

Beyond COVID-19: Vaccines and the Workplace

Employer's Vaccination Policy Considerations

February 19, 2021

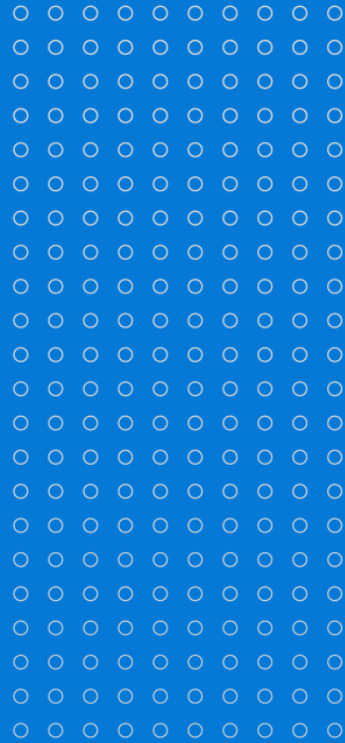


Table of Contents

INTRODUCTION	3
HOW TO USE THIS DOCUMENT	3
Foundational Considerations.....	3
Legal Considerations	3
Mandatory Programs	4
Americans with Disabilities Act	4
ADA — Direct Threat.....	5
Administration of the Vaccine	5
Title VII of the Civil Rights Act of 1964 — Religious Discrimination	6
Fair Labor Standards Act — Wage and Hour Laws.....	7
Workers’ Compensation	7
Other Policy Components and Considerations.....	8
Voluntary Programs	8
General Compliance Considerations	8
Vaccine Administration.....	9
Other Policy Considerations	9
Medical Confidentiality.....	9
State Requirements	10
Genetic Information Nondiscrimination Act (GINA).....	10
Vaccine Delivery.....	11
Employee Communication	11
Vaccine Incentives	11
Workers’ Compensation and Side Effects	11
National Labor Relations Act and Collective Bargaining Agreements	12

Will You Mandate, Motivate, or Educate?

Introduction

The employer's approach to vaccines in the workplace can be wrought with various culture, people, and compliance considerations. The [CDC has issued vast guidance regarding employer vaccination communications and programs in the workplace](#) – many of those links are included throughout this document. We generally recommend that employers develop written policies and protocols that include (but may not be limited to) the considerations detailed in this document. This self-inventory document is designed to supplement the [HUB Back to Business Playbook](#) and the [COVID Workplace Health and Safety Self Inventory](#).

How to Use This Document

We have created this document as a self-inventory for employers. The document is divided by nature of the vaccination approach – Mandatory vs. Voluntary. In each section we provide questions that employers should consider addressing associated with the applicable vaccination approach. We have also provided some employer tips.

Throughout this document we address many important employer considerations that are often also addressed by various government agencies such as the Centers for Disease Control (CDC), Department of Labor (DOL), and the Equal Employment Opportunity Commission (EEOC). We have placed links to the applicable guidance throughout this document for your easy reference. While the EEOC has issued guidance regarding vaccines under federal law, states may interpret their own employment laws in a manner that is more protective of employees. Employers should ensure they consult with outside legal counsel before implementing a mandatory or voluntary vaccine program.

Foundational Considerations

- **Culture** — What approach will your culture sustain?
- **Cost** — Administration costs can vary — what can your budget withstand?
- **Compliance** (legal) — The compliance considerations can be complex — are you prepared to manage a vaccination compliance program?
- **Recruitment and retention** — Will your vaccination program have an impact on your recruitment and retention efforts?

Legal Considerations

- Currently, the only vaccines available are under an [EUA \(Emergency Use Authorization\)](#) and do not have full FDA approval. With respect to EUA-vaccines, the FDA has a regulatory obligation to ensure that potential recipients of such vaccines are informed of the known benefits and risks and have the option to accept or refuse it for any reason. As long as the EUAs are in effect, this right to refuse directly conflicts with an employer-mandated program and exposes the employer to more legal uncertainty and risk.
- Do you employ 15 or more employees on its payroll for 20 or more calendar workweeks (which do not need to be consecutive) in either the current or preceding calendar year (Title VII, ADA, and GINA)?
- Have you demonstrated a legitimate business interest to substantiate your vaccination program?
- Have you demonstrated a legitimate business interest to substantiate your vaccination program?
- Have you clearly explained the company's justification for the policy including the background and basis for the policy and approach?

Mandatory Programs

Have you developed a written policy that provides avenues for employees to seek an accommodation on the basis of their religion ([Title VII of the Civil Rights Act – Religion](#)) and/or health condition (i.e. [Americans with Disabilities Act](#))?

