

Vaccination in the Workplace

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What should we consider if we are going to mandate the vaccine?

- Vaccine availability?
- Legitimate interest?
- All or some employees?
- Unionized workforce? (may be mandatory subject of bargaining)
- Written policy
 - Include process for requesting an exemption for a disability, sincerely held religious belief and/or pregnancy-related condition. Consider alternate procedures to mitigate risk when an employee is granted an exemption
- Employee communications, reactions
- Be prepared to enforce policy consistently
- Consult with employment counsel before instituting a mandatory vaccination policy, disciplining an employee for non-compliance, or denying an exemption/accommodation request

Incentivizing employees to get vaccine

- Can provide “de minimis” benefits in order to incentivize employees to get vaccinated, per EEOC proposed rule.
 - Risk of providing more than de minimis benefit is that (1) it runs afoul of ADA wellness program requirements by “coercing” a wellness benefit; and (2) it could be perceived as discriminating against employees who cannot be vaccinated for medical or religious reasons.
 - Consider providing those who cannot be vaccinated the same benefit through other means (e.g. compliance with safety measures, covering for others getting vaccine)
- De minimis: lunch, modest gift card, small amount of PTO
- More than de minimis: Bonus compensation, significant additional PTO
- Disincentives to those who are unvaccinated
 - Continued testing for unvaccinated employees
 - Activity limits on unvaccinated employees (e.g., on travel/vacation time and company event attendance)

Asking for proof of vaccine

From EEOC guidance:

- **K.3. Is asking or requiring an employee to show proof of receipt of a COVID-19 vaccination a disability-related inquiry? (12/16/20)**
- No. There are many reasons that may explain why an employee has not been vaccinated, which may or may not be disability-related. Simply requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry. However, subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be “job-related and consistent with business necessity.” 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 may want to warn the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA.

Realigning functions based on safety of exposure to public

- If some employees are not vaccinated, you can realign functions based on safety concerns
- Examples:
 - Only vaccinated employees may interact with customers/clients/members of the public
 - Only vaccinated employees are assigned to areas where multiple people are working
- Analysis of direct threat when thinking about accommodations – will be fact-specific
- Careful about confidentiality
 - Don't specifically disclose vaccine status
 - Don't disclose reasonable accommodations/disability

FFCRA (ARPA) paid time for employees receiving and recovering from vaccine

- The American Rescue Plan Act extended the 2020 Families First Coronavirus Response Act through September 30, 2021 on a voluntary basis.
- The 2 weeks of EPSL refreshed as of April 1, 2021
- ARPA also added two reasons related to the vaccine for paid leave:
 - Time for an employee to get the vaccine
 - Time for an employee to recover from the vaccine
- An employer can receive an equal tax credit for all paid time under FFCRA/ARPA. IRS fact sheet with details is here:
<https://www.irs.gov/newsroom/employer-tax-credits-for-employee-paid-leave-due-to-covid-19>.



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