

## COVID-19 Vaccine Questions Answered

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With the surge of COVID-19 cases due to the Delta variant, many employers are considering whether to require employees to be vaccinated, how to encourage employee vaccinations, and the implications of vaccine policies for their businesses. Here are some of the top questions that Perkins Coie has received from its clients.

### 1. May an employer make COVID-19 vaccination mandatory for their employees?

Generally, yes, under federal law so long as employers accommodate individuals with disabilities, sincerely held religious objections, or other legally protected characteristics that prevent employees from receiving the vaccine. The [EEOC's guidance](#) explains that federal equal employment opportunity laws do not prevent employers from requiring employees who physically enter the workplace to be vaccinated for COVID-19, so long as the employer provides reasonable accommodations to employees who are not able to be vaccinated due to a disability or a sincerely held religious belief, practice, or observance, unless doing so would cause an undue hardship to the employer. Employers also may need to respond to allegations that the mandatory vaccine requirement has a disparate impact on employees based on protected characteristics.

Notably, several lawsuits have been brought by employees alleging mandatory vaccination policies are prohibited, in part because the COVID-19 vaccines are authorized only under an Emergency Use Authorization (EUA). However, the U.S. Department of Justice (DOJ) has released a [memorandum opining](#) that the Food, Drug, and Cosmetic Act (FDCA)—which authorizes an EUA for a vaccine—does not prohibit entities, including employers, from requiring a vaccine even if the vaccine is authorized for emergency use only. Further, one federal district court in Texas dismissed federal and state law claims brought by 117 employees related to their hospital-employer's mandatory vaccine policy. There are additional lawsuits pending. On August 23, 2021, the Food and Drug Administration (FDA) [announced](#) full approval for the Pfizer-BioNTech COVID-19 vaccine, which will undercut some arguments made by employees that mandating this vaccine is prohibited.

President Biden [announced](#) at the end of July 2021, that "every federal government employee and onsite contractor will be asked to attest to their vaccination status. Anyone who does not attest to being fully vaccinated will be required to wear a mask on the job no matter their geographic location, physically distance from all other employees and visitors, comply with a weekly or twice weekly screening testing requirement, and be subject to restrictions on official travel." The Biden administration is encouraging private employers to follow this model.

However, state law may prohibit employers from requiring vaccines or prohibit it in certain circumstances. Several states have proposed legislation prohibiting mandatory vaccination policies. [Montana](#) currently prohibits employers from discriminating against a person based on the person's vaccination status. Other states have proposed similar legislation. Again, some of these laws are tied only to vaccinations that have emergency use authorization, which will no longer apply if the FDA grants full authorization to all vaccines. Collective bargaining agreements or employment agreements also may impose additional requirements.

Employers should continue to watch for developing state or local guidance and/or regulations relating to mandating COVID-19 vaccinations.

## **2. If an employer has a mandatory vaccination policy, what do they do if an employee objects? May the employer fire the employee?**

That depends on why the employee is objecting. If the employee objects to getting a COVID-19 vaccine on religious grounds or due to a disability, then the employer must engage in the interactive process to determine whether the employee can be accommodated. There are many factors that go into the accommodation analysis and each situation must be assessed on a case-by-case basis. If the employee objects on other grounds, the employer may exclude the employee from the workplace or possibly even terminate the employee; however, employers should be mindful of checking any state and local laws that may apply (including any legislation passed specifically in response to mandatory COVID-19 vaccine policies). Employers should ensure employees who handle accommodation requests or employee objections are trained on accommodation procedures and the interactive process, and managers are trained about the process for referring accommodation requests. Employees also may object on the basis of political beliefs, and employers should consult counsel to determine applicability of any local laws.

## **3. May I offer COVID-19 vaccines at the worksite?**

Yes, but this decision should be carefully considered. Employers who offer COVID-19 vaccines at the worksite, either directly or through a third-party, may be liable for losses that arise in administering vaccines to employees, such as when an employee suffers an adverse reaction to a vaccine. Employers may shield themselves from this liability by seeking the protections of the Public Readiness and Emergency Preparedness Act (the PREP Act). Under the PREP Act, covered persons are immune from liability for losses caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure if a declaration has been issued by the Secretary of Health and Human Services (the Secretary) about the countermeasures. On [March 17, 2020](#), the Secretary issued a declaration under the PREP Act specific to COVID-19. Although vaccines would certainly qualify as a covered countermeasure under the declaration, employers should consult with counsel about whether the employer and its vaccination program will satisfy the other requirements of the PREP Act to afford them immunity.