Americans with Disabilities Act

- Do you have current knowledge of an employee with a health condition that may qualify under the ADA?
- Do any of the following apply to the employee:
 - A physical or mental impairment that substantially limits one or more major life activities of an individual (that is, an actual disability).
 - A record of this kind of impairment.
 - Being regarded as having such an impairment (for which the ADA's reasonable accommodation requirements do not apply).
- Can the employee perform the essential functions of the job with or without a reasonable accommodation?
- Are you prepared to proactively reach out to these employees?
- Have you developed and communicated an avenue for an employee to request a reasonable accommodation?

Employer Tip: Remember there are no magic words – the employer's obligations are triggered by knowledge of a qualified employee with a condition that may qualify under the ADA

- Have you established an approach for the [interactive process](#) in response to a request for an accommodation? Are your employees trained on how to engage in the interactive process?

Employer Tip: The ADA permits requests for reasonable documentation of the disability

Employer Tip: Workers with disabilities under the ADA do not have the right to the accommodation of their choice, but rather to a "reasonable accommodation," one that "reasonably" accommodates their disability, and that does not impose an "undue hardship" on an employer. For example: Remote work arrangements, additional personal protective equipment (PPE), moving an employee's work location either within the worksite or to another worksite, modifying an employee's non-essential job duties, and/or temporary reassignments. Additionally, in certain situations a leave of absence in and of itself can be considered a "reasonable accommodation."

- Do you have an ADA compliant form that the employee can provide to his/her health care provider to obtain ADA allowed medical information?

ADA — Direct Threat

- Have you determined whether an unvaccinated worker who enters the workplace poses a direct threat to the health and safety of others?

Employer Tip: A “direct threat” under the ADA is based on an individualized assessment of the individual’s present ability to safely perform the essential functions of the job.

- **Direct Threat Analysis:** Have you conducted an individualized assessment of the following factors to determine if a direct threat exists?
 - The duration of the risk
 - The nature and severity of the potential harm
 - The likelihood of the potential harm occurring
 - The imminence of the potential harm
- **Employee Individualized Assessment:** Have you conducted an individualized assessment based on a reasonable medical judgment about the employee’s disability using the most current medical knowledge and the best available objective evidence, which may include:
 - the severity of the pandemic in a particular area;
 - the employee’s own health;
 - the employee’s particular job duties;
 - the likelihood of an individual being exposed to the virus at the worksite; and
 - measures that the employer is taking to protect all workers.

Employer Tip: If the employer determines that an unvaccinated worker who enters the workplace represents a direct threat, the employer should engage in the interactive process with the employee to determine if there is a reasonable accommodation that will eliminate the direct threat and allow the employee to perform the essential functions of the job.

Administration of the Vaccine

- Will you administer the vaccine yourself? Have you analyzed the pros and cons of administering the vaccine yourself?
- Or will you contract with a third-party to come onsite?
- Are the vaccine related screening inquiries “job-related and consistent with business necessity”?

Employer Tip: Necessary pre-vaccine screening questions are likely to elicit medical information and/or information about a disability. This includes questions regarding medical reasons that may prevent the person from receiving the vaccination and/or indicate that the individual should receive the vaccine from the person’s physician or in a hospital setting.

Employer Tip: To comply with the ADA, employers (including vendors with which they contract) may only ask employees these questions if doing so is job-related and consistent with business necessity. Therefore, an employer that requires an employee to receive a COVID-19 vaccination administered by the employer or contractor must ensure the medical questions are necessary for administration of the vaccine (and nothing more)

- Onsite administration of the vaccine: have you established a process to ensure the privacy of the employee during the administration of the vaccine (i.e. in a location where others can't hear the conversation between the health care provider and the employee)?
- Have you established a process to ensure the privacy of all medical information and records obtained during the vaccination process (regardless of vaccination location) (see confidentiality of medical information below)?

Title VII of the Civil Rights Act of 1964 — Religious Discrimination

- Does your policy provide for an accommodation for individuals who have a sincerely held religious belief that conflicts with a vaccination requirement?
- Have you established a process to discuss with employees the conflicting religious belief and potential solutions to remove the conflict?
- Does the person having the discussion with the employee understand the EEOC's guidance and the employer's obligations regarding a "sincerely held" religious belief?

Employer Tip: *The EEOC instructs “because the definition of religion is broad and protects beliefs and practices with which the employer may be unfamiliar, the employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely-held religious belief.”*

- Does your policy include a process that includes requesting supporting documentation from employees?

Employer Tip: *Ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief, practice, or observance.*

- Do you have an objective basis for questioning either the religious nature of a particular belief, practice, or observance, or the sincerity of a particular belief, practice, or observance?

Employer Tip: *The EEOC has suggested that if the employer has an objective basis to question the nature or sincerity of the religious practice or belief, it would be justified in requesting additional information.*

Employer Tip: *The “religious” nature of a belief or practice, the “sincerity” of an employee’s stated religious belief is usually not in dispute. Employers may consider*

1. The employee has behaved consistently with the belief;
2. The employee is seeking the accommodation for secular reasons;
3. The timing of the request is suspect; and
4. The employer otherwise has reason to believe the accommodation is not sought for religious reasons

But, but no single factor is dispositive.

