

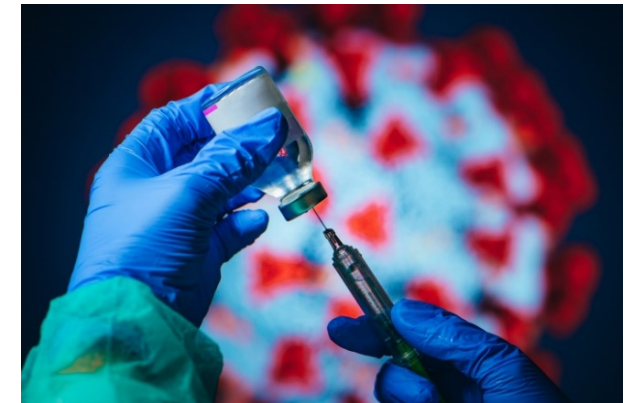
COVID-19 and Preparing for a Return to the Workplace: Key Legal and Practical Considerations

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Today's Agenda

- **Current COVID-19 Legal Backdrop**
 - CDC and Other Federal Guidance
 - NYS Guidance and HERO Act
 - SEIU Local 32BJ: Best Practices Regarding Mask Rules
- **What Employers Need to Know About COVID-19 Vaccines**
 - Communications with Employees
 - Other Vaccination Issues
- **FAQs about COVID-19 Vaccines in Employment and Your Questions**



Current COVID-19 Legal Backdrop



CDC Guidance: COVID-19 Employer Information for Office Buildings

- According to CDC guidance (updated **April 7, 2021**), office buildings can take the following steps to create a safe and healthy workplace:
 - Before resuming operations, evaluate the building to determine if it is ready for occupancy.
 - Increase circulation of outdoor air as much as possible.
 - Modify or adjust seats, furniture, and workstations to maintain social distancing.
 - Encourage employees who have symptoms of COVID-19 to stay home.
 - Consider conducting health checks (e.g., symptom and/or temperature screening).
 - Consider posting signs that ask visitors to wear face coverings if possible, to not enter the building if they are sick, and to stay 6 feet away from others, if possible.
 - Clean high-touch surfaces.
 - Consider limiting the number of people in an elevator and leaving steps empty between passengers on escalators, where possible.

CDC Guidance for Vaccinated Individuals

- According to **May 28** CDC guidance, **fully vaccinated** people can:
 - Resume activities without wearing masks or physically distancing, **except where required by federal, state, or local law**, including local business and workplace guidance;
 - Resume domestic travel without testing/quarantine;
 - Refrain from testing before leaving for international travel and quarantining upon return;
 - Refrain from testing following a known exposure, if asymptomatic, with some exceptions;
 - Refrain from quarantine following a known exposure if asymptomatic; and
 - Refrain from routine screening testing if feasible.
- People are considered **fully vaccinated** 2 weeks out from receipt of:
 - A single-dose vaccine (Johnson & Johnson); or
 - The second dose in a two-dose series (Pfizer, Moderna).

OSHA's COVID-19 Guidance

- **June 10 update:** “Unless otherwise required by ... [law], most employers no longer need to take steps to protect their **fully vaccinated** workers who are **not otherwise at-risk** from COVID-19 exposure.”
- Under the OSH Act, employers must provide a safe and healthy workplace free from recognized hazards likely to cause death or serious physical harm.
- Employers **should**:
 - Instruct workers who are infected, unvaccinated workers who have had close contact with someone with COVID-19, and workers with COVID-19 symptoms to stay home.
 - Implement physical distancing for unvaccinated and at-risk workers.
 - Provide unvaccinated and otherwise at-risk workers with face coverings.
 - Maintain ventilation systems.
 - Perform routine cleaning and disinfection.

EEOC's COVID-19 Guidance

- Addresses reasonable accommodation, confidentiality, screening, and vaccination issues.
- **May 28 update:** EEOC provided additional guidance regarding COVID-19 vaccinations, which addresses:
 - Mandatory and voluntary vaccination programs.
 - Permissible inquiries regarding vaccination status.
 - Confidentiality rules.
 - Vaccine incentives for employees and their family members.

Current State of the NYS Reopening Guidance for Offices

- Effective **June 15**, the New York Forward guidance for commercial buildings, real estate, offices (and most other sectors) is **optional**.
 - Masks are still required for non-fully vaccinated individuals. Businesses must:
 1. Require employees and visitors to wear masks when in direct contact with others and when unable to maintain social distance.
 2. Provide face coverings, at their expense, to employees.
 - All other requirements, including those involving social distancing, daily health screenings, and cleaning are no longer mandatory.
 - Businesses are free to choose to lift all or some restrictions, continue to adhere to the optional guidance, or implement other health precautions.
 - Businesses are also authorized to require masks and six feet of distancing within their establishments, regardless of vaccination status.

