation](#) here.

Keeping Vaccination Data and Status Confidential

Per the EEOC, employers should treat vaccination records as confidential medical information. *Technical Assistance* at K.4. This was a bit of a surprise, in that the EEOC has also made clear that vaccination is not itself a medical examination. In any event, employers should treat vaccination status and records the same as other confidential medical information (“CMI”), and maintain it apart from the personnel file, be it hard copy or electronic.

Can a company share vaccination status with supervisors who have a need to know, for example, in order to enforce a company-imposed mask mandate for those not fully vaccinated (assuming no applicable state or local government mandate is in effect)? Under the ADA, CMI cannot be shared with supervisors; only information concerning restrictions and accommodations flowing from the CMI can be shared. 29 C.F.R. § 1630.14(c)(1)(i).

Vaccination status of any employee must not be shared with that employee’s co-workers or others. We therefore do not recommend that employers mandate the use of stickers, name badges, or other marks intended to differentiate vaccinated employees from unvaccinated employees. Not only are the legal implications unclear, bad facts can make for bad law, and we think it better not to force employees to wear a vaccination indication either way.

Paying for Time Associated With COVID-19 Vaccination and Testing

Employers that mandate vaccination or testing must consider whether an employee's time spent on either process must be paid. That question arises at two levels: (1) is the associated time compensable, such that it must be counted and paid as hours worked; and (2) if the time is not hours worked, is the employer nonetheless required to provide paid leave for the time?

The compensability of time spent obtaining a required vaccination or testing remains largely uncharted—certainly at the federal level, and in most states as well. In our experience, many employers have proven willing to provide compensation or incentives for employees to receive vaccination injections, even where they might not be required to do so. Payment for time associated with regular testing presents a taller financial and logistical burden and has seemingly resulted in more divergent practices. Nevertheless, understanding the contours of what is or may be *required* is a necessary starting point for making these sorts of decisions.

The federal wage and hour law, the FLSA, doesn't speak to mandatory vaccinations or related testing. Furthermore, the U.S. Department of Labor, which has authority to interpret and enforce the FLSA, has offered few guideposts. The DOL's guidance confirms that time spent undergoing mandatory testing on the employer's premises, during an employee's workday, is compensable time. Presumably time spent receiving vaccination injections, during the workday and onsite, would be treated the same way.

But when it comes to offsite, after-hours testing or vaccination, we have merely a scattering of dots that cannot yet be conclusively connected. They include:

- **The Definition of Work.** Employees must be paid for time performing their “principal” work activity, as well as time that is an “integral and indispensable part” of that activity. In *Integrity Staffing Solutions v. Busk*, the U.S. Supreme Court clarified that (i) “principal activities” are those the employee is employed to perform, and (ii) an activity is integral and indispensable “if it is an intrinsic element of the [employee's principal] activities and one with which the employee cannot dispense if he is to perform his principal activities.”
- **Pre- and Post-Shift.** Employees needn't be paid for time spent performing activities that are “preliminary” or “postliminary” to their principal work activities.
- **De Minimis Time.** In some circumstances, an employer isn't required to pay for what could be described as inconsequential amounts of working time or, as characterized by the U.S. Supreme Court, “trifles” of time.
- **Time Receiving Medical Attention.** In pre-pandemic guidance, the DOL instructed that “[t]ime 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.” 29 C.F.R. § 785.43.
- **Time on Special Tests, Such as Medical Exams.** Also before the pandemic, the DOL advised that if an employer imposes “special tests, requirements or conditions” that an employee must meet, such as medical examinations, fingerprinting, or drug tests, an employee's time spent traveling to/from and undergoing the exam/test is “probably hours

worked.” See U.S. DOL, FLSA Hours Worked Advisor, Physical Exams, Fingerprinting and Drug Testing.

- **Onsite Testing.** As noted above, the DOL has advised that while time spent undergoing mandatory COVID-19 testing during an employee’s workday is compensable work time, after-hours testing is compensable only if it is necessary for the employee to be able to perform her job safely and effectively during the pandemic (e.g., a grocery store cashier). See www.dol.gov/agencies/whd/flsa/pandemic (“COVID-19 and the Fair Labor Standards Act Questions and Answers, U.S. Department of Labor”).

These guideposts point to the fact sensitivity of questions surrounding whether and when time spent undergoing mandatory vaccination or testing is compensable work time under federal law. Onsite vaccination or testing during an employee’s normal work hours presents the clearest case—that time should be paid. While it’s tempting to say the opposite is also true—i.e., that offsite vaccination or testing outside of an employee’s normal work hours needn’t be paid—the better and safer bet is a fact sensitive answer for this scenario, as well as other testing or vaccination scenarios, that turn on factors such as:

- **Location.** When an employer requires an employee to test or receive a vaccination injection on its premises, that will lean in favor of deeming the time compensable. Where the employer allows the employee to test or receive their injection wherever they choose, that will point toward non-compensability.
- **Connection to the Job.** Where a retail employer, for example, mandates that only its customer-facing employees must vaccinate, there could be a strong argument that the requirement is closely connected to the job’s principal activities and therefore should be treated as compensable time. Conversely, where an employer issues a vaccine mandate as to all employees, regardless of position, this line of argument substantially weakens.
- **Amount of Time.** While an employer might not have much control over how much time an injection takes, testing is a different story. If an employee is permitted, for example, to utilize an at-home test that can be completed in seconds, that would enhance the employer’s ability to later argue that the associated time, even if technically work time, is *de minimis*.
- **Voluntariness.** For employees who undergo weekly testing because they have chosen not to vaccinate, but not as a result of a disability- or religious-based vaccine exemption and accommodation, an employer would have a stronger argument against the compensability of the time. The testing, in this circumstance, is being undertaken at the employee’s option. If, however, an employee is required to test as a reasonable accommodation for a medical or religious exemption from a mandated vaccine, that time is arguably compensable, as individuals cannot be disadvantaged based on their medical or religious status.
- **Existence of a Government Mandate.** If employees are being vaccinated or tested pursuant to a government mandate that they vaccinate or test, that leans in favor of non-compensability under the FLSA because it suggests the activity stems from something other than a principal, intrinsic, or integral aspect of any given employee’s job.

