



Return to Work Update: New Vaccine Guidance from the EEOC and Other Challenges

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Agenda

- Agency Update
 - CDC
 - EEOC
 - OSHA
- FAQ's

Agency Updates: CDC

- CDC guidance as of May 13, 2021: fully vaccinated individuals need not wear face coverings indoors or maintain social distance in most situations
- State and local governments and individual businesses may continue to require restrictions
- Employer considerations include how and whether to change policies in light of employee attitudes, and continuing to ensure compliance with COVID-19 related policies

Agency Update: EEOC

- Since December 2020, EEOC has stated that employers may lawfully mandate COVID-19 vaccines under applicable EEO laws, provided that
 - Employers ensure there is a reasonable accommodation process for employees who cannot receive the vaccine for disability-related reasons.
 - Employers ensure there is a reasonable accommodation process for employees who cannot receive the vaccine due to a sincerely held religious belief.
- May 28 update: best practice is to inform employees of accommodation process in place for ADA and religious reasons

Vaccine Considerations

- Mandate is a qualification standard, and under ADA, must be job related and consistent with business necessity.
- Mandatory vaccination should be considered as needed consistent with employer obligations to maintain workplace free from recognized hazards

Mandatory Vaccine Considerations

- Emergency Use Authorization
- EEOC position has not changed under EEO laws
- May 28 update from EEOC recognizes the EUA is still in effect, but notes EEOC does not enforce EUA law
- Lawsuit risk?

Vaccine Incentives

- If the COVID-19 vaccine is obtained in the community, then employer may lawfully (under EEO law) provide monetary or gift card incentives to employees
- Consider employee benefit concerns
 - Are gift cards taxable income?

Vaccine Incentives

- If employer or agent (including health insurance provider) is providing vaccine, then incentives must not be so large as to create an environment of coercion.
 - No guidance regarding what this means concretely
- Employer may not provide incentives to family members under GINA

Vaccine Status Inquiry

- Employers may inquire of vaccine status under pandemic conditions, as doing so is generally job related and consistent with the business necessity of maintaining health and safety in workplace.
- May 28 update from EEOC confirms vaccine status is confidential medical information under ADA.

ADA Accommodations

- Employers obligated to reasonably accommodate employees with disabilities to allow them to perform essential functions of the position.
- ADA accommodations may be necessary for fully vaccinated employees with medical conditions that place them at high risk of serious complications if they contract COVID-19.
 - Remote work
 - Leave
 - Other workplace modifications or adjustments

State and Local Laws

- State and local requirements
 - Mask requirements
 - Legislation to limit employer vaccine mandates is pending or has passed in some places
 - Other legislation, including Washington obligation to reasonably accommodate employees at high risk of COVID-19 by potentially allowing work from home, including older employees

Agency Updates: OSHA

- OSHA initially stated that employers who mandate COVID-19 vaccine would be required to record adverse reactions on their OSHA 300 logs
- However, as of May 22, OSHA has stated that the agency “does not wish to disincentivize employers’ vaccination efforts.” Therefore, the agency “will not enforce” the recording requirement through May, 2022.

Agency Updates: June 10, 2021

- COVID-19 Emergency Temporary Standard (“ETS”)
 - Guidance for employers in the health care sector
 - Effective date = when it is published in the Federal Register (not yet occurred)
 - Most compliance dates are 14 days after the effective date
 - Key Requirements
 - COVID-19 plan
 - Patient screening and management
 - Standard and Transmission-Based Precautions
 - PPE
 - Aerosol-generating procedures on a person with suspected or confirmed COVID-19
 - Physical distancing
 - Physical barriers
 - Cleaning and disinfection
 - Ventilation
 - Health screening and medical management
 - Vaccination
 - Training
 - Anti-retaliation
 - Requirements implemented at no cost to employees
 - Recordkeeping
 - Report work-related COVID-19 fatalities and in-patient hospitalizations to OSHA

Agency Updates: June 10, 2021

- Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace (“General Guidance”)
 - “Unless otherwise required by federal, state, local, tribal, or territorial laws, rules, and regulations, **most employers no longer need to take steps to protect their fully vaccinated workers** who are not otherwise at-risk from COVID-19 exposure.”
 - ...most employers no longer need to take steps to protect their workers from COVID-19 exposure in any workplace, or well-defined portions of a workplace, where all employees are fully vaccinated. **Employers should still take steps to protect unvaccinated or otherwise at-risk workers in their workplaces**, or well-defined portions of workplaces.