## **4. Do employers need to allow employees to take time off from work to get a COVID-19 vaccine, and must an employer pay employees for the time they spend getting a COVID-19 vaccine?**

While the American Rescue Plan Act of 2021 (ARPA) does not require that employers provide paid leave for this purpose, state and local laws may require it. Employers also may be required under state and local law to provide paid sick or medical leave in the event employees suffer adverse side effects from a vaccine. If the employer decides to provide vaccines at the worksite or require vaccination off-site during working hours, employees should remain "on the clock" while vaccines are administered. Employers requiring vaccinations as a condition of employment may be required under state law to pay employees for time spent getting the vaccine. Employers may also voluntarily choose to provide additional paid leave in an effort to incentivize employees to get vaccinated, even if the vaccine is administered off-site, and to alleviate the need for time off in the case of adverse reactions to vaccines. The [CDC encourages](#) employers to offer paid sick leave to seek vaccination in the community. The CDC also advises employers offering the vaccine on-site to stagger vaccinations to ensure continuity of operations, including for both doses, as side effects from the second dose seem to occur more frequently.

Under the ARPA, eligible employers may claim a paid sick and family leave tax credit for providing paid time off for employees to obtain a COVID-19 vaccination or to recover from an illness related to the immunization. This tax credit generally is available to eligible employers that pay for sick and family leave from April 1, 2021, through September 30, 2021.

On [April 21, 2021](#), and again on July 29, 2021, President Biden encouraged employers to provide full pay to employees for time needed to get vaccinated and for time needed to recover from the aftereffects of vaccination. For employers with fewer than 500 employees, he also announced a paid leave tax credit to offset the cost of providing time off related to the vaccine.

### **5. Do employers need to reimburse employees for the cost of a COVID-19 vaccine?**

Employer-sponsored group health plans (whether fully or self-insured) generally will be required to pay for COVID-19 vaccines for employees covered under the plan without cost-sharing. For employees who are not covered by an employer-sponsored group health plan, the requirement for an employer to pay for a COVID-19 vaccine depends on whether the employer has mandated a vaccine and applicable state law. Some jurisdictions may require employers mandating COVID-19 vaccines to reimburse employees for incidental costs and travel expenses for off-site vaccinations. Even if the company is not required to reimburse employees for the cost of vaccines, offering reimbursement may be a strategy to encourage employees to get vaccinated in an effort to reduce lost productivity due to employees becoming infected with COVID-19 or the need to quarantine following close contact with an infected individual.

### **6. May employers require an employee to state whether they have received a COVID-19 vaccine or require proof of an employee's COVID-19 vaccination? If so, does the employer need to obtain a release allowing access to vaccine information?**

The Equal Employment Opportunity Commission (EEOC) has stated that employers may ask employees whether they have received a COVID-19 vaccination and may require proof that an employee has been fully vaccinated. However, the EEOC suggests that employers consider warning employees not to provide any additional medical or genetic information as part of the proof of vaccination, to avoid potentially running afoul of the Americans with Disabilities Act (ADA) or the Genetic Information Nondiscrimination Act (GINA). (Note that the vaccination process may require some prescreening questioning that could implicate the ADA's prohibition against disability-related inquiries. This is one reason to consider using third-party providers for vaccination purposes rather than having in-house personnel handle aspects of vaccine administration. Employers administering vaccines should carefully review employment prescreening questions to ensure that they are job-related and consistent with business necessity.) Additionally, employers should be cautious about asking employees why they have not received the vaccine, as such questions may elicit disability-related or genetic information.

Although many employers are not "covered entities" subject to the Health Insurance Portability and Accountability Act (HIPAA), which governs and establishes strict protocols associated with the use and disclosure of individuals' protected health information and use and disclosure of the same, an employer can be subject to HIPAA while acting in the capacity as sponsor of a group health plan. To mitigate that risk, employers would be well advised to provide advanced written disclosures to employees regarding the vaccination process, the legitimate business reason for same, and how the employer (or the group health plan) will use, store, and share (if at all) vaccination data of individual employees. Obtaining a signature acknowledgment and consent to a vaccination protocol is recommended if the data is being shared with the employer group health plan. There are also HIPAA considerations to take into consideration if a third-party healthcare provider who would be subject to HIPAA is administering vaccines; specifically, the third-party should require employees to fill out a valid HIPAA authorization prior to releasing information regarding vaccine status to the employer. If coverage for the COVID-19 vaccine is provided through the group health plan, the employer (as the plan sponsor) must separately comply with all HIPAA policies and procedures applicable to the group health plan as a HIPAA covered entity.

