

Navigating vaccine labor laws and COVID-19 vaccination policy



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Emily Litzinger, workplace law expert and partner at Fisher Phillips LLP, sat down to discuss the [legal considerations](#) employers should be aware of as vaccines become more readily available. She's answering some of the most frequently asked legal questions that employers have about the vaccine and helping leaders understand what they can do right now to support their workforces.

COVID-19 vaccine distribution continues to ramp up with more vaccines available to employees each day. With the availability of vaccines increasing, employers will need to answer questions about vaccinations in the workplace and come up with strategies for navigating employee communications. Understanding the laws surrounding vaccinations and knowing how to relay this information to employees will be critical for business leaders in the coming months.

Can I require employees to get the COVID-19 vaccination?

Yes, but there are important considerations employers should take into account. Circumstances vary from workplace to workplace, which means reasons for requiring vaccinations and resulting vaccination policies will also vary for each business.

“Employers need to be prepared to establish an objective reason for [requiring vaccinations] and ensure that it ties to the business’ needs.”

The Americans with Disabilities Act ([ADA](#)) is the primary statute employers should consider. It prohibits discrimination based on an employee’s disability and also protects employees’ medical information.

If requiring the vaccine, employers should be prepared to make accommodations for employees who cannot get vaccinated for medical reasons.

[Title VII](#) is the other relevant law for employers to consider. It requires that employers make accommodations for employees that have a religious or sincerely held belief that prevents them from getting the vaccination.

Employers should have a policy that clearly outlines the steps in which to request an exemption from a vaccine requirement. Employers should take these requests seriously and engage in the interactive process to determine if a reasonable accommodation can be made.

Can I ask if an employee has received a COVID-19 vaccination?

“Simply seeking proof of vaccination is not a risk as a vaccination card is unlikely to list any private medical information like disabilities, but that is where it has to stop,” Litzinger says. “The deeper you go into medical information, the more likely you are to come across confidential information.”

An employer can require proof of vaccination, but, under the [ADA](#), you should not ask for an employee’s medical information unless it is job-related and consistent with business necessity. A vaccination and, subsequently, a vaccination card provided by a third-party vaccine administrator is a good way to obtain this proof. According to Litzinger, this eliminates the need for an employer to ask pre-screening questions, thus limiting the amount of medical information an employer receives.

Can I offer incentives to employees to encourage COVID-19 vaccination?

Offering incentives may run counter to the ADA wellness program incentive rules, which says that employer wellness programs should be voluntary and those not participating should not be penalized.

“At first glance, incentive programs seem pretty simple. But there are many factors employers need to consider before offering incentives for vaccination.”

A wellness program with a high incentive is less likely to be viewed as truly voluntary. Employers should keep the incentive reasonably simple to ensure that it comes across as voluntary. “The higher the incentive offered, the higher the risk to employers,” says Litzinger.

If an employee cannot get vaccinated for medical reasons or due to religious objections, employers should offer an alternative means so that they can still get the incentive. For example, employees unable to get the vaccine could earn the same incentive by watching an educational video or reading literature on reducing the spread of COVID-19.

Should I require PPE and daily symptom screenings of employees that have been vaccinated for COVID-19?

Even though the [CDC](#) has relaxed some of the guidance on social distancing and personal protective equipment (PPE) for vaccinated individuals, employers should carefully consider whether to require PPE for fully vaccinated employees and follow all of the [CDC-recommended protections in public spaces such as workplaces](#).

[OSHA has released recommendations to reduce virus spread](#) and protect employees, including vaccination, masks, distancing and increased ventilation. Employers are responsible for the General Duty clause that requires employers to maintain a workplace free of recognized hazards, such as COVID-19. “PPE, daily symptom screenings, and following other CDC guidance are recommended to keep all employees safe, not just those that haven’t been vaccinated,” says Litzinger.

OSHA also advises that employers:

1. Make it easier for employees to get vaccinated by granting PTO for vaccines
2. Instruct workers to stay home if they are infected or unvaccinated and have had close contact with someone who tested positive for COVID-19
3. Enforce physical distancing in communal work areas for unvaccinated or at-risk workers
4. Provide workers with face coverings or surgical masks, as appropriate
5. Educate and train workers on your COVID-19 policies and procedures using accessible formats and [languages](#)
6. Suggest or require that unvaccinated customers or visitors wear masks in public-facing workspaces (e.g. retail establishments)
7. Maintain ventilation systems to reduce the concentration of viral particles in indoor air, and the risk of virus transmission
8. Perform routine cleaning and disinfection of work areas.
9. Record and report COVID-19 infections and deaths
10. Set up an anonymous process for workers to voice concerns about COVID-19

For more information and resources about COVID-19, visit our [website](#).