General Guidance

- Grant paid time off for employees to get vaccinated.
- Instruct any workers who are infected, unvaccinated workers who have had close contact with someone who tested positive for SARS-CoV-2, and all workers with COVID-19 symptoms to stay home from work.
- Implement physical distancing for unvaccinated and otherwise at-risk workers in all communal work areas.
- Provide unvaccinated and otherwise at-risk Educate and train workers on your COVID-19 policies and procedures using accessible formats and in language they understand.
- Suggest that unvaccinated customers, visitors, or guests wear face coverings, especially in public-facing workplaces such as retail establishments.
- Maintain ventilation systems.
- Perform routine cleaning and disinfection.
- Record and report COVID-19 infections and deaths.
- Implement protections from retaliation and set up an anonymous process for workers to voice concerns about COVID-19-related hazards.
- Follow other applicable mandatory OSHA standards.

General Guidance

- Appendix: Measures Appropriate for High-Risk Workplaces with Mixed-Vaccination Status Workers
 - High risk workplace = Ex. Manufacturing, meat and poultry processing, high-volume retail and grocery, and seafood processing

FAQ's

- Question: Can we drop all preventative measures (such as masking) for all employees-vaccinated or unvaccinated?
- Answer: CDC guidance regarding preventative measures only addressed vaccinated individuals.
 - Make sure you check state and local guidance!
 - OSHA directed employers to follow CDC guidance during the pandemic.
 - Risks:
 - COVID outbreak
 - OSHA non-compliance
 - Lawsuit/ workers' compensation claims?

FAQ's

- Question: Can employers still require unvaccinated employees to utilize preventative measures (such as masking)?
- Answer: CDC guidance did not change for unvaccinated individuals.
 - If mandatory vaccine, accommodation may be to continue preventative measures.
 - If employee previously needed an accommodation related to masking, the same need may continue.

FAQ's

- Question: If we want to allow vaccinated employees to stop wearing masks, how do we continue to enforce the requirement for unvaccinated employees?
- Answer: Require proof of vaccination.
 - HR should have this information
 - HR is responsible for enforcing the policy for unvaccinated employees

FAQ's

- Question: Is requiring some employees, but not all employees, to continue wearing masks discriminatory?
- Answer: No, there are many reasons employees may choose to continue wearing a mask.

FAQ's

- Question: Do we have to allow unvaccinated employees to:
 - Work in the office?
 - Travel?
 - Participate in group meetings?
 - Attend conferences?
- Answer: Conditions of employment may be reasonable but employers should carefully analyze each situation and engage in the interactive process for any employee that is not vaccinated because of religious, disability, or pregnancy reasons.

FAQ's

- Question: Can customers mandate that the company require its employees to be vaccinated?
- Answer: Customers who have your employees on their worksites can set conditions on who can be on their worksite.
 - The company's HR team should gather vaccination records and provide appropriate information for employees assigned to the customer worksite.

FAQ's

- Question: If we implement a policy requiring unvaccinated employees to continue taking preventative measures, including wearing mask, and an employee who has been wearing a mask for the entire time now asks for an accommodation due to disability or religion, what do we do?
- Answer: Evaluate the request for the accommodation.
 - ADA
 - Title VII

FAQ's

- Question: If I have an employee that is immunocompromised but fully vaccinated, can I require that employee to return to the workplace?
- Answer: This was specifically mentioned in the May 28 EEOC update. Employers must work through the ADA accommodation process for this employee.

FAQ's

- Question: Can we require employees who have been fully vaccinated to wear a sticker or button identifying them as fully vaccinated to others?
- Answer: As the button discloses medical information, this would not be consistent with the obligation to maintain confidentiality under the ADA.

Thank You



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