



# COVID Pandemic 2.0 for Employers: Vaccination Issues & Challenges

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# Welcome



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# The Legal and Administrative Stuff

- This presentation is not legal advice.
- Information presented as of August 31, 2021.
- Laws, regulations, and guidance continuously evolving (especially on these subjects!).
- Topic and issues yield divergent and strongly-held opinions.
- Presentation includes more content than we can cover in one hour.
- Presentation materials will be emailed within a few days.

# Agenda

- Data and Trends
- Recent Legal Developments
- Potential Liabilities
- Vaccination Strategies
- Incentives & Penalties
- Inquiries & Disclosure
- Vaccination Policies
- Accommodation Issues



# Data and Trends

# Webinar Participant Survey: Know Your Audience

- We have a sense of today's audience from seminar registrations.
- Presentation tailored to cover information relevant for all employer types.
- Survey questions throughout first segment of presentation.
- Please answer survey questions on right-hand side of your screen.
- Survey questions will remain open for 30 seconds while we continue presentation.

# Vaccination Mandates: What are you doing?

- Survey Question #1: **Is your organization mandating vaccination for employees returning to the workplace, either now or in the near future?**
- Answer Options:
  - Yes, for everyone.
  - Yes, for certain groups.
  - No, not planned at this time.
  - No, and probably never will.

# Vaccination Mandates: Trending Upward

- Associated Press Poll (Aug. 12-16): 50% of workers support mandates.
- Different approaches taken by large employers:
  - All Employees: Facebook, Google, Microsoft\*, Tyson, United Airlines, U.S. Military
  - All Corporate Employees: CVS, Lyft, McDonalds, Walmart
  - All Salaried Employees: Disney, MGM
  - All New Hires: CVS, Delta, Disney, MGM, Walmart
- Health Care and Education
  - American Medical Association & 50+ national medical groups: July 26 Joint Statement in Support of COVID-19 Vaccine Mandates for All Workers in Health Care and Long-Term Care
  - Over 700 colleges and universities mandating vaccination for students and staff (as of 8/23/21)
  - California, Illinois, NYC, Washington: All teachers and education staff.



# Vaccination Mandates: Trending Upward

- Vaccination as a condition of application: Up but still low.
- Indeed.com job postings requiring vaccination as condition of employment doubled in one month between July and August (1,200 per million vs. 600).
- Greatest area of increase: Education... Up over 6500% since February.

Source: SHRM 8/23/21 (as reported from Indeed.com)

# Vaccination Status Disclosure: What are you doing?

- Survey Question #2: **Is your organization requiring workers to disclose their vaccination status, either now or in the near future?**
- Answer Options:
  - Yes, because we are mandating vaccination and need to confirm status.
  - Yes, for policy enforcement reasons (e.g., masking for unvaccinated workers).
  - Yes, but only if the employee wants an incentive.
  - No, but we ask for voluntary disclosure.
  - No, and we do not want to know.

# Requiring Vaccination Status Disclosure: Trending Upward

- Disclosure obviously required by employers mandating vaccination.
- But even employers that do not require vaccination have reasons to mandate disclosure of vaccination status.
  - Enforcing social distancing, masking, and other mitigation policies
  - Workplace exposures and contact tracing
  - Direct threat analyses

# Mandatory Testing: What are you doing?

- Survey Question #3: **Does your organization impose any mandatory testing requirements for in-person workers, either now or in the near future?**
- Answer Options:
  - Yes, for everyone.
  - Yes, for certain groups or circumstances (e.g., int'l travel).
  - No, but we're considering it.
  - No, and probably never will.