- Do you have an established process to ensure that the employer and employee engage in a cooperative effort to address a conflict between the religious belief or practice and work?

- Does the accommodation impose more than de-minimis burden on the organization?

Employer Tip: Under Title VII, an undue hardship can include both financial and non-monetary costs. It is important to remember that monetary costs alone may not create an undue burden on the employer. Relevant factors may include:

- The type of workplace
- The nature of the employee's duties
- The identifiable cost of the accommodation in relation to the size and operating costs of the employer, including the monetary cost and the burden on the employer's business,
- The number of employees who need a particular accommodation
- Whether the accommodation violates or conflicts with another law

Fair Labor Standards Act — Wage and Hour Laws

- Will employees be required to obtain the vaccine outside of ordinary working hours?
- Will non-exempt employees receive compensation during their waiting time for the vaccine?

Employer Tip: Employers should ensure required payment of wages under the Fair Labor Standards Act (FLSA) for time taken by employees to get vaccinated, particularly if the employer has a mandatory vaccination policy (see [29 C.F.R. § 785.43](#) "Time spent by an employee in waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when he/she is working constitutes hours worked.").

Employer Tip: It is important to also understand any state wage and hour laws law may differ or vary from the FLSA.

- Will the employer reduce the compensation of an exempt employee for time spent waiting to receive the vaccine?

Employer Tip: Pursuant to the FLSA, being paid on a "salary basis" means an employee regularly receives a predetermined amount of compensation each pay period on a weekly (not less than \$684 each week), or less frequent, basis. The predetermined amount cannot be reduced because of variations in the quality or quantity of the employee's work. Subject to certain and specific exceptions, an exempt employee must receive the full salary for any week in which the employee performs any work, regardless of the number of days or hours worked.

Workers' Compensation

- Have you analyzed potential exposure under state workers' compensation laws?

Employer Tip: if an employee becomes ill or suffers a significant adverse reaction to the vaccine, such an injury could be deemed a work-place injury compensable under workers' compensation. Employers should speak to their carrier/broker about any potential workers' compensation limitations, issues and/or concerns.

Other Policy Components and Considerations

- Have you excluded pregnant employees or those considering pregnancy soon from the mandate? (there is limited data regarding the vaccine and pregnant women - see CDC page [HERE](#))
- Is there an anti-retaliation section to ensure that employees who request an accommodation suffer no negative repercussions?
- What enforcement mechanisms (for those without legal accommodations) exist and what are the consequences for noncompliance? Will employees face termination? Job reassignment? Discipline? Additional PPE requirements?
- Have you analyzed the legal risks associated with enforcing compliance with a mandatory program?

Voluntary Programs

General Compliance Considerations

- How will you encourage employees to get the vaccine? Will you motivate employees with incentives (see Vaccine Incentives section below)? Educate employees?
- If you offer an incentive, do you have an accommodation for employees who are not able to receive the vaccine because of an underlying ADA health condition, a sincerely held religious belief, or pregnancy that will allow them to still earn the incentive (see considerations in the "Mandatory" section)?
- Do you have controls in place to ensure that any medical questions are likewise voluntary?

Employer Tip: *In voluntary program – an employee’s decision to answer vaccine medical questions must be voluntary – if the employee chooses not to answer the questions then he/she likewise may opt out of receiving the vaccine?*

- Do you have controls to avoid asking employees who decline the vaccine medical questions? Or asking questions that elicit medical information?
- Do you have controls to ensure that no one retaliates against, intimidates, or threatens the employee for refusing to answer any questions or get the vaccine?
- Will you require employees to provide proof of receiving the vaccine?

Employer Tip: *Asking for proof the vaccine is not a medical inquiry under the ADA. See [EEOC Question K.3](#)*

Vaccine Administration

- How will you administer the vaccine in a voluntary program?
- Will you offer the vaccines on-site? Have you analyzed the pros and cons associated with administering vaccines on-site?

Employer Tip: Vaccines administered on-site will trigger the employer's ADA medical inquiry and confidentiality obligations with respect to anyone who receives the vaccines and must answer related medical questions.

- Will employees receive the vaccine from a third-party not contracted by the employer does not trigger the employer obligations under the ADA so long as the employer does not engage in medical inquiries.

Employer Tip: Vaccines administered by a third-party not contracted by the employer does not trigger the employer obligations under the ADA so long as the employer does not engage in medical inquiries.

Other Policy Considerations

Medical Confidentiality

- Have you developed processes and procedures to ensure employee medical information remains confidential?
- Does your policy ensure that employee medical information will be limited to only those who "need to know"?