Even if an employer concludes it needn't treat vaccination or testing time as compensable under the FLSA, some states' laws may dictate a different result. Unsurprisingly, California provides an example. There, state law defines "work" more broadly than the FLSA, focusing not on "principal" or "integral and indispensable" activities, but rather on whether the employee is subject to the employer's control. With that guidance in mind, California's Labor Commissioner has confirmed that "[i]f the employer requires an employee to obtain a COVID-19 test or vaccination, then the employer must pay for the time it takes for the testing or vaccination, including travel time." See www.dir.ca.gov/dlse/COVID19resources/FAQs-Testing-Vaccine.html ("COVID-19 Testing and Vaccine FAQs"). Because such time counts as work time, it would count toward daily and weekly overtime.

California isn't the only state that is likely to take a different view of compensable time than what the FLSA might dictate. In Illinois, as another example, the state labor department has similarly provided that "[u]nder the [state minimum wage law] and the FLSA, if an employer requires employees to get vaccinated, the time the employee spends obtaining the vaccine is likely compensable, even if it is non-working time." See [DOL_Vaccine Leave Guidance.pdf](#) (illinois.gov). Furthermore, some states, such as Pennsylvania and California, deviate from the FLSA in that they do not recognize a *de minimis* exception.

Separate and apart from the question of compensability is the question of whether an employer must provide paid time off for testing or vaccination. Various states and localities require employers to provide employees with paid time off to receive a COVID-19 vaccine, as well as for time missed from work due to side effects of the vaccine. This includes, for example, New York, which requires employers to provide up to four hours of paid leave for each COVID-19 injection, and Massachusetts (through September 2021) and California, which have expanded COVID-19 supplemental paid sick leave laws to include vaccination-related entitlements.

Paying for Costs Associated With COVID-19 Vaccination and Testing.

While employers should expect to pay for *time* to get vaccinated or tested, having to reimburse for hard costs is a different matter. If employers are requiring testing of unvaccinated employees and there is an out-of-pocket cost, then for those employees being tested because they have received an approved exemption as an accommodation for a disability, pregnancy, or sincerely held religious belief, employers should reimburse them for these out-of-pocket costs.

If, however, unvaccinated employees are being tested because of a personal choice not to be vaccinated without a legally protected accommodation, then employers in most states need not reimburse them for the testing costs so long as minimum wage is not jeopardized. Note that some states require reimbursement of expenses, and others maintain statutes that prohibit shifting the cost of medical examinations to employees. In addition, some states have passed COVID-specific guidance that says employers must pay for testing. One state that represents a close call is California, where normally required costs must be reimbursed. However, since the employee could avoid the cost by getting vaccinated, employers may have an argument that the associated cost is not reasonable and necessary and therefore need not be reimbursed.

Incentives for Vaccination (or Disincentives for Non-Vaccination).

Employers strategizing to safely return more employees to the workplace, or to keep employees safely working onsite, have long contemplated offering incentives to encourage vaccination. Now,

as the focus shifts to the costs of hospitalizations caused by COVID-19 as well as indefinite routine testing, some employers are looking to impose disincentives on those who refuse to vaccinate without a disability exemption or bona fide religious objection. Such measures can be imposed, for example, through wellness programs or increased insurance premiums.

These measures, which differentiate unvaccinated plan participants from others, implicate regulatory considerations imposed by the U.S. Department of Health and Human Services (“HHS”) (relating to HIPAA) and the EEOC (which enforces the ADA and Genetic Information Nondiscrimination Act).

HIPAA divides wellness programs into two main categories: (1) participation-only programs; and (2) health-contingent programs. Participation-only programs do not require any conditions for receiving a reward and have very few associated requirements but must be available to all similarly-situated individuals.

Health-contingent programs, by contrast, reward employees who satisfy a standard related to a health factor (based on activity or outcome). Although HHS has not provided direct guidance, consensus is building that a vaccine incentive under a health plan would constitute a health-contingent activity-only program because some employees are not able to vaccinate due to underlying health conditions. Such programs must meet the following requirements:

1. **Incentive Limit.** Incentives must be limited to 30% (when combined with any other “health contingent” wellness program offered under the plan) of the overall cost of coverage (i.e., the COBRA rate) of the value of the elected coverage (e.g., self-only, family). (The limit is increased to 50% if the plan links incentives to smoker status.)
2. **Reasonable Alternative.** A reasonable alternative must be offered to persons who cannot get vaccinated because it is medically inadvisable (or due to the overlay of Title VII, because of a sincerely held religious belief).
3. **Notice Requirement.** Participants must be notified of the availability of the reasonable alternative in all materials substantially describing the program.
4. **Annual Opportunity to Qualify.** Participants must be offered the opportunity to qualify for the incentive at least once per year.