# Mandatory Testing: Trending Upward

- Some state and local laws now require mandatory testing for certain groups of unvaccinated workers.
- More employers imposing testing mandates for unvaccinated workers.
  - Federal Government: Weekly or twice weekly (+ masking and social distancing)
  - Large private employers: Amtrak, Walgreens
  - MGM: Option of \$15 co-pay for on-site test or obtain test elsewhere and report results
  - Goldman Sachs: Weekly testing even for **vaccinated** employees

# Incentives: What are you doing?

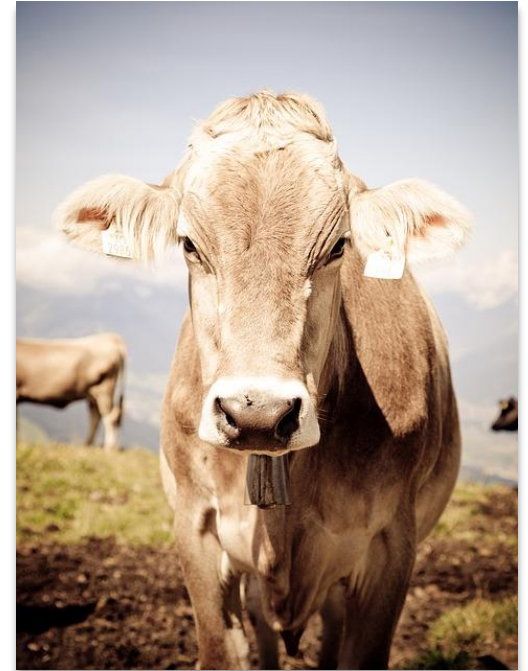
- Survey Question #4: **Has your organization offered a vaccination incentive to workers?**
- Answer Options:
  - Yes, cash or a cash-equivalent.
  - Yes, a non-monetary benefit.
  - No, but we're thinking about it.
  - No, and we have no plan to do so.

# Incentives: Trending Upward

- 60% of workers support use of incentives.  
Source: Eagle Hill Consulting – Aug. 2021 Survey
- 28% of unvaccinated workers are willing to get vaccinated in exchange for an incentive.  
Source: Joblist.com – July 2021 Survey
- 39% of unemployed, unvaccinated workers are willing to get vaccinated in exchange for an incentive.  
Source: Joblist.com – July 2021 Survey
- 20% of unvaccinated workers say they are afraid to miss work or are too busy. This number jumps to 26% for Black workers and 40% for Hispanic workers.  
Source: Kaiser Family Foundation – June 2021 Survey

# Incentives: Trending Upward

- Types of incentives vary widely.
- Vanguard: \$1,000 bonus
- American Airlines: Extra PTO day + \$50
- Dollar General: Four hours of wages
- Target: Free Lyft rides to vaccination sites
- State of Tennessee: No incentives for COVID-19 vaccination, but... farmers can receive up to \$1,500 to vaccinate their cows against respiratory diseases.







# Recent Legal Developments

# Legality of Vaccine Mandates in General

- Generally lawful
- But exceptions:
  - State treats vaccination status as protected characteristic (MT)
  - State prohibits all or some employers from imposing a vaccine mandate (Exs: AZ, AR, GA, IN, TN, TX, UT)
  - State prohibits vaccination mandate for vaccines still in EUA status (OH; mostly public sector employers)
  - Constantly evolving at the state/local level (including court challenges), so stay abreast of the state/local developments in your geographic area.

# FDA: “Full Approval” for Pfizer Vaccine

- “Comirnaty” received FDA approval on August 23, 2021 “for the prevention of COVID-19 disease in individuals 16 years of age and older.”
- Emergency use authorization remains for ages 12-15.
- Approval and timing for Moderna, J&J remain TBD.

# FDA: “Full Approval” for Pfizer Vaccine

- What does this mean for employers?
- Diminished legal risk for vaccination mandates.
- Increased receptivity among hesitant unvaccinated workers?
  - 3 out of 10 unvaccinated adults more likely to get vaccinated upon full approval.  
(Source: Kaiser Family Foundation Vaccine Monitor Survey, June 2021.)
  - Nearly 1 of 2 taking “wait and see” approach believes vaccination likely by year-end.  
(Same source; July 2021.)
  - Only 14% of adults signaled they think they will “definitely not” get vaccinated.  
(Same source, July 2021; % remains relatively unchanged since Dec. 2020.)

# Federal Vaccination Mandate for Nursing Home Workers

- White House announced impending vaccination mandate for all long-term care workers on August 18, 2021.
- HHS is developing new regulations to require nursing homes to mandate workers' vaccination as a condition of participating in the Medicare and Medicaid programs.
- Estimated to apply to 15,000 facilities employing 1.6 million workers.