Employers should also be cognizant of other state and local laws applicable to personally identifiable information, especially as they relate to their employee's health status. HIPAA, as federal law, is only one of many laws that may be applicable with respect to the employees' private health information and status.

Employers should keep the proof of vaccination in confidential files (similar to employee medical files), separate from employee personnel files, and accessible by only those who have been routinely trained with respect to HIPAA and other laws applicable to an individual's personally identifiable information with a business "need to know." If employers administer vaccines in-house, they should also keep any prescreening records in the separate, confidential files. Employers should not disclose which employees have or have not been vaccinated.

Finally, employers should review any state and local laws regarding asking whether employees have received a COVID-19 vaccination or asking for proof of such vaccination, as some jurisdictions may prohibit this or have specific requirements.

### **7. May employers offer bonuses/incentives for employees who have been vaccinated?**

According to [EEOC guidance](#), under certain circumstances, employers may offer incentives to employees who receive COVID-19 vaccines. An employer may offer an incentive to employees to voluntarily provide documentation or other confirmation of a vaccination received from a third-party provider (i.e., that is not the employer or an agent of the employer).

For vaccines administered by the employer, an employer may provide any incentive (which includes both rewards and penalties) provided the incentive "is not so substantial as to be coercive." The EEOC explained, "[b]ecause vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information" and therefore run afoul of the ADA.

For information about employees' family members, employers may offer an incentive to employees to provide documentation or other confirmation that employees' family members have been vaccinated without running afoul of GINA. If the employer administers the vaccine, employers should not acquire genetic information, and the EEOC has said the pre-vaccination medical screening questions for the three COVID-19 vaccines now available do not.

Employers may not offer any incentives to an employee in exchange for a family member's receipt of a vaccination from an employer or its agent. However, the EEOC has said GINA permits an employer to offer vaccinations to an employee's family members if it takes certain steps to comply with GINA, including not requiring employees have their family members vaccinated, not penalizing employees if their family members do not get vaccinated, and keeping all medication information obtained from family members during the screening process confidential.

Employers should also be mindful of potential discrimination claims by individuals who are unable to participate in a COVID-19 vaccine program due to disabilities or sincerely held religious beliefs and, thus, are ineligible for the incentive through no fault of their own. However, the EEOC has received requests for clarification but has yet to weigh in, so employers should monitor this issue as it develops.

Finally, state laws (or pending legislation) prohibiting employers from requiring vaccination may be expanded or construed to affect an employer's vaccination program.

### **8. Do employers offering a vaccine bonus or incentive need to include it in a nonexempt employee's regular rate of pay or change incentives based on whether offered via a benefit plan?**

Employers should consider how such bonuses/incentives are paid to nonexempt employees, and whether such bonuses/incentives should be included in a nonexempt employee's regular rate of pay. The U.S. Department of Labor (DOL) has issued [guidance](#) that payments as incentives for receiving the COVID-19 vaccine may be excluded from the regular rate of pay under the Fair Labor Standards Act (FLSA). Employers should monitor this issue as well as any state and local guidance interpreting wage-and-hour laws.

Similarly, employers should consider whether the incentive should be considered wages for tax purposes, and whether such payments may need to be taken into account for deferral purposes of 401(k) and other retirement plans.

Special considerations also apply with respect to incentives that are designed as health insurance premium discounts or surcharges, as there are compliance requirements around how large that discount or surcharge can be, other technical requirements, and what has to be done if an individual has a sincerely held religious belief, a health contraindication, or other protected reason not to be vaccinated.

### **9. Following vaccination, may employees be excused from wearing masks, social distancing, and other workplace precautions to limit community spread?**

This answer is currently unclear as federal, state, and local guidance is changing given the Delta variant. On July 27, 2021, the CDC recommended that fully vaccinated people "can further reduce their risk of becoming infected with the Delta variant and transmitting it to others by wearing a mask in public indoor settings in areas of [substantial or high community transmission](#)." The CDC, however, has not offered any helpful guidance on what settings qualify as "public indoor settings" and whether all indoor workplaces would qualify. Further, it is unclear whether the CDC intends to provide any guidance for workplaces given that it recently archived its "Guidance for Businesses and Employers Responding to Coronavirus Disease 2019 (COVID-19)" and "General Business Frequently Asked Questions" pages and noted that it would no longer be updating these pages.