The EEOC approves of health-contingent activity-only wellness programs that meet the HIPAA/HHS standards. (And new EEOC wellness program rules also will allow a non-coercive (i.e., not overly large) incentive for participatory programs that incent vaccination.)

Because EEOC guidance confirms that seeking vaccine status alone is not a “medical exam or disability-related inquiry” under the ADA, if an employer simply requests proof of vaccination status without requiring the employee to get the vaccine directly from the employer (or its contractor) that program is arguably outside of the scope of the EEOC’s wellness guidelines entirely.

Employers considering this approach should be wary of any applicable collective bargaining considerations and the following additional concerns:

- **ACA/Affordability Rules May Further Restrict Surcharge.** For ACA purposes, if the “incentive” is structured as an increased premium, the employer must treat *all employees* as if they failed to get vaccinated and were required to pay the increased amount for purposes of determining the affordability of coverage. An employer could potentially mitigate this concern by designing its “penalty” as a deductible increase rather than a premium increase, which would not impact affordability. Similarly, the ACA only requires that employers offer one affordable option. To the extent the surcharge only applies to one of several benefit packages, this may mitigate ACA risks by leaving lower-cost options untouched.
- **HIPAA Privacy.** If vaccination status is procured in conjunction with a health plan-linked wellness program, vaccination status would constitute PHI and could not be used/disclosed for non-health plan purposes (e.g., workplace safety monitoring). Employers could still request vaccination status outside of the health plan and/or have the employee complete an authorization permitting the disclosure.
- **Section 125 Plan.** Any mid-year “significant” cost changes could be considered a mid-year qualifying life event. That assumes, of course, that the plan (a) recognizes that permissible IRS event, and (b) the plan administrator considers the cost increase to be significant. If it’s insignificant, the plan can simply adjust the premium automatically (subject to applicable state wage withholding requirements).
- **Material Modification.** A surcharge (or reward) likely would constitute a material change requiring a Summary of Material Modification (“SMM”). A surcharge may also constitute a material reduction, meaning the SMM should be issued within 60 days of adoption.

The Rise of Government Mandates

Many states' legislatures have been active in proposing bills hostile to vaccine mandates for most types of private employers (outside of health care or elderly care and congregate settings). Lawmakers in many states have proposed legislation designed to prevent private businesses from mandating COVID vaccinations of employees. As noted above, however, only Montana has passed such a law—a vaccine mandate remains legal everywhere else.

Nonetheless, the volume of proposed legislation underscores that employers requiring vaccination must anticipate resistance among some employees while continuing to monitor legislative developments. This is especially the case while some vaccines continue to be administered under EUA rather than full FDA approval. In Minnesota, proposed legislation would make it a felony with a minimum ten-year sentence for any “agent” of a “business” to “treat differently, single out, deny opportunity, ostracize, stigmatize, or discriminate against an individual as a result of the individual’s decision on whether or not to receive a vaccine.” Even in New York, a proposed bill provides that no “vaccine used for the purposes of inducing immunity against coronavirus in humans in this state shall be a mandatory immunization” and no “person shall be required to receive such vaccine unless such individual chooses to be vaccinated.”

Governors have also actively issued executive orders during the pandemic, many directed at requiring vaccine passports of patrons or customers. Most such orders are directed solely at government actors, but some apply to private businesses that receive funds or have contracts with the state, including those issued in Arizona, Florida, Montana, and Texas. Vaccine passport issues have also resulted in state law restrictions on both government and private business actors. That said, none of these orders expressly restrict employment actions by private employers.

Meanwhile, some states and local governments have themselves mandated vaccination for certain kinds of workers, particularly government employees who care for patients and the elderly, or who work in “congregate” settings such as prisons, hospitals, etc. An increasing number of states are expanding these mandates, and with the August 23rd FDA approval of the Pfizer vaccine, the expectation is that more and more government-imposed mandates will issue requiring vaccination for state and federal workers.

Mandates for private employers are less common at present. California, Connecticut, Massachusetts, New Jersey, New York, Oregon, Puerto Rico, and Denver, Colorado have all taken steps to mandate that employees in certain sectors—most commonly health care and long-term care facilities (though more broadly in Puerto Rico)—become fully vaccinated. Other states, such as Kentucky and North Carolina, impose mandates for certain employees at state-run hospitals. President Biden, following Pfizer’s FDA approval, urged private employers to mandate vaccination, which may prompt further legislative action.

See the next page for a chart of state and local vaccine mandates for certain private sector employees, as of September 1, 2021.