# Federal Vaccination Mandate for Nursing Home Workers

- Timing and details remain to be determined.
- What about home health care and assisted living?
- Catch-22: Lose workers or lose federal funding?
- 94% of nursing homes and 81% of assisted living facilities report staffing shortages.

Source: American Health Care Assoc. & Nat'l Center for Assisted Living

# EEOC Guidance

- No updates since May 28, 2021.
- Republican majority remains in place through 2022, which may mean fewer updates compared to other agencies.

## “Big Picture”

- Federal EEO laws do not prevent vaccination mandates (subject to accommodation and disparate impact limitations).
- Federal EEO laws do not prevent vaccination incentives (but if vaccination provided by employer, incentive can't be so substantial as to be coercive).
- Asking for vaccination status and proof of same are not considered medical inquiries under ADA, but once obtained, must be kept confidential.

# OSHA / CDC Updates

- Mandatory COVID-19 Emergency Temporary Standard - for employees (private sector plus public sector in states that have state OSHA plans) in healthcare settings who provide healthcare services or healthcare support services (but doesn't mandate vaccination)
- New guidance for fully vaccinated workers in areas of **substantial or high community transmission** (90% of U.S. counties as of August 23, 2021).
  - Wear a mask in public indoor settings in areas of substantial or high transmission.
  - Choose to wear a mask regardless of transmission level if someone in household is at-risk.
  - Get tested 3-5 days following known exposure.
  - Wear a mask in public indoor settings for 14 days after exposure or until negative test result.
- Guidance for unvaccinated and “at-risk” workers remains relatively unchanged.
  - E.g., masking, social distancing, testing, ventilation systems.
- Recording and reporting requirements for work-related COVID-19 cases.



# “Long COVID” as Disability

- DOJ and HHS (but not EEOC?) issued guidance on July 26, 2021.
- “Long-haulers” are people who experience symptoms lasting weeks or months after first developing COVID-19.
- Long COVID is a disability “if the person’s condition or any of its symptoms is a ‘physical or mental’ impairment that ‘substantially limits’ one or more major life activities.”
  - Organ damage (lung, heart, kidney, neurological, circulatory)
  - Lingering emotional illness and other mental health conditions
- Requires individualized assessment; Long COVID not always a disability.

# State Law Developments: Limits for **All** Employers

- **Arizona:** Mandates permitted for private employers as long as religious accommodations are provided.
- **Florida:** TBD. But existing “vaccine passport” ban for customers, students.
- **Montana:** Prohibits mandates & discrimination based on vaccination status.
- **New Hampshire:** Mandates only permitted if “direct threat” exists; health care facilities exempt.
- **North Dakota:** Gov’t units cannot require private employers to mandate vaccination.

# State Law Developments: Limits for **Public** Employers

- **Prohibits vaccination mandates** by all or certain public employers (which may include public schools):
  - Arizona
  - Arkansas
  - Georgia
  - Indiana
  - Montana
  - Tennessee
  - Texas (as of Aug. 25)
  - Utah
- Some limited exceptions (e.g., nursing homes)

# State Law Developments: Vaccine Passports

- **Affirmatively permit use of vaccine passports:** 3 states (CA, HI, NY)
- **Prohibits use of vaccine passports by all employers:** 3 states (AR, FL, MT)
- **Prohibits or limits issuance or use of vaccine passports by certain public employers:** 17 states (AL, AK, AZ, GA, ID, IN, IA, KS, MO, ND, OK, SC, SD, TN, TX, UT, WY)

# State Law Developments: Requirements for **Public** Employees

- **Proof of vaccination or regular testing required** for all or certain public employees (sometimes including private school educators): 13 states (CA, CO, CT, DE, HI, MD, MN, NV, NJ, NM, NY, NC, VA) and D.C.
- **Mandatory vaccination** for certain public employees: 7 states (CO, IL, MA, NM, OR, VT, WA)

# State Law Developments: Requirements for **Healthcare** Employees

- **Proof of vaccination or regular testing required** for most or all healthcare workers: 4 states (CA, DE, MD, NJ)
- **Proof of vaccination or regular testing required** for workers at state-run healthcare facilities: 2 states (KY, PA)
- **Mandatory vaccination** for most or all healthcare workers: 8 states (CO, IL, ME, NM, NY, NC (state-run only), OR, RI, WA) and D.C.
- **Mandatory vaccination** for long-term care staff: 2 states (CT, MA)

The background of the slide features a light gray, semi-transparent image of a workspace. On the left, a portion of a laptop keyboard is visible. In the center and right, a pair of black-rimmed glasses and a dark pen are resting on a white surface, likely a desk or notebook.

