



Getting To The Point: What Schools Should Know Before Setting Up On-Campus COVID-19 Vaccine Clinics

Insights

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Many private and independent schools annually provide their employees with the convenience of on-campus flu vaccines – and now hope to extend this complimentary service to COVID-19 shots. In part, schools hope that easing the logistical burden of getting the vaccines will increase the rate of vaccination for the entire faculty and staff. However, we’re entering new territory with the COVID-19 vaccine, and you need to consider a variety of legal considerations before providing such clinics.

Step One: Ensuring Your Staff Is Eligible

As a baseline, your school must be certain that your employees are eligible for the COVID-19 vaccine. A number of states have prioritized educators for receipt of the vaccine, but not all such states include other on-campus personnel such as maintenance, clerical, food service employees, or other non-teaching staff in the eligibility list. Moreover, while certain states have committed to prioritizing educators, they have not yet release them as a category eligible for vaccination.

As discussed below, while in a more specific way you are able to contractually obligate the vaccination vendor to screen which employees are eligible to receive the vaccine, there are plenty of illegitimate vendors willing to vaccinate employees who do not meet the state eligibility requirements. Vaccinating employees who are not legitimate recipients of the vaccine can result not only in legal liability for your school but also in a public relationships nightmare. The headlines are fraught with stories relating to “wealthy private schools’ teachers jumping the line” for the coveted COVID-19 vaccines. Therefore, you should take on the ultimate responsibility of ensuring to the best of your ability that only those employees eligible to receive the vaccine in your state get it line to get a shot on campus.

A Check-Up Is Crucial: Due Diligence On Vendors

If your school is going to take on the responsibility of providing employees the ability to walk down the hall or across campus to get a COVID-19 vaccine, you must first be certain you have done appropriate due diligence on the vendor. In part, this means your school needs to be reasonably certain that the vendor is able to safely vaccinate employees.

Your school should be sure that the vendor will have only licensed medical personnel onsite giving the vaccines, and that appropriate medical personnel will be present to observe the vaccine

recipient for side effects for at least 15 minutes following the vaccination. We have all seen the stories of various unsuspecting entities being bamboozled by unscrupulous vendors providing personnel with little to no medical training. Many schools provide flu vaccine clinics through their health insurer, and such an arrangement may likely satisfy the due diligence obligation if also available for COVID-19 vaccine clinics.

Your school also needs to confirm that the vendor is authorized to administer the COVID-19 vaccine in the state where you are located. Many states are requiring specific authorization for those seeking to give COVID-19 vaccines even if the entity is already permitted to provide flu vaccines. In some states, a school can simply check the state department of health's website for a list of authorized COVID-19 vaccine administrators. In other states it is more complicated to figure out. In either case, however, your school should have the vendor affirm in writing that it is so authorized.

Some states are partnering with private and independent schools to provide educators with vaccines. If your school accepts vaccines from the city, state or federal government, be sure you work with legal counsel to determine whether your school will be considered a recipient of federal financial assistance and corresponding regulatory requirements.

Put It In Writing

Once you have located a reputable vendor that is authorized to administer the COVID-19 vaccine, it is critical that your school enter into a written agreement with the vendor so as to mitigate the risks associated with providing employees the opportunity to be vaccinated on campus. There are a variety of elements such a written agreement should cover:

- One of the many things that the vendor agreement should do is place the onus on the vendor for pre-screening employees for the vaccine. The pre-screening questions necessary to safely vaccinate an individual can give rise to disability and medical disclosures such that the questions could be considered a medical examination as defined by the Americans with Disabilities Act (ADA). In other words, the pre-screening process can have serious ADA implications.
- In this same vein (pun intended), your school must be certain that the vendor agreement states that your school does not want access to any of the records or information related to who is vaccinated or the answer to the pre-screening questions – unless you are willing to jump through all of the hoops necessary to require employees to be vaccinated. If your school is not doing so, you should not be tracking which employees are vaccinated. These ADA nuances are one of the many reasons it is important for your school to have legal counsel review your vendor agreement for any COVID-19 vaccine clinic.
- As you have no doubt read, there is considerable conversation around the fact that the currently available COVID-19 vaccines are under Emergency Use Authorization from the Food and Drug Administration. That being the case, each vaccine recipient must receive certain disclosures, warnings, and opportunities to opt out of the vaccine. Clearly as between your school and the

vaccine vendor, the vendor is best suited to provide that information. Consequently, the vendor agreement should place the obligation for providing those to recipients on the vendor.