Sampling of State Mandates Applicable to Private Sector Employees

CA	Employees of hospitals, nursing homes, dentists' and doctors' offices and other health care settings will have to be vaccinated against COVID-19 by August 23, 2021 , or be tested weekly.
CT	Employees at long-term care facilities including nursing homes, residential care homes, and assisted living facilities must receive their first vaccination injection by September 7, 2021 .
CO	Denver will mandate all city employees and private sector workers in high-risk settings to be vaccinated by September 30, 2021 . The order includes congregate care settings such as nursing homes, homeless shelters, hospitals, and correctional facilities. After September 30, workers who do not get vaccinated but are required to do so under the mandate will not be allowed to work onsite .
KY	Contractors and state employees working in state-operated health care facilities are strongly encouraged to be fully vaccinated by October 1, 2021 , unless there is a religious or medical reason they cannot be vaccinated. If any of the staff in these facilities is unvaccinated, they will be tested at least twice weekly.
MA	Employees and contractors at skilled nursing and other long-term care facilities must be vaccinated by October 10, 2021 barring medical and religious exemptions. Agency approval is expected to extend this mandate (through October 31) to workers in rest homes, assisted living, hospice and home care (contracting or subcontracting with MassHealth).
NJ	All workers in certain state and private health care facilities and high-risk congregate settings will be required to be fully vaccinated against COVID-19 or be subject to COVID-19 testing at minimum one to two times per week . Health care facilities and other settings covered by the requirement will have until September 7, 2021 for all employees to come into full compliance.
NY	Pursuant to its governor's announcements and a subsequent order by the state public health department , health care workers, including staff at hospitals and long-term care facilities (including nursing homes, adult care, and other congregate care settings) must vaccinate. For patient-facing health care workers at state-run hospitals, a first vaccination shot is required by September 6, 2021 . For other health care workers, a first injection is required by September 27 .
NC	As reported by the AP , workers and volunteers at state-run health care facilities must be fully vaccinated against COVID-19 by September 30, 2021, or be tested at least once each week.
OR	Oregon health care workers must be vaccinated by September 30, 2021 , or be tested weekly. Limited in scope to "workers who have direct or indirect contact with patients or infectious materials." Advisory on health care professionals with authority to vaccinate in Oregon.
PR	Health facility workers, in addition to government contractors and hotel employees, must be vaccinated by September 30, 2021. The governor has also announced that employees of restaurants and other enclosed places that serve food or drinks must get vaccinated. Those who do not vaccinate for any reason must bring a negative test result weekly.

ACCOMMODATIONS STRATEGIES



Accommodations Strategies

Employees or applicants who cannot get the COVID-19 vaccine because of qualifying disability may be entitled to reasonable accommodation under the ADA. Here, we provide an overview of this aspect of a vaccination policy, followed by common questions.

Disability Accommodations

Commonly claimed disabilities that may prevent someone from getting the COVID-19 vaccine, include:

- **Anxiety:** This cannot be a generalized fear and must be supported by a medical certification to be considered a qualifying disability.
- **Allergic Reactions:** The individual must be allergic to a component of the vaccine or prior vaccines where the reaction was severe enough to cause anaphylaxis or other reaction that caused hospitalization.
- **Certain Autoimmune Disorders:** Certain autoimmune disorders may cause individuals to have a negative reaction to the vaccine or prevent employees who receive the vaccine from developing antibodies. Common autoimmune disorders that employees tend to seek accommodations for include: Lupus, Bell's Palsy, Guillian-Barre Syndrome, and Rheumatoid Arthritis. There is conflicting information and guidance regarding whether these or any other autoimmune disorders disqualify someone from receiving a COVID-19 vaccine. Therefore, if the employee presents a valid medical certification supporting their inability to receive the vaccine for either of these reasons, an employer should not engage in a medical debate and accept the autoimmune disorder as a disability.
- **Pregnancy/Breastfeeding:** The CDC recommends the COVID-19 vaccine is safe for pregnant and breastfeeding individuals, but there continues to be a difference of opinion amongst medical practitioners. Therefore, if the employee presents a valid medical certification supporting their inability to receive the vaccine for either of these reasons, an employer should not engage in a medical debate and accept the pregnancy as a disability.

If an individual has a qualifying disability, the employer must consider whether it can reasonably accommodate the employee under a "direct threat assessment." The ultimate question is whether the unvaccinated person poses a direct threat to themselves or others by exposing them to COVID-19 in the workplace. The factors to consider include:

- **Nature of the work.** With whom is the employee working and interacting? Are they exposed to a lot of unvaccinated or high risk people, such as children or the elderly?
- **Amount of close contact with others.** Are they working in a customer-facing retail setting or in an office job? If an office, is it an open concept or are there independent offices?
- **How many others in the workplace are vaccinated?** In general, over or under 70% is a common "tipping point" in terms of tolerance for an unvaccinated population. Are others in the office required to wear masks or socially distance?

- **Is the workplace located in an area with a high transmission rate per the CDC?**

An employer cannot automatically exclude an individual from the workplace or take any action even if they determine the employee poses a direct threat, unless no reasonable accommodation is available that would eliminate or reduce the risk of the unvaccinated employee posing a direct threat.

An employer must go through the interactive process to determine whether the employee poses a direct threat with or without a reasonable accommodation and if they do, whether there are any reasonable accommodations that can be made to eliminate that threat.

An employer should engage in the interactive process in the same way it would for any other disability-related accommodation request. This is especially true in California, where there is a separate and independent cause of action for failing to engage in the interactive process.

Common examples of reasonable accommodations include: masking, testing, social distancing, alternative work hours, work from home, unpaid leave, etc.

Common Questions Regarding Disability Accommodations

Question	Answer
<i>If an employer is only requiring employees be vaccinated to come into the workplace and is allowing any non-vaccinated employees to continue working remotely, do they have to provide reasonable accommodations under the ADA?</i>	Yes, but only if the individual is unvaccinated due to a qualifying disability and says they do not want to work remotely because, for example, they are being disadvantaged (i.e., the whole team is meeting in person and they are being excluded) or they cannot do their essential job functions remotely. In that situation, an employer must engage in the interactive process as described above.
<i>Can an employer request medical documentation to verify whether the employee has a qualified disability?</i>	Yes, an employer can and should request supporting medical documentation from employees who assert they cannot be vaccinated because of a disability.
<i>Can an employer implement temporary accommodations while working through the interactive process with the employee?</i>	Yes, an employer should consider temporary measures while engaging in the interactive process so that the employee does not create health/safety risks for themselves or other employees while an employer is determining whether or not the employee can be reasonably accommodated. An employer should provide confirmation, in writing, to the individual making it clear that the “accommodation” being provided is only temporary while the parties are engaging in the interactive process.