# Potential Liabilities

# Potential Liabilities

- For employee becoming infected (and consequences thereof) from workplace spread (worker's compensation or negligence issue).
- For vaccine side effects (if vaccination mandated; if administered by employer), particularly for adverse reaction/event or death
- For side effects from regular testing (if required of unvaccinated).
- For simply mandating vaccine.
- For effectiveness (or lack thereof) of the vaccine.
- For discrimination based on vaccination status as protected characteristic.
- For discrimination/adverse impact on protected groups (if vaccine mandated).



# Potential Liabilities

- For failure to accommodate the unvaccinated (due to medical, pregnancy, or religious reason) – Title I or Title III of ADA.
- For violation of OSHA COVID-19 ETS (employees who perform healthcare services or healthcare support services in healthcare settings).
- For violation of OSHA general duty clause (if COVID-19 spread within a workforce).
- For breach of duty of confidentiality under ADA (Title I).
- For violation of the Fair Credit Reporting Act (if employer uses third party background investigation company to verify vaccination status).

# Managing/Reducing Potential Liabilities

- Require that vaccinations be administered by a third party of employee's choice.
- Require that regular COVID testing be administered by a third party of employee's choice.
- Use care in making representations about the benefits of vaccination.
- Don't use third party background company to verify vaccination status (or ensure that proper FCRA disclosures are made since vaccination status is arguably a medical inquiry under FCRA).
- Maintain confidentiality of vaccination status and vaccination records by limiting disclosures.

# Managing/Reducing Potential Liabilities

- If employer is subject to the new OSHA COVID-19 ETS, comply with that standard and all requirements related to vaccination status
- Adopt a sound COVID-19 vaccination policy if you require vaccination and distribute to all those affected by it
- Adopt a sound accommodation process (including forms) for individuals to request an exception to a vaccination mandate
- Be aware of what states have COVID-19 immunity statutes
- Determine if your general liability insurance policy would cover COVID-19
- Consider use of waivers and assumption of risk agreements (although more likely to be enforceable as to non-employees)

# Wage & Hour Issues and Pay Deductions

- Time off to get vaccinated or tested under federal FSLA or state wage/hour laws:
  - Must time off be granted and not held against employee?
  - Must the time off be paid?
  - Who must pay for the cost of the vaccine?
  - Who must pay for the cost of any required regular testing (for the unvaccinated)?

# Wage & Hour Issues and Pay Deductions

- Pay Deduction Issues:
  - Federal FLSA considerations:
    - Exempt employees and salary basis test (deductions for violation of safety rules or serious misconduct?)
    - Non-exempt employees (no deduction if brings wages below minimum wage)
  - State wage/hour laws:
    - May impose restrictions on types of deductions from pay
    - May require written consent from employee
    - May require employer to pay cost of all medical exams and testing



# Vaccination Strategies

# Spectrum of Vaccination Strategies (as to Employees)

- Remain neutral
- Determine number of employees who are vaccinated to assess risk and accommodation issues
- Encourage vaccination, but no incentive
- Encourage vaccination, with positive incentive or with penalty if not vaccinated
- Mandate vaccination of new hires only (with regular testing for current employees who are not vaccinated)
- Mandate vaccination of only those employees whose jobs require in-person close contact with others (esp. where social distancing is not possible) – Ex. front line workers v. office staff
- Mandate vaccination for all current employees (including new hires)

# Vaccination Strategies (as to Non-Employees)

- Remain neutral
- Mandate vaccination of other workers from third parties who perform services for employer and have in-person interactions with employer's own employees or customers
  - Require actual proof of vaccination status from the third party
  - Require actual proof of vaccination status from those workers assigned to employer's premises
  - Require that the third party certify that those it assigns to the employer's premises are vaccinated
- Mandate vaccination for all visitors to the employer's premises (e.g., customers/patrons, vendors, family members, delivery personnel, etc.)





