

# 6 OPTIONS FOR EMPLOYERS WANTING TO IMPROVE VACCINATION RATES (UPDATED)

Insights  
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With the Delta-variant-fueled surge of COVID-19 cases leading to [new CDC masking guidance](#), statewide mandates, and the specter of further restrictions, employers have a renewed interest in seeing the vaccination rate of their workforces climb. Yet many employers report frustration at a hesitant bloc of workers who have not yet received any vaccine doses. This hesitancy is only emboldened by the [CDC's most recent data](#) suggesting that, although rare, those who are fully vaccinated can contract *and* transmit the virus. What can you do if you fall into this group that is still striving to increase vaccination rates among employees? Here are six options employers can consider to improve workforce vaccination percentages, listed from what could be classified least to most intrusive.

*Note: you can effectively mix and match these initiatives; don't necessarily limit yourself to one option.*

## Option 1: Launch an Informational Campaign

Before considering any other option, evaluate whether you can make progress in your drive to improve vaccination rates by offering targeted informational opportunities to your workers about the vaccines. Many people are flooded with disinformation about COVID-19 vaccines from social media, disreputable news sources, and word of mouth. Reliable informational efforts are critically important in light of the recent revelation that fully vaccinated individuals cannot only contract, but transmit, COVID-19. Others simply don't pay attention to news the way you do and therefore are not knowledgeable about some very basic information (many

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believe they have to pay for the vaccine, for example, even though a simple internet search would show they are free of charge).

Employers can help their workforce sort through the confusing and often contradictory information found online by emphasizing that although the vaccine is not 100% effective at preventing infection or transmission of COVID-19, it is still the best defense against serious illness, hospitalization, and death. [According to the CDC](#), less than .004% of those fully vaccinated have been hospitalized with COVID-19, and only .0001% have died. By addressing specific questions, concerns, or misconceptions among vaccination skeptics in your workforce, such targeted information can be effective.

You can provide information through a variety of methods depending on your company culture, the workers you are trying to reach. You might even vary your methods and roll out a wave of informational opportunities striking different chords at each pass. Some options to consider:

- Having your HR Department, legal department, or company leadership present informal question-and-answer sessions.
- Inviting respected representatives from your medical community or other public health officials to your place of business for a lunch-and-learn series.
- Including community leaders and employees in interactive conversations to help combat mistrust of the vaccines.
- Showing videos available from the CDC or other state resources about the vaccines.
- Soliciting questions ahead of time via confidential means and answering them at group gatherings.

Make sure you offer these opportunities in every language necessary to get your point across, and provide your workers with take-home materials so they can consider the matter at their own pace and even discuss with their families. And to make sure you get as many people in attendance as possible (and to comply with state and federal wage and hour laws), you should pay your employees for the time they spend at your education sessions.



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## Service Focus

Workplace Safety

## Option 2: Offer Incentives

The second option you can take falls into the “carrot” category, foregoing any “stick” – offering incentives to any worker who can prove they are fully vaccinated. The most common incentives employers have offered include cash, gifts, or paid time off. [Thanks to clear guidance from the EEOC earlier this summer](#), you have simple directions to ensure you don’t run afoul of any discrimination laws if you decide to offer incentives:

- 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.**
- 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.**

If you host a vaccine drive at your facility or otherwise offer the shots at your location, you will want to do everything you could to keep a wall up between you and the healthcare provider offering the vaccines to avoid the incentive. In particular, you should clearly establish in writing that the provider is not acting on your behalf or sharing any employee-specific information with you. Unnecessary entanglements could arise if you gather medical information about your employees, assist with screening questions, or include an onsite nurse or other medical staff members to aid the healthcare provider in administering the shots. [More details can be found here.](#)

Some other considerations to keep in mind, regardless of what incentive you offer:

- **Accommodations** – Some employees may have legitimate medical or religious reasons not to get vaccinated, and failure to provide them with access to the same types of incentives could lead to claims under the Americans with Disabilities Act (ADA) or Title VII. You will need to consider offering alternative means by which an employee can earn an incentive if they cannot be vaccinated due to a disability or sincerely held religious belief. Alternative ways to earn the incentive might be watching a workplace

COVID-19 safety video or reviewing CDC literature on mitigating the spread of COVID-19 in the workforce.

- **Confidentiality** – Once you gather information from employees about whether they have been vaccinated or not, you must maintain confidentiality. You should maintain the records as you would any other medical-related documentation (in a separate file, accessible to only those who need to know, etc.) and comply with all other state-specific privacy rules (such as in California).
- **Family Members** – While you can offer an incentive to employees to provide documentation or other confirmation from a third party not acting on your behalf that their family members have been vaccinated, you may not offer incentives to your employees in return for their family members getting vaccinated by your organization or your agent. However, you can still offer an employee's family member the opportunity to be vaccinated by your organization or your agent if you take certain steps to ensure compliance with federal privacy laws.