<p><i>Must an employer automatically allow an employee to work remotely as a reasonable accommodation if the employee has worked from home during the pandemic?</i></p>	<p>This is a fact intensive analysis and should be assessed on a case-by-case basis. Working remotely may not be a reasonable accommodation in every situation, but the employer must be able to show that the employee cannot perform their essential job functions remotely in order to deny an employee's request to continue working remotely (where they cannot be vaccinated for disability-related reasons). In the case of an employee who has been working remotely for the duration of the pandemic, it may be more difficult to show that they must be in the workplace to perform their job—but not impossible.</p>
<p><i>If an employee says that they cannot be vaccinated and cannot wear a mask due to a qualified disability, what are the employer's options?</i></p>	<p>If an employee cannot be vaccinated <u>and</u> cannot wear a mask due to a qualified disability, there are very few options for allowing the employee to physically return to the workplace that would mitigate or eliminate the "direct threat" to the employee or others. Unpaid leave or working remotely are possible options, but it will ultimately depend on the duration of the need for the accommodation and/or whether or not the employee can perform their essential job functions remotely.</p>

Religious Accommodations

In general, applicants and employees with “sincerely held religious beliefs” may be exempt from vaccination requirements to the extent such a requirement contradicts those beliefs. As a result, religious claims of exemption from mandatory vaccination policies must be taken into careful consideration, and employers must consider whether sincerely held religious objections can be accommodated.

Religion is broadly defined, and difficult to question. The EEOC defines “religion” to include “all aspects of religious observance and practice as well as belief,” not just practices that are mandated or prohibited by a tenet of the individual’s faith. In particular, the “belief” need not be tied to any formal, organized religion. In fact, official doctrine from most major religions does not prohibit vaccination and, to the contrary, many religions actively encourage or support vaccination.

“Because the definition of religion is broad and protects beliefs, observances, and practices with which the employer may be unfamiliar,” the EEOC explains, “the employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief.” The EEOC also notes, however, that if “an employer has an objective basis for questioning either the religious nature or the sincerity of a particular belief, observance, or practice, the employer would be justified in seeking additional supporting information.” See EEOC’s Compliance Manual on Religious Discrimination, 12.I.A.3.

Religious beliefs may include those that are new, uncommon, not part of a formal church or sect, or only subscribed to by a small number of people. They may even include beliefs that appear illogical or unreasonable to others. Under the law, the belief need not even be theistic at all—it is enough that it is a moral or ethical belief about right and wrong. By contrast, a belief rooted in social, political or economic philosophies, or mere personal decisions or preferences, are not religious beliefs protected by law.

Whatever the claimed religious belief, however, it must be sincerely held.

Probing Claims of Religious Objection.

As noted even by the EEOC, the employer “must have enough information to make the employer aware that there exists a conflict between the applicant’s or employee’s religious observance, practice, or belief” and the employer’s job requirement. Employers may also take steps to determine whether the religious belief is sincerely held. These inquiries, however, are sensitive and can take preparation and skill to navigate.

Employers who press applicants and employees on whether their belief is “religious” or “sincerely held” do so at their own risk, and employers should generally assume that a request for religious accommodation is legitimate. At the same time, employers mandating vaccination are drawing an unprecedented number of objections that appear to be under questionable circumstances. Churches and pastors are popping up on-line, advertising services for writing religious exemptions to vaccination, testing and masking programs. “Customizable” form templates for exemptions are also available for free online.

The primary step is to make sure the employee completes an exemption request form that requires the employee to specifically write down their precise religious beliefs, and include a detailed explanation of how their beliefs are contrary to the practice of COVID-19 vaccinations,

testing or masking, as the case may be. The form should make clear that employees must provide truthful and accurate information, and should note that the employee may be asked to provide additional information to support the request. Employers also should endeavor to uncover, up front, whether the employee intends to raise objections to potential accommodations, such as testing and masking.

If the information returned appears to be spurious or gives the employer an objective reason to doubt sincerity or the link to religious beliefs, employers may then take additional steps in the interactive process dialogue to try to parse mere personal preferences from religious beliefs, and also to determine whether claimed religious beliefs are sincerely held.

For example, if an employee presents a boilerplate form purchased on or downloaded from the internet, or a form that many others have also submitted from the same source, or the employee suddenly shifts from secular objections to a purported “religious” objection, that may constitute objective reason to make further inquiry of the employee about the sincerity of the employee’s religious beliefs.

Essentially, the tenor of such a follow-up inquiry is “tell me more” or “help me understand.” While the volume of objections may make individual follow-ups difficult, employers interested in testing the veracity of religious objections likely will have more success uncovering the truth in a conference or phone call, rather than in a letter or email-writing campaign. But either way, employers must proceed carefully when following up with clarifying requests and information. Documenting that each step in the interactive dialogue took place, and its outcome, remains critical.