# Vaccination Incentives and Penalties

# General Issues

- Must those who are granted an exemption from a vaccination requirement (for medical, pregnancy, or religious reason) be given an incentive if those who are vaccinated are given an incentive?
- Can incentives be given in installments over time rather than as current lump sum?
- Can you provide an incentive in installments over time for those who are given a vaccination exemption (and required to do regular testing instead), while providing the incentive in one lump sum to those who are vaccinated?

# Types of Incentives

- Cash payment – lump sum payment now
- Cash payment – paid in installments over time
- Gift card (cash equivalent or from particular vendor)
- Extra day (or more) of PTO

# Types of Penalties

- Surcharge on monthly health insurance premiums
- Paid leave (not charged to PTO) if employee gets COVID-19 and is vaccinated, but charged to PTO (or leave is unpaid) if employee is not vaccinated
- One-time, ongoing, or progressively larger monetary penalty for not being vaccinated (deducted from pay)
- No accrual of additional PTO if unvaccinated
- No merit increases if unvaccinated
- No promotions if unvaccinated
- Termination of employment

# General Considerations Re: Penalties

- Medical, pregnancy, or religious exceptions to vaccination
- Disparate impact on protected categories
- Potential wage/hour issues if deduction from pay involved
- HIPAA, ACA, and EEOC wellness program issues
- Morale issues and workforce perceptions of workplace culture
- Reputational harm for the business

# Health Insurance Surcharges

- 41% of workers support surcharges

Source: Eagle Hill Consulting – Aug. 2021 Survey

- Delta (Airlines, not the virus variant) made headlines last week.
  - \$200/month premium surcharge for unvaccinated workers
  - Likened to premium surcharges imposed for smoking.
  - Justification: All recent hospitalizations were among Delta's unvaccinated workers, and average unvaccinated worker's hospitalization cost the company over \$50,000.

# Health Insurance Surcharges

- HIPAA: Prohibits discrimination in eligibility, premiums, and coverage based on health-related factors.
  - Don't condition plan **eligibility** on vaccination status.
  - But variations in employee contributions may be permissible when tied to activities-based wellness programs.
  - Offer reasonable alternatives for individuals where (1) health status makes vaccination medically inadvisable, or (2) religious objection exists.
- Other considerations and questions:
  - Extend to spouses and dependents?
  - Amount of surcharge: Subject to wellness program caps for permissible ranges.
  - Notice period and effective date: give people reasonable opportunity to be vaccinated.
  - What about states like Montana that prohibit discrimination based on vaccination status?



# Inquiries and Disclosures



# Inquiries

- To Applicants:
  - Can you require an applicant to be vaccinated in order to be interviewed?
  - Can you ask an applicant if they are vaccinated?
  - Can you ask for proof of same?
  - Can you reject an applicant for not being vaccinated?
- To Employees:
  - Can you ask employees if they are vaccinated?
  - Can you ask if an employee intends to get vaccinated, and if so, by when?
  - Can you ask an employee for the reason the employee is not vaccinated?
- To Non-Employees (customers/clients, visitors, vendors, patients, etc.):
  - Can you ask non-employees if they are vaccinated?
  - Can you ask for proof of same?
  - Can you deny access to premises if they are not?
  - If there any duty to accommodate non-employees?

# Disclosure Restrictions

- ADA (Title I) disclosure restrictions:
  - Immediate supervisor only if supervisor needs to know of a specific accommodation made (for not being vaccinated)
  - Safety and health personnel only if need to know in event of an emergency
  - Government official investigating compliance with or violations of ADA
- ADA (Title III) disclosure restrictions – none
- HIPAA (doesn't typically apply to employer-employee relationship)

# Disclosure Considerations

- If vaccination is required to be on the premises (or face mask and social distancing in lieu thereof), who will have authority to enforce the rules?
- Will those with authority to enforce such rules be given a list of who is vaccinated and who is not? How will you control disclosures so that you don't violate the ADA confidentiality rules?
- What will you do when a co-worker who is vaccinated complains about having to work near a co-worker who is not vaccinated?
- Won't employees necessarily know who is and isn't vaccinated if face masks are required in lieu of vaccination?
- Can you require the vaccinated (or unvaccinated) employees to wear a "tag" or "badge" to let others know of their vaccination status?

