



# COVID-19 Vaccination Programs

## A Guide for Your Business

Presented by Benjamin Briggs



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# Agenda

- 1 | CDC, OSHA and EEOC Guidance
- 2 | Mandatory vs. Voluntary Vaccine Programs in the Workplace
- 3 | Accommodation Issues
- 4 | Addressing Vaccine Hesitancy

# CDC Guidance: Vaccines

- Strongly recommends people get the vaccine
- Has created priority eligibility groups related to the vaccine rollout
  - But remember state and local ordinances
- Has a fact sheet to help educate individuals about the vaccine

# CDC Guidance: Fully Vaccinated Individuals

## Non-Healthcare Settings

### Can:

- Visit other fully vaccinated people indoors without social distancing or wearing masks
- Visit unvaccinated people from a single household who are low risk for severe COVID without wearing a mask or socially distancing
- Refrain from quarantining and testing if exposed but asymptomatic
- Remember states and municipalities may have different rules

### Should:

- Wear masks and socially distance in public
- Avoid medium and large size in-person gatherings
- Wear masks and socially distance when with multiple households

# OSHA Guidance: Vaccines

## Make vaccine available at no cost to employees

- Provide information and training on safety of vaccines
- Do not distinguish between vaccinated and unvaccinated employees – all still need to follow protective measures



# EEOC Says Employers Can Mandate Vaccination Company-Wide if they:

- Have employees receive vaccine from an independent third party
- Comply with ADA and Title VII (religious) accommodation requirements

## Third Party Provider Issues

- No contractual relationship means none whatsoever
  - Referrals may be okay under limited circumstances
- This avoids employer asking otherwise prohibited pre-vaccination questions.
- If employer itself administers vaccines (or uses a related provider), it must establish case-by-case that the unvaccinated employee poses a *direct threat* to others.
  - Virtually impossible as to all employees, among other reasons because of accommodation requirements.
- Vaccination via employer-sponsored voluntary wellness programs is an alternative.
  - But then vaccination isn't really mandatory.



# Mandatory versus Voluntary – Pros and Cons of Mandatory Vaccines in the Workplace

## PROS

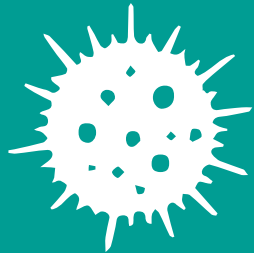
- More people will be vaccinated – at least in theory
- Increased morale for pro-vaccine employees
- Tell clients and customers you require the vaccine
- Demonstrates reasonable care

# Mandatory versus Voluntary – Pros and Cons of Mandatory Vaccines in the Workplace

## CONS

- Unlikely you will have 100% vaccinated workforce
- Decreased morale for anti-vaccine employees
- Increased risk of litigation
- Standing up and administering accommodation process
- Potential workers compensation liability for adverse effects
- Need to pay for time spent being vaccinated and any attendant costs
- Clear authority for mandate comes from EEOC in light of federal employment law – not states in light of state law.
- Need to discipline/terminate otherwise good employees who do not want to be vaccinated.

# ADA



## Mandatory Vaccines and the ADA

- If Employer wants to administer the vaccine or contract with a pharmacy or health care provider to administer the vaccine (and therefore ask medical pre-screening questions) THEN
  - it must show that the questions are job-related and consistent with business necessity AND
  - this necessitates showing that employer has a reasonable belief that an individual who refuses to answer such questions, and therefore no get the vaccine, would present a direct threat to themselves or others if they do not get vaccinated
- Responses to pre-screening questions must be kept confidential as required by the ADA
- Employers may ask if employees have been vaccinated
  - but if the employees say they have not, no questions about why they have not may be asked unless the above standard for job-related and consistent with business necessity is met

# Reasonable Accommodations Under the ADA

- Mandatory Vaccine Program
- If employee cannot get vaccine **because of qualifying disability** may be entitled to reasonable accommodation under the ADA
- EEOC Guidance, *December 2020*
  - **Direct Threat Assessment** – must determine that unvaccinated person exposes others to the virus at the worksite
    - Nature of work
    - Amount of contact with others
    - How many others in workplace are vaccinated
  - Cannot automatically exclude from worksite or take any action even if direct threat, unless no reasonable accommodation is available that would eliminate or reduce the risk of unvaccinated employee no longer poses a direct threat.

# Reasonable Accommodations Under the ADA

## Examples of Disabilities

- Anxiety
- Allergy\*
- Certain Autoimmune Disorders
- Other

## Must Follow Standard ADA Process

- Interactive process / Individualized Assessment
- Supporting medical documentation
- Cannot automatically terminate
- Train managers responsible for communicating/facilitating vaccine program

# Reasonable Accommodations Under the ADA

## Possible Reasonable Accommodations

- Masks / Face Coverings or Other PPE
- Testing
- Social Distancing
- Remote Work
- Alternative Work Hours (less exposure)
- Leave of Absence\*
- Combination of the Above

# Reasonable Accommodation Issues: Religion (Title VII)

- Employee must request accommodation or otherwise provide notice to employer.
- Employee must have “sincerely held” religious beliefs that preclude vaccination.
- EEOC says employers generally should not question employees’ religious beliefs.
  - Courts generally agree, both within and outside vaccination contexts.
  - But being an “anti-vaxxer” is not a religious belief.
  - Working remotely is an obvious (though not necessarily feasible) accommodation.
    - But employers should assess feasibility today, not as things were pre-pandemic.

## Reasonable Accommodation Issues: Religion (Title VII) - cont'd

- Employer still has an undue hardship defense.
  - Much easier to prove under Title VII than under ADA.
  - However, employer must prove hardship can't be averted through reasonable accommodation (e.g., social distancing, masks, and frequent hand-washing)
- Accommodations that “burden others” generally are not required, but what does “burden others” mean?
- If accommodation isn't possible, termination doesn't necessarily follow.



# Addressing Vaccine Hesitancy

## Promote Vaccine Literacy

### *Key Facts:*

- Vaccines are safe and effective.
- Although approved for emergency use authorization to speed delivery, the vaccines were subjected to the same safety standards as other vaccines.
- Vaccines were subjected to rigorous trials involving thousands of adults of diverse racial, ethnic, age and health status classifications.
- More than 100,000,000 adults in the U.S. have received at least one dose; approximately 50,000,000 have been fully vaccinated.

# Addressing Vaccine Hesitancy

## Promote Vaccine Literacy

- To date, not one person who has received a vaccine has died from COVID-19.
- Vaccines are 100% effective at preventing hospitalizations and death from COVID-19.
- Vaccines and herd immunity provide the path back to activities important to us (family, friends, work, events, travel).
- Vaccines not only protect you, they protect others around you.

# Addressing Vaccine Hesitancy

## Vaccine Incentive Plans

- Employers can provide incentives to employees get vaccinated.
- ADA risk is less if employer does not provide the vaccine or contract with third party to provide.
- The EEOC has withdrawn its prior proposed rule for employer-sponsored wellness plans stating the incentive must be *de minimis*.
- Still need to accommodate those who decline vaccination for disability or religion-related reasons.



# Thanks for joining us!

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