SEIU Local 32BJ: Best Practices Regarding Mask Rules

- Employers should clarify their mask policy in light of CDC/NYS guidance.
 - Employers may require **all** employees to wear masks.
 - Employers who wish to exempt vaccinated employees from mask requirements may do so if they:
 1. Provide employees with a central point of contact to coordinate inquiries/responses; **and**
 2. Require employees to submit competent evidence of vaccination (*i.e.*, COVID-19 Vaccination Record Card **or** a letter from the employee's medical provider).
- No employer shall prohibit vaccinated employees from wearing masks.

New York State HERO Act

- Requires the NYS Department of Labor to issue **workplace safety standards** (and a **model prevention plan**) addressing, among other items:
 - Employee health screenings;
 - Face covering and social distancing requirements;
 - Compliance with quarantine/isolation orders; and
 - Compliance with applicable engineering controls such as proper air flow, ventilation, etc.
- Employers have 30 days from the date that the state releases the model standard to adopt a compliant plan.
- Effective November 1, employers with at least ten employees must allow employees to establish and administer a joint labor-management **workplace safety committee**.

New York State HERO Act *(cont'd)*

- A recent amendment to the Act:
 - Makes certain changes to the Act's enforcement provisions; and
 - Places limitations on:
 - Quarterly meetings of the workplace safety committee, which may be limited to 2 hours.
 - Training for members of the workplace safety committee, which may be limited to 4 hours.
- These requirements can be waived by a **CBA** if it references: (1) the section governing the workplace safety standards, and (2) the section governing the workplace safety committee.
 - An MOA is currently pending between the RAB and 32BJ.
 - The RAB is also beginning negotiations for an MOA with Local 94.



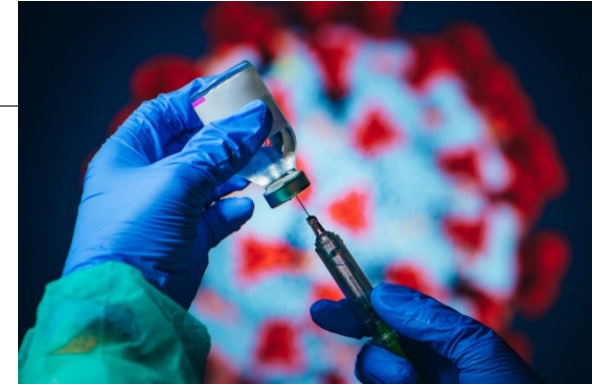
What Employers Need to Know about COVID-19 Vaccines

Can Employers Require That Employees Receive a Vaccine?

- The EEOC has issued guidance clarifying that employers **may require employees to be vaccinated**, subject to certain limitations and exceptions.
- Some have suggested that the FDCA prohibits employers from mandating vaccines authorized for emergency use by the FDA.
 - On June 12, 2021, a federal district court in Texas held that the FDCA does not prohibit mandatory vaccination policies in employment.
 - Other litigation is currently pending.



Overview of Reasonable Accommodations



- Employers must provide reasonable accommodations:
 - For known **disabilities** of employees; and
 - For an employee's sincerely held **religious beliefs**.
- Employers may be obligated to provide a **disability-related** accommodation if the employee has:
 - An impairment that is a contra-indicator to the COVID-19 vaccine.
 - A mental disability that would be exacerbated by a mandatory vaccination.
 - An allergy or sensitivity to the vaccine.
- **Religion** is construed broadly under Title VII.
 - But, social, political or economic philosophies (and personal preferences) are not protected.

Potential Reasonable Accommodations

- Employers can only bar an unvaccinated employee from the workplace if no effective accommodation exists (absent undue hardship).
- **Examples** of accommodations:
 - Requiring the use of a mask or other types of PPE;
 - Requiring the employee to work at a social distance from others;
 - Requiring the employee to work a modified shift;
 - Submitting to periodic testing and/or maintaining a temperature log; and/or
 - Reassigning the employee to a vacant position that does not require vaccination.
- There is no obligation to provide the accommodation of the employee's choice, so long as a reasonable accommodation is offered.

Limits on the Duty to Accommodate

- Employers do not have a duty to provide reasonable accommodations that would impose an “**undue hardship**” on the employer.
 - **ADA standard:** Significant difficulty or expense incurred by the employer.
 - **Title VII standard:** More than a *de minimis* cost or burden.
- Employers may deny **disability-related** accommodations where there is no available alternative that alleviates the “**direct threat**” posed by an unvaccinated employee.
 - **Direct threat:** A significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation.
 - In assessing this risk, the EEOC notes that employers should consider the number of other employees in the workplace who have received the vaccine.