The background of the slide is a light gray, semi-transparent image of a desk setup. On the left, a portion of a laptop keyboard is visible. In the center, a pair of black-rimmed glasses rests on a white surface. To the right of the glasses, a black pen lies horizontally. The overall aesthetic is clean and professional.

# Vaccine Policies

# Recommended Content

- Scope and application – some or all employees; non-employees?
- Actual vaccine mandate (to be “fully vaccinated” – 2 weeks after final shot)
- Deadline for becoming fully vaccinated
- How proof of vaccination status is to be submitted
- Who bears cost of vaccination:
  - Whether employer’s health insurance will apply
  - Whether cost will be reimbursed by employer
- Whether vaccine shots can be obtained during working hours or not, and if so, will it be paid time off (or must PTO be used)

# Recommended Content

- Whether employer will provide vendor for shots if employee selects own
- Exemptions for bona fide medical, pregnancy, and religious reasons
- Process for requesting an exemption (exception to the mandate) and alternatives to being vaccinated (possible accommodations)
- Statement that employee must be able to safely perform all essential duties if accommodated
- Statement that exemption and accommodation are temporary only and can be withdrawn if at any time employer believes the direct threat posed by being unvaccinated cannot be accommodated without undue hardship (due to changes in community spread, COVID cases/hospitalizations/deaths, etc.)

# Recommended Content

- Requirement that employee complete written request form (and produce medical certification if reason for exemption is medical or pregnancy)
- Statement that each request will be based on individualized assessment
- Confidentiality statement, but qualify that it will be maintained to the extent reasonably possible under the circumstances relevant to COVID-19 considerations
- Consequences if not fully vaccinated and if no exemption granted

# Revisiting Policies Based on New Developments

- Should employers that are mandating vaccination be prepared to mandate boosters?
- Should employers now consider mandating seasonal flu shots, too?





# Accommodation Issues

# Medical and Pregnancy

- Limited number of medical reasons for not getting vaccinated (according to CDC)
- Pregnancy not a reason for not getting vaccinated (according to CDC)
- Require medical certification
- May not be worth taking risk of challenging reason and recommendation of employee's own health care provider
- Instead of challenging the reason as being “bona fide,” probably better to determine if there really is an “effective” accommodation that is available that will mitigate the risk of being unvaccinated
- May see certain health care providers willing to complete a medical certification – keep an eye out for them and probably request second opinion

# Religious Beliefs

- Limited number of religions that would actually prohibit vaccination (e.g., Christian Science), but just have to be a sincerely-held religious belief and not necessarily tied to an organized religion
- May see a surge in using religion as the basis for not getting vaccinated (especially arguments that the body is a sacred vessel into which foreign substances should not be put or that intentional puncturing of body is not permitted)
- Should consider interviewing any employee who claims religious exemption:
  - Have you received shots as an adult for other vaccines (e.g., flu, pneumonia, shingles, etc.)?
  - Have you had any minor children vaccinated for any illness/disease?
  - If you can't put certain substances in your body, how do you distinguish on various foods and beverages?
  - How long have you had such beliefs?

# Religious Beliefs

- Instead of challenging the beliefs as being “sincerely-held,” probably better to determine if there really is an “effective” accommodation that is available that will mitigate the risk of being unvaccinated
- *De minimus* test for “undue hardship” on religious accommodations, but if you’re accommodating for medical reasons, how do you justify not accommodating for religion?

# Accommodation Alternatives to Vaccination

- If job can be performed remotely:
  - Permit work from home (but ensure that you can effectively supervise the position and measure productivity before you decide that “work from home” is a viable option).
  - Place on leave (allow employee to use PTO until exhausted, then becomes unpaid), but only for designated increment of time (and review upon expiration of each increment to see if you wish to renew the leave).