### **Option 3: Implement COVID-19 Testing for the Non-Vaccinated**

Just as President Biden announced for federal employees – [and a growing number of other municipalities are doing for their own workforces](#) – you can require all non-vaccinated personnel to be subjected to regular COVID-19 testing to ensure the highest level of workplace safety. To do so, you should consider four main points:

- **Communicate the new policy** with your workforce in a clear and direct manner. You may want to use a combination of methods: electronic through company digital services, an all-employee meeting where you can walk through the rationale and the new protocols, and through written materials handed out to all workers. Whatever forms of communication you choose, emphasize that sole the purpose of this policy is to maintain a safe workplace.
- You will obviously need to collect information from your workers about whether they are vaccinated or not in order to determine who is required to be tested. Make sure you **comply with all local laws to securely store the information collected** from your employees, whether electronically or in a hard copy personnel file (or both).

- Determine **how often you will test those employees** who do not or cannot prove they have been vaccinated, taking into account the unique safety-related concerns that arise at your workplace. You will want to require frequent-enough testing that the system reasonably catches potential outbreaks of COVID-19, but not so frequent that it seems your testing requirement is simply punitive in nature.
- Ensure that your protocols for required testing comply with **applicable wage and hour laws**. Time spent on receiving employer-required tests should almost always be treated as compensable.

Before you implement your policy, you will also want to work with your workplace safety legal counsel (in conjunction with the latest guidance from the CDC, OSHA, and local health authorities) to determine what you will do if a positive COVID-19 test arises. You should have quarantine and return-to-work protocols in place along with clear contact tracing guidelines (which will vary depending on the vaccination status of those who came in close contact with anyone testing positive).

#### **Option 4: Install Additional Safety Restrictions for the Non-Vaccinated**

Taking it one step further, you can also require those who do not prove vaccinated status to comply with additional safety restrictions as necessary to maintain a safe working environment. These can include renewed 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 who test positive. Just as with the testing regimen described above, you will want to craft your policies thoughtfully and with regard to your specific workplace so as not to create the perception that your rules are punitive or coercive.

#### **Option 5: Impose a Surcharge on Health Insurance**

Some employers are beginning to announce that their unvaccinated workers will soon face an increase in their health insurance premiums. Those who have made such an announcement cite rising health coverage costs as the main factor in imposing such a surcharge. Similar to a nicotine

surcharge that many employers already have in place as part of their wellness programs, you can impose an additional surcharge on health insurance premiums for those who are unvaccinated. Before considering any health insurance surcharge, you should make sure you understand state and federal law regarding this option. As an initial matter, any surcharge needs to be part of a Health Insurance Portability and Accountability Act (HIPAA)-compliant wellness program. Even then, there are several requirements you must consider under both the Affordable Care Act and HIPAA before implementing a surcharge. These federal laws have specific requirements with respect to notice to employees and also require carveouts to allow exemptions for medical and religious reasons. You should also be mindful of any state laws which may provide protections for unvaccinated workers, as that may impact an employer's ability to charge a higher insurance premium on those who have not received the shot.

For a comprehensive analysis of this option, please review our Insight: ["6 Employer Questions to Answer Before Imposing a Surcharge on Unvaccinated Workers."](#)

### **Option 6: Mandate the Vaccine**

Your final option is one that has been gaining steam in recent weeks: mandating that your workers receive the COVID-19 vaccine as a condition of their employment. While many employers were hesitant to impose a mandate in the early months of vaccination due to legal concerns or the unknown nature of the inoculation process, a series of events have lessened these concerns. For one, over 191 million Americans have received one or more both doses of the vaccine with only very rare side effects causing anything more than minor complications. Moreover, a series of legal victories and [last week's announcement from the Department of Justice](#) that the current Emergency Use Authorization status of the vaccines does not prevent employers from mandating them have eased many employers' fears regarding legal liability.

If you decide to proceed with a vaccine mandate, consider these lessons learned from other employers that have successfully rolled out a mandatory program at their workplaces:

- Figure out the best way to communicate your policy to employees, including how much notice to provide before

implementing the requirement.

- Consider related logistics, including compensation issues that may be implicated for the time spent traveling to and receiving the vaccine.
- Develop a robust and clear reasonable accommodation policy to [address religious and disability issues](#). Take special care to communicate and administer the accommodation process in a thoughtful way, with emphasis on individualized, confidential consideration of each request.
- Spend time considering how your employees, customers, and other constituents are likely to respond to the policy, including how you will handle pushback. Anticipate and prepare for certain levels and forms of anxiety and or resistance.
- Be wary about the issues raised by posing pre-screening vaccination questions that may trigger ADA requirements ([more detail found here](#)).
- Develop a designated “vaccine team” for coordinating this entire process.

## Conclusion

We'll monitor the situation and provide updates as developments occur, so make sure you are subscribed to [Fisher Phillips' Insight system](#) to get the most up-to-date information. If you have questions about how to ensure that your vaccine policies comply with workplace and other applicable laws, visit our [Vaccine Resource Center for Employers](#) or contact your Fisher Phillips attorney or any attorney on our [FP Vaccine Subcommittee](#).