



## COVID-19 Vaccine FAQs for Employers

### VACCINE MANDATES

#### **Can we still mandate the vaccine despite the fact that the Supreme Court struck down the OSHA ETS?**

Yes, in most states it is still permissible to impose your own vaccine mandate in most locations, regardless of SCOTUS's decision. Remember, all the Supreme Court said is that OSHA can't *require* you to implement a vaccine policy – but the Court did not say you couldn't implement a policy on your own, if you believe it is right for your workplace. If you want to go down this path, you should first coordinate with your workplace law counsel to determine if state law permits you to proceed or requires you to allow a broader set of exemptions than provided under federal law. And you'll need to sort out questions related to requirements for paying your employees for the time they spend getting vaccinated and any time they miss with side effects. The bigger question, of course, is how would such a policy impact your workforce – will morale issues and workforce shortages override your concerns about worker safety? Make sure you are in touch with your current business environment before moving forward.

#### **Can we create additional safety obligations for non-vaccinated workers instead of mandating the vaccine?**

Yes, you can require those who do not prove their vaccinated status to comply with additional safety restrictions as necessary to maintain a safe working environment. These can include masking requirements, social distancing rules, restrictions on business-related travel, and other concepts relevant to your work environment. Whatever you decide, you will want to announce these requirements ahead of time, so it does not appear as if you are individually targeting certain workers. You will want to craft your policies thoughtfully, with regard to your specific workplace, and in coordination with your workplace law counsel so as not to create the perception that your rules are punitive or coercive.

## **What proof of vaccination can we accept?**

There is no universal “proof” of vaccination status with the patchwork of federal, state and local COVID-19 and vaccine-related guidance, ordinances, and mandates. Acceptable proof may vary depending on the vaccine mandate or jurisdiction. For example, in California, a self-attestation is sufficient proof of vaccination status. However, under the federal contractor mandate, self-attestation is not acceptable. Check with your counsel regarding your specific situation.

## **What can we do if we believe a worker has provided us with a fake vaccine card?**

If you suspect that an employee has presented a falsified vaccine card, you can certainly take serious action, up to and including termination of employment. If you are concerned about this issue, [these following five steps can put your company in a much stronger position.](#)

## **RELIGIOUS ACCOMMODATION REQUESTS**

### **What do we need to know about religious accommodation requests for those wishing not to be vaccinated?**

The U.S. Equal Employment Opportunity Commission (EEOC) updated [its online COVID-19 technical guidance](#) to further explain its position regarding religious objections to employer COVID-19 vaccination requirements, specifically relating to Title VII of the Civil Rights Act of 1964. The Commission’s guidance focuses on questions that arise when applicants or employees seek exemptions or accommodations from vaccine requirements. The seven key points from the update are:

1. Title VII does not require you to exempt employees from vaccine requirements for their political, social, or economic reasons, which are not “religious beliefs.”
2. For an employer to be required to consider religious possible exemptions or accommodations, the applicant or employee must inform you by making a request. No “magic words” are required to ask for an accommodation, however.
3. Once you receive a request based on a religious belief or practice, you should assume that it is sincerely held, unless you have an “objective basis” for questioning either the religious nature or sincerity of the belief. You may also ask how your company’s vaccine requirement conflicts with the individual’s religious beliefs or practices and employees requesting accommodation must respond. The EEOC has also published [the form it is using internally to evaluate religious-based accommodation requests from its employees.](#)
4. [As we have noted before,](#) even though prior inconsistent conduct may raise a question regarding the sincerity of a person’s belief or practice, the EEOC recognizes that beliefs may change over time. Thus, a request may be “sincere” even if an individual acted inconsistently with a certain belief in the past.

5. Most assessments of religious accommodation requests will likely hinge on whether or not they would cause your business an “undue hardship.” At this stage, the EEOC says that you may consider not only costs, but also “the risk of the spread of COVID-19 to other employees or to the public.”
6. You should consider each request on the basis of “its specific factual context.” Thus, granting (or denying) one request does not necessarily mean that another request would result in the same result.
7. Significantly, although an assumption that many more employees may seek a religious accommodation in the future is *not* evidence of an undue hardship, the EEOC recognizes that you may need to “take into account the cumulative cost or burden of granting accommodations” to many other employees.

