

YOUR EMPLOYEES ARE VACCINATED – NOW WHAT?

Insights

Apr 26, 2021

COVID-19 vaccinations passed the 200-million mark in the United States last week, which means certain workforces might have the majority of employees fully vaccinated. In recent months, we've discussed guidance from the [EEOC](#) and California's [DFEH](#) regarding COVID-19 vaccine mandates, [vaccine incentives](#), [tracking employee vaccinations](#), and even [vaccine passports](#). However, the question remains — what measures can employers take once employees are vaccinated?

Other than input on requiring "proof" of vaccination, there is limited guidance on what employers may do or say about employees' vaccination status. Consistent with other challenges employers have faced throughout the COVID-19 pandemic, vaccinations in the workplace present new and unique privacy considerations. You must maintain a safe workplace while balancing the privacy interests of employees, customers, and the public. Below we tackle some of the vaccination-related questions many employers are grappling with.

May we disclose the vaccination status of my workforce?

An employee's individual vaccination status is confidential medical information that must be protected and may not be disclosed. However, a general statement of the estimated percentage of vaccinated employees may be acceptable.

There are some items to consider when making a statement along these lines. Such a statement may prompt inquiry from clients or customers about *which* employees are vaccinated and may even elicit requests to only work with or be

Related People



Nicole Kamm

Partner

818.230.4253



Hannah Sweiss

Partner

818.230.4255

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serviced by vaccinated employees. Further, employees may feel pressured by such statements, which could subject certain employees unable to receive a vaccination due to a protected reason to levels of discomfort, possible unequal treatment, or concerns that their medical status/religious affiliation may be indirectly disclosed. To address these concerns, you may consider an internal communication to employees reinforcing that individual COVID-19 vaccination status and other information, such as requests for accommodation, reasons for accommodation, etc., will not be disclosed.

What should we do if clients or customers demand they receive service from only vaccinated employees?

You should remind employees that, if asked about vaccination status, they should not disclose any employee's individual status. You should prepare them with specific statements they can use respond, such as: "We cannot disclose any individual's particular vaccination status, but as the company has indicated, 80% of our staff have been vaccinated. Coupled with our safety measures, that should provide reassurance that we are taking necessary steps to ensure a safe environment."

What safety measures can be adjusted now that employees are vaccinated? Can we relax masking requirements?

The Centers for Disease Control and Prevention (CDC) and many state and localities have [relaxed the quarantine requirements for those who are fully vaccinated](#). However, as of this time, most state safety agencies still require that all safety measures continue regardless of vaccination status of employees, including masking and social distancing. Additionally, recent OSHA guidance provides that employers should not distinguish between vaccinated and non-vaccinated employees, and vaccinated employees must continue to follow protective safety measures such as wearing face coverings and remaining physically distant. If and when such guidance changes, this may raise additional issues for employers in that there may be different safety requirements for vaccinated and unvaccinated employees, which could potentially give rise to other legal considerations.

May we require employees who are unvaccinated to submit to regular COVID-19 tests?

In California, the recently updated guidance for certain industries (e.g., private venues and events), allows employers to exempt workers participating in routine weekly testing or showing proof of full vaccination from the occupancy capacity limits, but workers not participating in a routine weekly testing program or not fully vaccinated shall still count toward any occupancy limit. This updated industry-specific guidance in California suggests routine testing may be viewed as an alternative safety measure for those who are unvaccinated.

However, as noted above, the current guidance from OSHA and other agencies is that employees should not be treated differently in terms of workplace safety precautions based on vaccination status. Given the tension between the guidance, this appears to be an area of uncertainty for now. At a minimum, you should be consistent in applying your policies, reasonably accommodate employees who may decline or not be able to get tested or vaccinated due to medical or religious reasons, and take steps to safeguard the confidentiality of test results and vaccination status (e.g., conduct tests in private, not single out unvaccinated employees, etc.).

May we ask vaccinated employees to return to the workplace before unvaccinated employees?

As a practical matter, it may not make sense to ask vaccinated employees to return to the workplace before unvaccinated employees. A vaccine does not necessarily mean employees cannot transmit (or contract) the virus. Thus, OSHA and other state agencies are still requiring masking, distancing, etc., in most workplace settings. Putting aside that such safety measures remain in place, you will also still have to evaluate and respond to requests for accommodation by employees who have legally protected reasons for declining or being unable to get vaccinated. Thus, in an environment where vaccinations are encouraged but not mandated, requiring vaccinated employees to return to work first could potentially serve as a disincentive to some employees receiving vaccinations.

Our business did not mandate COVID-19 vaccines initially, but how do we get the last few people vaccinated? Can we mandate now? What are the legal implications?

While it is legally permissible to do so, you should evaluate both legal and practical issues before [mandating the COVID-](#)

[19 vaccine](#) among your workforce. You must first ensure that you can articulate how the vaccination is job-related and consistent with business necessity. You should also ensure that policies fully inform employees of the vaccine requirement and spell out how employees may seek an exemption as an accommodation based on a medical condition or a sincerely held religious belief. If an employee seeks an exemption on either or both bases, you must be prepared to engage in, and document, an interactive exchange with the employee to determine whether a reasonable accommodation would enable them to perform their essential job functions without compromising workplace safety.

You should follow preestablished procedures to respond to any accommodation requests. The [Fisher Phillips Vaccine Resource Center \(VRC\)](#) contains links for forms, model policies, and other materials that may be helpful in dealing with these requirements.

You must also keep in mind that legislators in several states have introduced measures that may further restrict or even eliminate your rights to require workers to get the vaccine. Thus, you should continue to monitor these developments and check with your legal counsel before proceeding.

Do fully vaccinated employees have to quarantine after non-essential travel?

The CDC and other state and local agencies have relaxed the quarantine guidelines after travel for individuals who are fully vaccinated. For those who are unvaccinated, quarantine after travel is still recommended or required in some places. In many jurisdictions, however, a recommended testing protocol for unvaccinated persons may be followed as an alternative, providing for a shortened quarantine period after travel. It is important to keep an eye on the orders and guidance that are applicable to your workplace when making this determination.

Conclusion

Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to [Fisher Phillips' Insight System](#) to get the most up-to-date information. If you have questions about any aspect of this new law and its impact

on your workplace, contact your Fisher Phillips attorney or visit our [Vaccine Resource Center for Employers](#).