# Accommodation Alternatives to Vaccination

- If job cannot be performed remotely:
  - Review most recent CDC, state, and local guidance to determine what options might comply with that guidance
  - Possible options:
    - Regular testing:
      - How often?
      - What kind of test (regular, rapid, over-the-counter)?
      - Who pays for the test?
      - Will the test be performed on employer time? If so, how much time will you allow for testing?

# Accommodation Alternatives to Vaccination

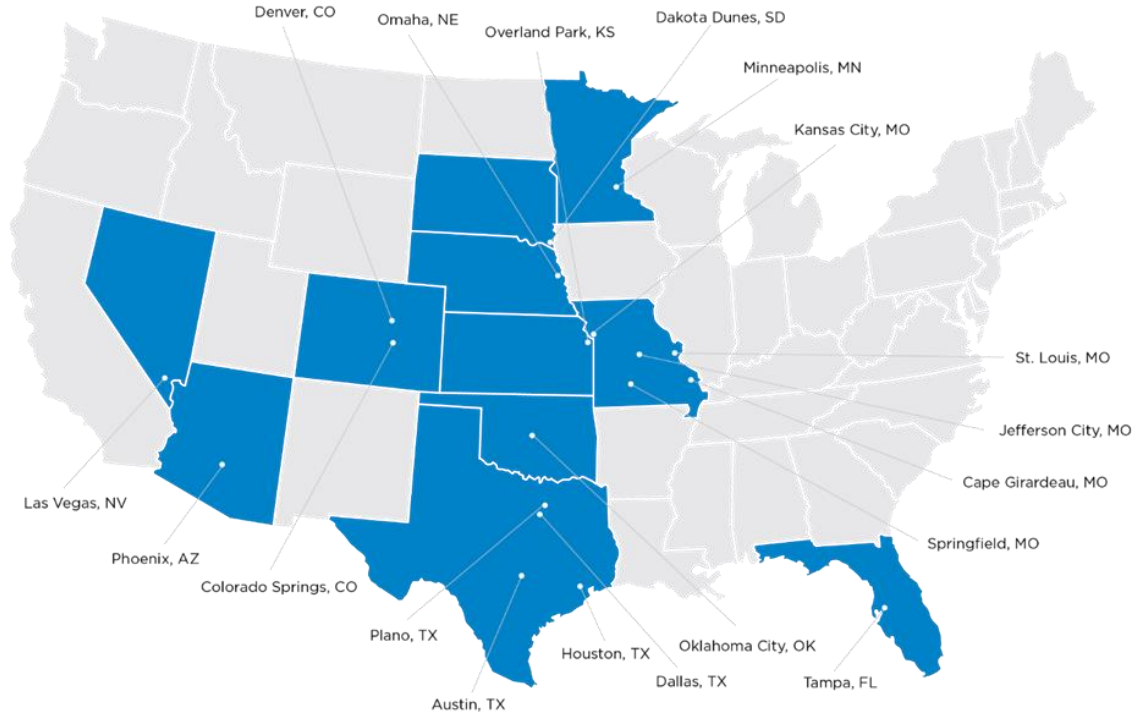
- Other possible options:
  - Face mask requirements:
    - Wear face mask and socially distance at all times (other than own enclosed office)
    - Wear face mask and socially distance at all times (including in own enclosed office)
    - Wear specific kind of mask (employer may have to provide)
    - Wear mask to fully cover mouth and nose at all times
  - Social distancing requirements (use 6' or should you use more?)
  - Requirements for use of common areas:
    - Break rooms – permitted or not?
    - Restrooms – special sanitation requirement?
    - Conference rooms – permitted or not?
    - Break and meal periods – must they be taken inside own office or outside the premises?

# Accommodation Alternatives to Vaccination

- Regularly review CDC, state, and local guidance for any changes that might apply to accommodation options
  - Infection-control protocols
  - Travel restrictions
- Other issues:
  - What if job requires travel and employee is unvaccinated?



# Spencer Fane Office Locations



A light gray background image showing a person's face from the nose up, wearing glasses, and a laptop keyboard in the lower-left corner. The person is looking down, and a pen is visible in the lower-right corner.

Questions? Contact us!

# Thank You!



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