As a follow-up to suspicious religious accommodation requests, the employer will often glean the most useful information with open-ended questions asking the employee further to explain the nature of the religious belief and the objection to vaccines. Some possible areas for respectful further discussion or inquiry may include:

- A general discussion about what the employee knows about the state of vaccines, which may cause the employee to reveal that he or she is really motivated by personal, political, or even conspiratorial reasons to be anti-vaccination;
- Follow-up questions about the specific religious underpinnings of the objection to the vaccine (or testing or masking), or how the employee’s religion informs his or her views;
- Questions about how recently the employee has subscribed to this faith (understanding that even recent beliefs may be protected in some cases);
- Whether the employee has received other vaccinations in their lifetime and if so, how the COVID vaccine is different in terms of their religious belief system;
- If the employee has raised objections to potential accommodations such as testing or wearing masks, whether the employee has complied with mask guidance or has received a COVID test in their lifetime, and how the potential need to do so for work would be different in terms of their religious belief system.

Again, employers should proceed cautiously. As the EEOC explains:

An employee who fails to cooperate with an employer's reasonable request for verification of the sincerity or religious nature of a professed belief risks losing any subsequent claim that the employer improperly denied an accommodation. By the same token, employers who unreasonably request unnecessary or excessive corroborating evidence risk being held liable for denying a reasonable accommodation request, and having their actions challenged as retaliatory or as part of a pattern of harassment.

Therefore, the touchstone for the employer's inquiries should be making sure they are "reasonable" and not "unnecessary or excessive."

With the above cautions in mind, below are examples of some generally permissible follow-up inquiries if an employee requests a religious exemption from COVID-19 vaccination, and the employer has established an objective basis for doubting the religious nature and/or sincerity of the belief. Please remember that one size does not fit all so that some of the questions may not be appropriate to the situation in question and may have to be changed even in the course of the interactive meeting:

"I am respectful of whatever you believe, but I need to better understand it in order to consider your request. What is it about your religious beliefs or practices that prevents you from getting vaccinated?"
"What is the name of your religion (if any)?"
"Are you a member of a particular church or religious organization?" (<i>Understanding that such membership is not required for a belief to be protected.</i>)
"What is the nature of your beliefs/practices/ observances?"
"Where and how do you adhere to these beliefs/observances/practices?"
"When did you first began to embrace these beliefs/observances/practices?"
"How do the company's policies and/or procedures conflict with your beliefs, observances, or practices?"
"Have you ever received any vaccines before? What is the difference between your getting vaccinated before and now?"

"We understand you are comfortable complying with various COVID-19 safety protocols: social distancing, face coverings, and frequent handwashing. Can you help me understand why those measures are consistent with your religious beliefs but vaccination is not?"

"Besides vaccines, do your religious beliefs prevent you from being tested for COVID-19? (Note that the testing involves a nasal swab—there's no injection or piercing of the skin. It is not a treatment; it's only a test.)"

"Any additional information regarding your beliefs, observances, or practices that support your request for a religious accommodation?"

Because the determination of whether an employee's beliefs, observances, or practices are religious in nature and/or sincerely held can sometime be complex, difficult to answer, and it is not always possible to develop generalized criteria that fit all situations, it is recommended that an employer consult legal counsel during the interactive process and before making a determination to deny a request for religious accommodation.

Reasonable Accommodation and Undue Hardship

Once an employer is on notice of a religious belief that is sincerely held, it must provide a reasonable accommodation unless that would pose an undue hardship. With respect to religious discrimination, "undue hardship" is defined as having more than a *de minimis* cost or burden on the employer. Pre-pandemic, this has generally been an easier standard to meet than for disability-related accommodations, which requires a showing of significant difficulty or expense.

How religious exemption requests will play out against a mandatory COVID vaccination requirement remains to be seen. It certainly seems that risking the health and safety of co-workers *should* be too heavy of a burden for an employer to bear. That said, if an objecting employee's work can be and has been done remotely throughout the pandemic, simply *desiring* that employees return to the office may not suffice to deny the accommodation of continued remote work in a particular situation. At a minimum, if an employer continues to allow remote work for other employees in the same role, then remote work should also be an option for the employee who asserts a religious objection to vaccination.

Some employers may also consider whether there's a safe and acceptable way to allow the objecting employee to return to the workplace. If the job really only requires infrequent, periodic in-person meetings, the employer may need to tolerate a regimen of frequent testing, mask-wearing, personal protective equipment, distancing, and other protections used throughout the pandemic to minimize the risk of spread. For example, an employer could require: (i) before meeting in-person, an employee must have two negative test results that are 48 hours apart, with the most recent test occurring the day prior or day of the meeting; and (ii) daily symptom-checks plus continuous mask wearing and social distancing. The employer may wish to specify the type of test required, or the specific mask required (such as a well-fitting N95). Wherever possible, employers should consider vacant positions or other roles for which the employee may be

qualified without vaccination, and should always make an effort to legitimately explore potential accommodations and document having done so.

However, in certain cases, an employer may be able to conclude that an employee's religious belief against the COVID vaccine cannot be accommodated without undue hardship. Health and safety concerns have long been one of the strongest grounds for a successful undue hardship defense.

The employer should think through in detail the nature and strength of the potential undue hardship defense.

- What risk does the unvaccinated employee pose to other employees?
- To patients or customers or clients or vendors?
- In what ways are testing, masks or other measures inadequate to mitigate those risks in the particular work setting?
- Will the unvaccinated employee be working with populations that are high risk or not yet eligible for vaccination?
- Will the unvaccinated employee be in work settings where distancing or masking are not possible?
- Are there vulnerable employees in the workplace who have raised concerns about working in proximity with unvaccinated colleagues?
- What expert guidance supports the view that the unvaccinated worker presents a safety concern, and that other measures such as testing are not adequate protection?