The CDC recommends that fully vaccinated individuals continue to wear masks in correctional facilities, homeless shelters, and schools.

Federally, OSHA's current [guidance](#) adopts recommendations that mirror the CDC's mask and testing recommendations for fully vaccinated people. OSHA's guidance recommends, but does not require, that fully vaccinated people reduce their risk of becoming infected with the Delta variant of COVID-19 and potentially spreading it to others by:

- Wearing a mask in public indoor settings in areas of substantial or high transmission;
- Choosing to wear a mask regardless of level of transmission, particularly if individuals are at risk or have someone in their household who is at increased risk of severe disease or not fully vaccinated; and
- Getting tested 3-5 days following a known exposure to someone with suspected or confirmed COVID-19 and wearing a mask in public indoor settings for 14 days after exposure or until a negative test result.

OSHA's current guidance provides as follows: "Suggest or require that unvaccinated customers, visitors, or guests wear face coverings in public-facing workplaces such as retail establishments, and that all customers, visitors, or guests wear face coverings in public, indoor settings in areas of substantial or high transmission. This could include posting a notice or otherwise suggesting or requiring that people wear face coverings, even if no longer required by your jurisdiction. Individuals who are under the age of 2 or are actively consuming food or beverages on site need not wear face coverings."

Employers should also be mindful of any state and local orders that may be more restrictive than the federal agencies' guidance, as many require masking and other measures in the workplace even for fully vaccinated

persons.

## **10. Do fully vaccinated persons need to quarantine if they have been exposed or potentially exposed to COVID-19?**

The CDC has issued guidance explaining, "Most fully vaccinated people with no COVID-like symptoms do not need to quarantine or be restricted from work following an exposure to someone with suspected or confirmed COVID-19, if they follow the testing and masking recommendation above." CDC's testing and masking recommendation provides that fully vaccinated people should be tested three to five days following a known exposure to someone with suspected or confirmed COVID-19 and to wear a mask in public indoor settings for 14 days or until they receive a negative test result.

If a fully vaccinated person develops symptoms or tests positive, the CDC has said that the person should get tested, stay home, and stay away from others .

Individuals who have received only one dose of a two-dose series, or who are still within the two-week window from receipt of their final dose, should follow current guidance on quarantining after exposure to COVID-19.

Employers should also consult with their state and local jurisdictions to ensure that there are not applicable orders with more stringent quarantine guidelines.

## **11. Should employers mandating vaccines require employees obtain a booster shot?**

The CDC is currently recommending vaccine booster shots only for people who are "moderately or severely immunocompromised." However, on August 18, 2021, the U.S. Department of Health and Human Services (HHS) issued a statement that it plans to issue booster shots of the Pfizer and Moderna vaccines this fall "subject to FDA conducting an independent evaluation and determination of the safety and effectiveness of the third dose." Under the plan, the CDC is prepared to offer booster shots "for all Americans beginning the week of September 20 and starting 8 months after an individual's second dose," starting with healthcare providers, nursing home and long-term care residents, and other seniors based on the distribution of the vaccine rollout. The CDC anticipates that booster shots will likely also be needed for those who received the Johnson & Johnson vaccine, and expects to provide more information in the coming weeks. Employers should monitor CDC guidance as well as state and local health authorities for vaccination recommendations as they develop with regard to booster shots.

*For additional information, please visit [Perkins Coie's Frequently Asked Employment Questions Regarding COVID-19](#).*

## **How Perkins Coie Can Help**

COVID-19 vaccines raise numerous questions for employers and there is no one-size-fits-all approach. Rather, the needs of the business and the workforce must be considered when addressing issues surrounding employees receiving COVID-19 vaccines. Perkins Coie's [Labor & Employment](#), [Employee Benefits & Executive Compensation](#), [Privacy & Security Law](#), and [Healthcare](#) attorneys can assist in formulating that approach by:

- Advising on the pros and cons of a mandatory or voluntary vaccination policy, as well as whether to offer vaccines on the employer's premises;
- Creating vaccination policies and procedures, including releases/indemnification agreements for employer use and review of vaccination protocols proposed by vendors providing vaccination services;

- Training employer personnel on accommodation and leave issues associated with COVID-19 and vaccinations;
- Advising on HIPAA authorizations and data privacy issues surrounding COVID-19 exposure, notification, and vaccinations, including protocols for internal storage/disclosure of employee vaccine records; and
- Addressing overlaying questions of labor, benefits, and tax implications of incentivizing employees to obtain vaccinations with cash, paid time off, raffles, and health premium discounts or surcharges.

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