Employer Tip: "Need to know" is very strictly constructed; however, there are limited exceptions to the "need to know" standard:

- Supervisors and managers may be told about necessary restrictions on the work or duties of the employee and about necessary accommodations.
- First aid and safety personnel may be told if the disability might require emergency treatment.
- Government officials investigating compliance with the ADA must be given relevant information on request.

- Will you store the employee medical information in a secured sperate file from the personnel file?

State Requirements

- Does your state allow mandatory vaccination policies?
- Does your industry require vaccines? For certain industries or professions?
- Is your business considered essential for vaccine distribution purposes by the state(s) where you have employees?
- Does your state allow employers to register its employees for the vaccine or must employees register individually?

Genetic Information Nondiscrimination Act (GINA)

- Do any of your vaccine screening questions include questions that elicit genetic information (for example, questions regarding family members' medical histories or immune systems)?

Employer Tip: “According to the EEOC’s COVID-19 guidance, GINA is not implicated when an employer administers a COVID-19 vaccine to employees or requires employees to provide proof that they received a COVID-19 vaccine.

- Have you provided GINA Safe Harbor Notice?

Employer Tip: “GINA’s regulations provide sample safe harbor language for employers that request information about an employee’s own medical condition:

The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. "Genetic information" as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services. [29 C.F.R. §1635.8\(b\)\(1\)\(i\)\(B\)](#).

- Have you had outside employment law counsel review your medical questionnaires to ensure they are compliant with ADA? GINA? Other state laws?

Vaccine Delivery

- Who will pay for the vaccine?
- If the employer is paying for the vaccine, how will it make payment? Will the group health plan bear the cost for those enrolled, or will expenses run through another cost center, such as a wellness or safety program?
- What is the process for scheduling the vaccine? At the employee's convenience? Based on needs and demands of the employee's position/department? During work hours/not during work hours?
- Do you have a safety protocol and contingency program for vaccine shortages or delays?
- Have you established vaccine schedules to ensure that you minimize the impact to department operations in the event employees experience vaccine side-effects?

Employee Communication

- How will you promote and communicate about the vaccines? What vaccine education and informational resources will you make available and how may employees obtain them?
- Where will the vaccines be administered? If they are administered onsite, can you ensure the employee's privacy? Will it be a convenient/easily accessible location?

Vaccine Incentives

- Will you provide financial or other incentives to individual employees to receive the vaccination?

Employer Tip: *It is currently unclear what level of incentive would be considered voluntary under ADA wellness plan guidelines.*

Employer Tip: *Employers offering an incentive should offer the incentive across the organization to all eligible employees and not as part of the health or wellness plan. Likewise, employers offering an incentive should review the program with outside counsel.*

Workers' Compensation and Side Effects

- Have you discussed any workers' compensation considerations with your broker and/or carrier?
- Have you discussed your vaccination plan with your broker/carrier to determine the impact it may have, if any, on your workers' compensation coverage?

National Labor Relations Act and Collective Bargaining Agreements

- Do you have policy language that may interfere with an employee's Section 7 rights to freely discuss the terms and conditions of employment?

Employer Tip: Section 7 of the National Labor Relations Act provides with the right to join together to advance their interests as employees and makes it unlawful for an employer to interfere with or restrain employees in the exercise of those rights. Employers should be sure that their policies do not inhibit an employee's right to freely discuss the terms and conditions of employment, including (but not limited to) the employer's vaccination policies.

Employer Tip: If employees join together to protest an employer's COVID vaccine program (or lack of a program) and the employer takes adverse action against those employees as a result, it could lead to unfair labor practice charges being filed against the employer with the National Labor Relations Board.

- Do you have a unionized workforce with a collective bargaining agreement?
- Have you examined the collective bargaining agreement to determine the extent of your duty to bargain with the union over vaccine programs?

Employer Tip: Employers may need to consider whether their management rights clauses should be renegotiated with this in mind. But, even if the CBA gives the employer the right to unilaterally institute such programs, employers may still want to consider at least consulting with the union when developing such programs in order to foster goodwill with the union and to increase employee buy-in.

Get the latest information, guidance and resources on Coronavirus (COVID-19) to help you protect what matters most at hubinternational.com/coronavirus. For additional support, please reach out to your local HUB office.

Disclaimer: Neither Hub International Limited nor any of its affiliated companies is a law or accounting firm, and therefore they cannot provide legal or tax advice. The information herein is provided for general information only, and is not intended to constitute legal or tax advice as to an organization's specific circumstances. It is based on Hub International's understanding of the law as it exists on the date of this publication. Subsequent developments may result in this information becoming outdated or incorrect and Hub International does not have an obligation to update this information. You should consult an attorney, accountant, or other legal or tax professional regarding the application of the general information provided here to your organization's specific situation in light of your organization's particular needs.