Though health and safety concerns will generally be the strongest undue hardship defense, the employer can also consider other burdens created by unvaccinated employees—whether that is greater disruption to the business, imposition on co-workers by making their job harder, absences from illness and quarantines, an additional testing burden, or other costs.

A common religious objection letter that appears to be available online requests exemption not only from vaccination requirements, but also masking and testing requirements. Certainly during the pandemic, it would seemingly pose a legitimate health and safety concern to exempt an employee from all of these requirements if the job must be performed in person. An employer facing this type of exemption request therefore should consider the request as tantamount to a request for remote work, and must be able to justify why the job must be performed in person, and demonstrate that it would be an undue hardship to permit remote work. That means, at a minimum, the employer must not let other similarly situated employees work remotely, and must be able to answer the question: if the job was remote during the pandemic, why or how continuing remote work would now present an undue hardship.

There are employers—particularly in the health care sector—who are insisting on vaccination for all employees, even those who work exclusively remotely. Those employers cite goals including:

keeping all employees healthy and safe; ensuring adequate staffing to conduct operations; and a commitment to community health. Whether the courts will agree that it is an undue hardship to allow even remote workers to remain unvaccinated remains to be seen.

If an undue hardship has been established with no ability to reasonably accommodate, employers may move to end the employment relationship. In such cases, the employer should consider whether it can rely on both objective doubts about sincerity and religious belief as well as on the undue hardship defense to justify denying the accommodation. A wise employer will consult counsel before deciding to rely on an undue hardship defense in terminating someone's employment.

FREQUENTLY ASKED QUESTIONS



Frequently Asked Questions

FAQ for Human Resources Team

Mandatory Vaccination	
<i>Can employers require employees to get vaccinated?</i>	<p>Yes, but ONLY IF, per guidance from the U.S. Equal Employment Opportunity Commission (EEOC) under the Americans with Disabilities Act (ADA):</p> <p>(1) employees receive the vaccine from a third-party pharmacy or other medical provider with whom the employer does not have a contract; OR</p> <p>(2) the employer can show that the need to be vaccinated is job-related and consistent with business necessity, which necessitates a showing that employees who refuse to be vaccinated pose a direct threat to themselves or others in the workplace</p> <p>AND</p> <p>The employer reasonably accommodates those with disability-related or religious objections absent undue hardship.</p>
<i>How does an employer determine if an employee presents a “direct threat” in the workplace?</i>	<p>A direct threat is a significant risk of substantial harm to the health and safety of the individual or others that cannot be reduced by reasonable accommodation absent undue hardship. The EEOC acknowledges that there may be scenarios where accommodation is not possible considering an employee’s job duties and workplace.</p> <p>Determining whether a direct threat exists involves individualized assessment of:</p> <p>(1) duration of risk;</p> <p>(2) nature and severity of potential risk;</p> <p>(3) likelihood potential harm will occur; and</p> <p>(4) imminence of potential harm.</p>
<i>What are potential accommodations for unvaccinated employees?</i>	<p>Potential accommodations include continued masking, social distancing and periodic COVID testing; transfer to a position in which the employee has limited interaction with vulnerable populations, customers, or the public; and remote work.</p>
<i>In mandating the vaccine, does it make a difference that the vaccine is available under an EUA rather than full FDA approval?</i>	<p>Not from a legal perspective, but the EUA status of the vaccine will likely impact employee responses to an employer mandate. In addition, under an EUA, those administering the vaccine must convey in a patient fact sheet that is provided at the time of vaccination that individuals have the option to accept or refuse the vaccine. This can cause employees to question their employer’s ability to mandate a vaccine. Certain employees may be more likely to comply with a mandate if it occurs after the vaccine receives full FDA approval. The FDA approved the Pfizer vaccine effective August 23, 2021.</p>

<i>Can employers require non-employees who enter the workplace to be vaccinated?</i>	Yes, the ADA does not apply to non-employees. However, some states may have laws that require accommodation of non-employees' religious or disability-related objections, such as New York. Employers should also remain cognizant of potential joint employment and independent contractor classification issues in determining whether an individual is a "non-employee."
<i>Can employers require employees who travel for business, or visit customer sites, to be vaccinated?</i>	Yes, under the same conditions set forth in the first question above.
<i>If an employer has a vaccine requirement for employees, must they have the same requirement for contractors?</i>	<p>Generally, no. Employers typically have greater flexibility with non-employees because the ADA only applies to employees. However, some states may have different legal requirements (including New York with respect to independent contractors). Employers should also remain cognizant of potential joint employment and independent contractor classification issues in determining whether an individual is a "non-employee."</p> <p>Also, a number of states are considering legislation that would forbid an employer to take adverse action against individuals who are unvaccinated. See also the discussion of Montana legislation, above.</p>
<i>Is the time spent obtaining the vaccine "compensable time" for wage purposes for non-exempt employees?</i>	If employers are requiring vaccination, then it is safest to compensate non-exempt employees for the time they spend obtaining the vaccination. Additionally, local COVID-19 paid sick leave laws may require paid sick leave or the ability to use paid time off for any vaccine-related absences. OSHA's ETS also imposes such requirements on health care employers.
<i>If an employer requires unvaccinated employees to engage in regular testing and if there are out-of-pocket testing costs, must employers reimburse employees for such costs?</i>	If employers are requiring testing of unvaccinated employees and there is an out-of-pocket cost, then for those employees being tested because they have received an approved exemption as an accommodation for a disability, pregnancy, or sincerely held religious belief, the employer should reimburse them for these out-of-pocket costs. If, however, unvaccinated employees are being tested because of a personal choice not to be vaccinated without a legally protected accommodation, then employers in most states need not reimburse these employees for the testing costs so long as minimum wage is not jeopardized.
Impact of Not Being Vaccinated	
<i>Can employers require unvaccinated employees to continue to work from home?</i>	<p>Yes, if the employee does not have a legally protected reason for not being vaccinated.</p> <p>If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and the employee presents a direct threat in the workplace and there is no reasonable accommodation possible to reduce that threat, absent undue hardship, then it would be lawful for the employer to exclude the employee from the workplace.</p> <p>Also, a number of states are considering legislation that would forbid an employer to take adverse action against employees who are unvaccinated. See also the discussion of Montana legislation, above.</p>