## **WORKPLACE PRIVACY**

### **Can we ask employees if they are vaccinated?**

With the exception of a few jurisdictions that limit your ability to pose vaccine inquiries or seek proof of vaccination, employers are permitted to ask for an employee’s vaccination status or proof of vaccination under federal and state law. However, employers who ask about an employee’s vaccination status or proof must be careful about delving into an employee’s other health information. For example, simply tracking if an employee was vaccinated or asking to produce a copy of the vaccination card or an attestation with the date(s) the vaccination was administered would not dig too deep. However, asking an employee why they were or were not vaccinated could be a disability-related inquiry, triggering additional obligations.

### **Isn’t asking about vaccine status a HIPAA violation?**

Contrary to a popular misconception, employers are almost never blocked by HIPAA as you seek information about an employee’s vaccine status.

### **Can we disclose which employees have or have not been vaccinated?**

You should not disclose a particular employee’s vaccination status. Doing so will likely violate employee privacy laws, including but not limited to the ADA.

### **How can we ensure the confidentiality of employee medical information with regard to a vaccine?**

The ADA requires you to store employee medical information separately from employee personnel files. You may store COVID-19 and/or vaccine-related medical information in existing medical files.

### **How should I treat information provided by employees about their COVID-19 vaccination status?**

The EEOC has explained that employers may have many reasons for asking an employee strictly whether or not they have been vaccinated. Thus, that question by itself does not constitute a disability-related inquiry and an employee's straight-forward answer to the question does not, by itself, constitute confidential medical information, at least not under the ADA. The EEOC suggests that when making such an inquiry, you should warn employees not to provide any other medical information in response, to avoid bringing in ADA (or GINA) issues. This question and answer do not present HIPAA concerns either.

This issue can quickly become more complicated, however. First, the employee's response could implicate some state laws, triggering protections or other obligations on your part. Second, as noted above, any *subsequent* questions you might want to pose – such as asking the reason *why* an employee did not receive a vaccination – may elicit information that would invoke ADA protections, including the requirement that the question must be “job-related and consistent with business necessity.” If an employee seeks a vaccine-related accommodation or if the employee's vaccine status could affect the employee's pay or job assignment, that exchange is also likely subject to ADA protections and requirements. Therefore, even though the narrow question and answer referenced above does not by itself invoke confidentiality requirements under the ADA, the best approach will be to make sure the question is framed narrowly and to treat the inquiry and response as confidential nonetheless.

### **We're in California. Is there anything else we need to know about privacy?**

If the California Consumer Privacy Act (CCPA) or similar law applies to your business, then collecting information from employees about their vaccination status/proof of vaccination may trigger the “notice at collection” requirement. This requirement does not mean you have to provide a different or new CCPA notice every time you ask for or receive this information. If the information is already reflected in the broader notice you must provide to all employees (i.e., the notice that is supposed to inform the employee of all categories of personal information the company collects about or from the employee along with all the business purposes for which the information is used), then an additional or separate notice related to vaccine information will not be needed.

## **ISOLATION AND QUARANTINE GUIDANCE**

### **What policies should we follow regarding isolation and quarantine procedures, especially if we have an unvaccinated worker?**

The Occupational Safety and Health Administration (OSHA) recently adopted the Centers for Disease Control and Prevention's (CDC's) most recent guidance that reduced the COVID-19 isolation and quarantine periods. Employers can now implement the reduced isolation and quarantine periods and allow employees to return to work much sooner. However, you retain the option of continuing to implement the lengthier isolation and quarantine periods at your workplaces. You can read our detailed Insight here, but the upshot is that the CDC shortened the recommended time for isolation from 10 days for people with COVID-19 to five days, if asymptomatic, followed by five days of wearing

a mask when around others. For most of those who were exposed to COVID-19 and unvaccinated, the CDC's updated guidance recommends a quarantine period of five days followed by "strict mask use" for an additional five days.