- Among other things, be sure that your school's vendor agreement requires the vendor to return to school with the second dose of vaccine, if necessary, in accordance with all FDA, CDC, and manufacturer's guidelines and directives. Time is of the essence in providing the second dose, so it is important to set this out clearly.
- The vendor should also have the responsibility of keeping employees' health and medical information safe and protected as well as complying with HIPAA and HITECH, if applicable. Additionally, the vendor agreement should set forth exactly how the vendor will be compensated for the vaccines. It seems some vendors bill the vaccine through the employee's health insurer and, if none is available, will seek reimbursement through the federal government. In most instances, it will make sense to state that the school will not be billed for the vaccines under any circumstances.
- Another key provision of the vendor agreement is an indemnification and hold harmless provision insuring that your school is not responsible for any claims brought against the vendor. This protects your school from claims asserted by employees who would otherwise seek remuneration from the vendor.
- On a related note, you should speak with your insurer to determine whether the school's general liability, employment practices liability, or workers' compensation insurance will cover an employee who is injured by the vaccine or if you should get an insurance rider for such claims. There is lively discussion about whether workers' compensation, in particular, would cover a claim by an injured employee if you merely provide the vaccine clinic as a convenience to employees from an outside vendor. Whether in such situations there is a close enough correlation between the employment and the vaccine so as to trigger workers' compensation coverage remains to be seen.

Housekeeping Matters: Practical Logistics Concerns

Logistically speaking, COVID-19 vaccine clinics also require planning. For example, if your school is going to hold a one-day clinic on which all employees who want the vaccine will receive it, you ought to arrange the clinic such that the second dose is given on a Friday or immediately preceding another school holiday. A number of vaccine recipients endure mild-to-moderate side effects from the second dose of vaccine while others experience more severe side effects. Regardless, having a large number of faculty and staff experiencing vaccine side effects all on the same day could result in considerable absenteeism and chaos for the school day.

Other less complicated logistical considerations require that you provide private space for employees to be vaccinated where they are not in view of other employees. Of course your school's regular COVID-19 protocols should be followed by both the vendor and the employees seeking vaccination so as to ensure social distancing and appropriate masking. If the clinic is being provided to employees as purely a convenience you and the vendor must work out the hours of the clinic and

to employees as purely a convenience, you and the vendor must work out the hours of the clinic and you must decide how non-exempt employees will or will not be compensated depending on the hours and availability of the clinic.

Local Guidance Could Be Helpful

Be sure to check state and local guidance for holding on-campus vaccine clinics as well. Some states provide schools the opportunity to be public vaccination sites that must comply with a variety of state regulations. If that is not what you want to do, be sure when you are seeking information, you are clear your school is interested in holding a closed vaccine clinic with an outside vendor, open only to school employees.

No Good Deed Goes Unpunished? Offering Incentives

In the excitement of getting your employees vaccinated, be wary of providing incentives to employees getting vaccinated. Giving such incentives and remaining compliant with EEOC guidance is quite complicated and can expose unwitting employers to ADA violations, among other legal concerns. Incentives should only be provided with the guidance and advice of legal counsel.

Conclusion

It is a shame that doing a good deed such as helping your employees get vaccinated is so incredibly complicated – but rest assured it can be done. Moreover, offering the convenience of setting up an on-campus vaccination site will no doubt be repaid with a debt of deep gratitude from faculty and staff.

We recommend you coordinate with your Fisher Phillips attorney or any attorney in our Education Practice Group for assistance before setting up a vaccination clinic. Regardless of whether you distribute the vaccine on campus or not, it is becoming increasingly important for schools to develop their own action plan as vaccine availability increases. We have developed a 10-step action plan for employers to consider that provides practical guidance and suggestions for proceeding as we head towards the wider availability of the vaccine.

We will monitor the progress of this situation as well as vaccination of students and provide updates as warranted, so make sure you are subscribed to Fisher Phillips' alert system to get the most up-to-date information. If you have further questions about developing detailed vaccination plans or how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our Vaccine Resource Center for Employers.

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Kristin L. Smith

Partner

713.292.5621

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