

COVID-19 Vaccination: Five Steps for Employers Now

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Client Alert



Vaccination against COVID-19 means countless lives will be saved, and we now have an attainable path forward to truly combat the pandemic. Employers already play a vital role in stopping the spread through workplace safety protocols, and the next step will be adopting vaccination programs. Every business can start laying the foundation now for a vaccination strategy flexible enough to evolve over time.

1. Foster Trust.

Vaccine Task Force. Select an internal vaccine task force or point person to lead and execute a COVID-19 vaccination plan in coordination with business leaders. Charge the task force with tracking vaccine distribution developments in your industry and location(s), weighing in on internal vaccine-related correspondence, and working with key stakeholders, human resources, and legal advisors to develop and continue to adapt your vaccine strategy over time.

Targeted Communications. Focus vaccine communications on fact-based resources, and check the [CDC website](#) regularly for the roll-out of promotional toolkits applicable to your industry. Continue to promote [influenza vaccination programs](#). Remind business leaders to avoid speculating to employees about possible vaccine mandates, politicizing vaccination, asking employees or applicants if they plan to get vaccinated, or making commitments to employees about permanent remote work or broad exemptions that could conflict with a future mandatory vaccination program.

Lead by Example. Identify a few key executives willing to openly and candidly share their positive vaccination experiences with the workforce. Wait to share until vaccination is readily available to the broader employee population.

2. Remove the Obstacles You Can Now.

Costs. Cover as many direct and indirect costs of vaccination as feasible, and educate employees about available benefits. While the vaccine medication is provided free by the federal government, associated costs such as administrative fees, related physician visits, treatment for adverse reactions, or time away from work are not. Consult with benefit advisors about existing and potentially expanded coverage for associated costs. Consider establishing other means to fund immunization for employees who otherwise might not have health insurance coverage (e.g., furloughed employees, new hires, or those who waive coverage), consulting with legal counsel to avoid inadvertently creating a new health plan subject to the Affordable Care Act or other regulations.

Time Off. Allow time off for employees to obtain the vaccination. Prepare for flexibility in sick leave policies in the event of a need to recover from adverse side effects. Share these plans with employees.

Union Support. For unionized workforces, start a dialogue with the union about the importance of vaccination and supports offered by the employer, as union leaders ideally will play a key role in encouraging acceptance by employees. If not already authorized by a collective bargaining agreement, a vaccine program likely will be a legally mandated subject of bargaining, depending on program terms.

3. Know What You Should Not Do – Yet.

On-Site Vaccination Clinics. After vaccine supply is sufficient, third party providers may begin offering employers on-site vaccination clinics. Employers hosting clinics should be prepared to select a reputable vendor that tracks vaccine brand and second doses, offers sufficient post-injection safety monitoring, stores and transports vaccines appropriately, and maintains HIPAA-compliant confidentiality processes. Employers also will need to ensure employees timely return for a second dose and consider scenarios such as whether to allow a terminated employee to return to the on-site clinic for a second dose.

Purchasing Vaccines for Employees Directly. Currently, the vaccine is not available to purchase on the private market. While offers for purchase at this point should be met with skepticism, there may be opportunities by year-end to do so.

Ending Other Safety Protocols. The vaccine will not provide 100% protection for everyone, and even fully vaccinated employees should still assume they can spread the virus to others. Masks, social distancing, capacity limits, ventilation, and other safety protocols likely are to remain in place for some time. Staying home when sick and frequent handwashing, already key tools to battling seasonal influenza, will likely remain permanently.

Mandating Vaccination. Mandatory vaccination programs should wait until large segments of your employee population can be readily vaccinated. Employers of healthcare or other essential workers likely will seriously consider mandating COVID-19 vaccination by year-end, if not sooner. For workforces capable of remote work, mandating vaccination may not be a practical option for some time, if ever, given the incentive for employees to aggressively pursue exemption in order to continue working remotely. Early adopters of mandatory vaccination programs should be prepared for heightened legal and practical complications due to vaccine hesitancy and lack of targeted safety and regulatory guidance, as detailed below. As vaccines receive regulatory approvals beyond Emergency Use Authorization status and further legal guidance develops, mandatory vaccination programs may very well become standard for more employees.

4. Do Not Rush To Mandate.

Employer-mandated vaccination programs are proven to markedly increase vaccination rates. The [CDC reports](#) an influenza vaccination rate of 94.4% for employees whose healthcare industry employers mandate influenza vaccination, compared to less than 50% for the general adult population.

Employers who have never mandated employee vaccination should remain mindful that mandatory vaccination programs require not just a simple policy, but a robust, carefully constructed program developed in consultation with experienced human resources and legal professionals.

Key legal minefields at this point include:

Accommodation of Medical Objections. Employers must reasonably accommodate employees who cannot be vaccinated due to a disability. While the U.S. Equal Employment Opportunity Commission recently published new guidance under federal law (see Section K [here](#)), application of the guidance to real scenarios will prove challenging until more robust safety data is available to assist employers in differentiating between legitimate disability accommodation requests and generalized vaccine hesitancy. Employers should also anticipate that certain accommodations that may be reasonable on an individualized basis or at this point in time – remote work, mandatory masking, etc. – may ultimately be untenable if a larger percentage of employees must be granted accommodation or as businesses more fully re-open.

Accommodation for Religious Objections. Under federal law, sincerely held religious practices or beliefs that interfere with vaccination also must be accommodated. Objections typically arise from concerns about stem cell use in development, Halal status, or a belief that all vaccinations interfere with divine providence. While the [Vatican](#) and the [British Islamic Medical Association](#) have already issued statements supportive of vaccination, the hope is that more religious leaders will provide guidance to reduce the number of religious accommodation requests.

Occupational Safety and Health. Occupational Safety and Health Administration guidance currently presents a double-edged sword. Employees may object to vaccination based on a reasonable belief that vaccination will cause injury or illness to the employee. At the same time, there remains a risk of an unsafe work practices claim due to failure to enforce mandatory vaccination programs. It is anticipated that employers will receive further guidance in the near future to assist in navigating these concerns.

Workers' Compensation. If the employer mandates vaccination, an employee's adverse medical reaction to the vaccine may trigger workers' compensation benefits under certain state laws or could potentially form the basis of a separate tort claim against the employer. More safety data and further regulatory approval of vaccines should lessen these risks over time.

Concerted Activity. Concerted activity by employees to protest an employer-sponsored vaccine program, or the lack of a vaccine program, may be protected legal activity under the National Labor Relations Act, even for non-unionized workforces.

Industry and Location-Specific Requirements. In certain regulated industries, regulatory requirements or private contracts may impose vaccination requirements, restrictions, or record-keeping obligations. For all employers, current and proposed state laws may also expand rights to avoid mandatory vaccination, including requiring accommodation of employees who only hold "philosophical" objections.

5. Consider the Bigger Picture.

- Are we tunnel visioning vaccination as a magic bullet to the detriment of other health and safety strategies?
- Should we prioritize resources for other initiatives first, with high rates of employee vaccination a nice to have but not a must right now?
- How quickly and extensively is vaccination needed given the safety risks inherent to our workforce? Which strategy best fits those goals?
- Which segments of our workforce have more hurdles to vaccination than others? How can we close that gap?
- If vaccination is mandated only for the segment of our employees who cannot work remotely, are we unintentionally creating a disparate impact on certain groups of employees?

Adept business leaders who have been navigating the pandemic for over ten months now are already well-prepared for the need to evolve vaccination strategies over time. Starting with these five initial steps now will start the business in the right direction and set the stage for more action to follow.

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