## **EMPLOYEE BENEFITS AND TESTING**

### **Can we require regular COVID-19 testing for unvaccinated workers?**

Yes – [the SCOTUS ruling knocking down the ETS](#) in no way prevents you from implementing a policy that requires regular COVID-19 testing of all non-vaccinated personnel if you want to offer a vaccination alternative. You'll have some tough decisions to make before you roll out such a policy, however. How often will you test the unvaccinated workers? Will you be in compliance with national and local wage and hour laws for time spent on receiving employer-required tests? Who will pay for the tests? What kinds of tests will be acceptable under your policy? And finally, while tests are becoming more widely available in some regions, how will you ensure you have sufficient tests to cover the unvaccinated workers? These are just some of the considerations any employer will need to keep in mind when designing a COVID-19 testing program. [Here's a seven-step plan you need to consider](#) before making the mandate-or-test decision and implementing a testing program.

### **Do we have to pay for COVID-19 tests?**

[Three federal agencies recently teamed up to issue guidance](#) that will require group health plans to pay for at-home over-the-counter COVID-19 tests approved by the U.S. Food and Drug Administration and purchased on or after January 15, 2022. Plans may, but do not have to, pay for OTC COVID-19 Tests bought before January 15. [Here's what group health plan sponsors need to know about the latest COVID-19 testing coverage mandate released on January 10](#), and here is a [summary of recently released FAQs](#) that provide more details as to how employer group health plans may comply.

## **EMPLOYEE INCENTIVE ISSUES**

### **Can we provide a cash or other incentives to encourage employees to be vaccinated?**

The EEOC cleared the way for employers to offer their employees incentives to get the COVID-19 vaccine in guidance released in May 2021. The agency's COVID-19 Technical Assistance guidance provides employers with two clear options, drawing a key distinction based on who administers the shot:

1. If your employees voluntarily provide documentation confirming they have been vaccinated and got the shot on their own from a pharmacy, public health department, or other health care provider in the community, you can offer them any incentive you'd like with no apparent limitations.

2. If your organization (or an entity acting on your organization's behalf) administers the vaccine, you can still offer incentives – but they cannot be so substantial in value as to be considered coercive.

You can gather more information by reading our full Insight [here](#).

### **Can we impose a healthcare surcharge on unvaccinated workers?**

Some employers are now turning to charging a higher premium cost, or surcharge, for any group health plan participants who remain unvaccinated. There are hurdles you have to navigate if you want to impose such a surcharge on your unvaccinated workers. [Here are the six questions you need to resolve before undertaking such a plan.](#)

## **WAGE AND HOUR ISSUES**

### **Do we have to pay for our employees to get a vaccine?**

The Fair Labor Standards Act requires that employers reimburse employees for expenses incurred on his employer's behalf, or where the employee is required to spend money for the convenience of their employer, to the extent that failing to reimburse would, effectively, cut into the employee's FLSA-protected wages. State or local wage and hour law may also create similar, or even higher, obligations. Whether employers will be *required* to cover some or all of the costs or time associated with getting the COVID-19 vaccine will depend on the circumstances specific to the employee. If you require the vaccine, we recommend that you include the time spent getting the vaccine as hours worked, and cover the cost of the vaccine itself, to avoid a pseudo-deduction to FLSA-protected wages or to the extent necessary to comply with any other requirements applicable in the jurisdiction. If you have a voluntary vaccination policy and the vaccine is not directly job-related and consistent with business necessity, you will likely not have to take these steps, but should consider doing so in some circumstances. We recommend consulting with your employment lawyer in such situations both to discuss your obligations and any implications stemming from such scenarios.

## **LABOR ISSUES**

### **We have a unionized work force. Is there anything else we need to consider with respect to our vaccine policy?**

If you operate your worksite under a collective bargaining agreement, you should consult the management rights, health and safety, and any other applicable provisions within such agreements that may apply, along with any analogous past practices in effect. Before moving forward with implementation of any changes in that regard, you should also furnish advance notice to the incumbent union(s), and be prepared to bargain over the effects of such changes upon request. Check with your labor counsel for specific guidance, [and we recommend you read our Insight summarizing the realities of vaccine policies in a unionized environment.](#)

## **How should we address employee protests and walkouts over our vaccine policies?**

You might face a protest involving groups of employees confronting management at the workplace, distributing flyers to coworkers, picketing outside the property, or even striking. You may be surprised to learn that workers have significant rights in this area – regardless of whether they are part of a unionized workforce. However, you also have important rights as well, so it is critical to understand where the lines can be drawn. [Here is a summary of your rights and obligations when it comes to vaccine protests and walkouts and a detailed list of key considerations you should keep in mind as this situation develops.](#)