Communications with Employees About COVID-19 Vaccines

- **Background:** The ADA has restrictions on when and how much medical information an employer can obtain from an employee or applicant.
 - For current employees, “disability-related inquiries” must be “job-related and consistent with business necessity.”
- **Can employers ask employees to certify whether they have received a COVID-19 vaccine, and if so, when the vaccine was administered?**
 - Yes. These questions are not “likely to elicit information about a disability” and are therefore not considered disability-related inquiries under the ADA.
- **Can employers require employees to provide proof of vaccination status, such as a copy of their COVID-19 Vaccination Record Cards?**
 - Yes, for the same reason. Employers collecting proof of vaccination status should warn employees not to provide other medical or genetic information.

Communications with Employees About COVID-19 Vaccines *(cont'd)*

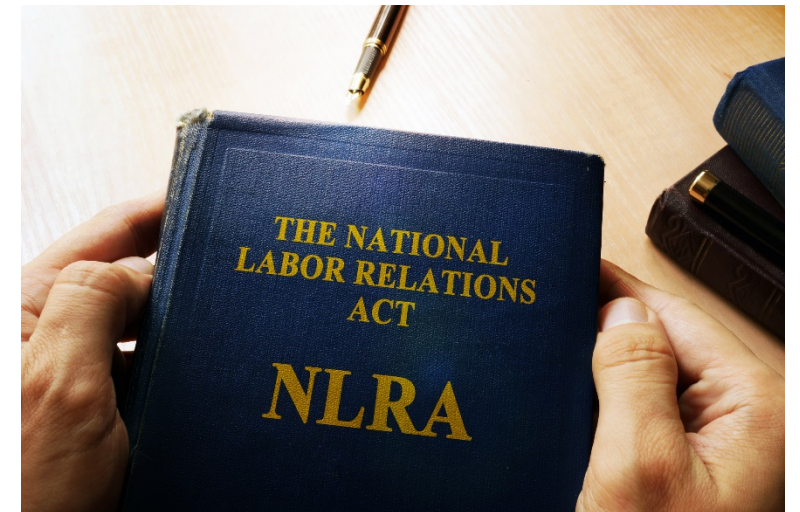
- **Can employers require employees to provide proof of their intent to receive a vaccine?**
 - Yes, for the same reason.
- **Can employers ask employees who are unwilling to be vaccinated to provide their reason for refusing vaccination?**
 - Yes, but only if the question is “job-related and consistent with business necessity.”
 - The employer must have “a reasonable belief, based on objective evidence, that an employee ... will pose a direct threat to the health or safety of her or himself or others.”
 - We believe this standard is more likely to be satisfied: (1) in workplaces where unvaccinated individuals are likely to be present, (2) in roles where employees are likely to come into frequent contact with others, and (3) at times in which there is significant community spread.

Communications with Employees About COVID-19 Vaccines *(cont'd)*

- **If an employee is unable to receive a COVID-19 vaccine because of a religious belief, can the employer request supporting documentation?**
 - Yes, but only if the employer has an objective basis for questioning the religious nature or the sincerity of a the belief, practice, or observance.
 - According to EEOC guidance, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief.
- **If an employee is unable to receive a COVID-19 vaccine because of a disability-related reason, can the employer request supporting documentation?**
 - Yes, but only information needed to establish that the employee has a disability and that the disability necessitates a reasonable accommodation.
 - An employer **cannot** ask for documentation when:
 - Both the disability and the need for reasonable accommodation are obvious; or
 - The employee has already provided the employer sufficient information to substantiate the request.

Unionized Employees and the Duty to Bargain

- In a unionized environment, there are additional legal obligations.
 - The NLRA requires bargaining over changes to terms and conditions of employment.
- The NLRB has found that the following are mandatory subjects of bargaining:
 - Drug and alcohol testing.
 - Polygraph testing.
- The RAB has engaged with the unions about COVID-19 vaccinations.





FAQs about COVID-19 Vaccines in Employment and Your Questions

Frequently Asked Questions about COVID-19 Vaccines in Employment

1. What should a building owner/manager do if a tenant requires that all individuals accessing the tenant's space be fully vaccinated?
2. Can employers require that all employees be vaccinated, and if so, what considerations should employers keep in mind?
3. What trends are we seeing in terms of vaccine policies?
4. What confidentiality rules apply to information about an employee's vaccination status?
5. Can we provide incentives to employees to get vaccinated?

Your Questions



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