<i>Can employers refuse non-employees who are unvaccinated entry to the workplace?</i>	<p>Yes. Some states may, however, have laws that require accommodation of non-employees' religious or disability-related objections, such as New York with respect to independent contractors. Employers should also remain cognizant of potential joint employment and independent contractor classification issues in determining whether an individual is a "non-employee."</p> <p>Also, a number of states are considering legislation that would forbid an employer to take adverse action against individuals who are unvaccinated. See also the discussion of Montana legislation, above.</p>
Information That Can Be Required	
<i>Can an employer ask employees whether they have been vaccinated?</i>	<p>Yes. The EEOC has confirmed that asking an employee about the employee's vaccination status is not a disability-related inquiry under the ADA. If the employee has not been vaccinated, however, and the employer follows up with questions about why, this could elicit information about a disability and therefore should be avoided unless such follow-up questions are job-related and consistent with business necessity.</p> <p>Also, if an employer requires employees to provide proof that they have received a COVID-19 vaccination, the employer should caution employees not to provide any medical information as part of the proof. It should maintain vaccination records separately, as confidential medical information.</p>
<i>Can an employer ask non-employees whether they have been vaccinated?</i>	<p>Yes. The ADA does not apply to non-employees. Employers should also remain cognizant, however, of potential joint employment and independent contractor classification issues in determining whether an individual is a "non-employee."</p>
Other Common Issues	
<i>Do employees who have been vaccinated need to wear masks and social distance?</i>	<p>The CDC recommends that these precautions continue until the extent of the vaccine's protection is finally determined and herd immunity is achieved and the pandemic abates. Moreover, until state or local requirements for social distancing and mask-wearing are repealed or amended, such requirements remain in place.</p>

FAQs for Employees

<i>Why should I be vaccinated if I am willing to do things like social distance and wear a mask?</i>	<p>Vaccines serve a purpose different from but related to social distancing and mask-wearing. Vaccines work with your immune system to enable your body to fight the virus if you are exposed. Other precautions, like covering your mouth and nose with a mask and staying at least 6 feet away from others, help reduce your chance of being exposed to the virus or spreading it to others. Doing both is the best protection from COVID-19.</p>
<i>If I am vaccinated, do I need to continue to wear a mask and social distance?</i>	<p>Yes. As more is learned about the protection that COVID-19 vaccines provide under real-life conditions, it will be important for everyone to continue using all the tools available to prevent transmission of the virus, like covering your mouth and nose with a mask, washing hands often, and staying at least 6 feet away from others.</p>

<i>Once I am vaccinated, when can I stop wearing a mask and social distancing?</i>	There is not enough information currently available to say if or when CDC will stop recommending that people wear masks and social distance. Experts need to understand more about the protection that COVID-19 vaccines provide before making that decision. Other factors, including how many people get vaccinated and how the virus is spreading in communities, will also affect this decision.
<i>If I have already had COVID-19 and recovered, do I still need to get vaccinated with a COVID-19 vaccine when it's available?</i>	COVID-19 vaccination should be offered to you regardless of whether you already had a COVID-19 infection. Anyone currently infected with COVID-19 should wait to get vaccinated until after their illness has resolved and after they have met the CDC criteria to discontinue isolation. Current evidence suggests that reinfection with the virus that causes COVID-19 is uncommon in the 90 days after initial infection. Therefore, people with a recent infection may delay vaccination until the end of that 90-day period, if desired.
<i>If I am vaccinated, will I have to work in the office with other employees who have not been vaccinated?</i>	Whether or not the company is mandating that employees be vaccinated to return to the office, we anticipate that certain employees will establish a valid medical or religious reason for exemption, so vaccinated employees and unvaccinated employees will continue to work together. Currently, all infection control protocols in place for those working in the office are continuing in effect until further notice.
<i>Is the COVID vaccine free?</i>	Currently, vaccine doses purchased with U.S. taxpayer dollars will be given to the American people at no cost. However, vaccination providers may charge an administration fee for providing the shot. Providers can get this fee reimbursed by the patient's public or private insurance company or, for uninsured patients, by the Health Resources and Services Administration's Provider Relief Fund.

The Vaccine Policy Playbook was produced by the Seyfarth Labor & Employment group, an industry-leading practice that works with companies of all sizes on their holistic talent strategies.

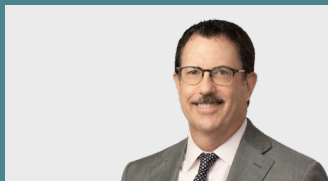
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