

# COVID-19 Vaccine Employer Checklist

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# Executive summary

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With the FDA approval of one vaccine and the emergency use authorization<sup>1</sup> of the others, along with the widespread availability of vaccines, employers are trying to determine the right strategy for their on-site workforce and how this impacts their work site.

Over 376 million vaccine doses have been administered in the United States as of Sept. 8, 2021<sup>2</sup>. Vaccines continue to be widely accessible in the U.S., and can be found at doctors' offices, retail pharmacies, hospitals and clinics, as well as state and local health departments. The CDC continues to update guidance for those who have been fully vaccinated.

**The experts at Lockton Companies have put together a list of items and issues to consider as employers determine the best course of action for their workforce.**

## THE CHECKLIST ADDRESSES:

1. Covering the cost of vaccines
2. Developing a vaccine policy
3. Developing a communication plan
4. Vaccinating your workforce

**NOTE:** This checklist was created before the Biden administration's COVID-19 action plan was announced in early September that may have an affect on an employer's strategy around vaccines. More details on the announcement, and whether you may be impacted, can be found at the [official announcement](#).

# Employer decisions

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As Americans continue to be vaccinated, there are specific steps employers can, or must, take today and areas employers can begin considering for the near future.

## *Cover the cost*

**COVID-19 vaccines are free. The federal government is providing the vaccine free of charge to all people living in the U.S., regardless of health insurance status. Plan sponsors should cover the cost of federally approved vaccines without cost sharing for vaccines received from in-network and out-of-network providers.**<sup>3</sup> Federal law requires group health plans to provide this coverage. The mandate **requires** covering the cost of the vaccine itself, administration cost and, unless billed separately, the office visit. The effective date was Jan. 5, 2021, for Pfizer-BioNTech, Jan. 12, 2021, for Moderna, and March 19, 2021, for Johnson & Johnson, so plan sponsors should confirm with their medical insurance carrier, third-party claims administrator or pharmacy benefit manager that they are administering this coverage appropriately.

## *Develop a vaccine policy*

**Employers should decide whether they will simply communicate the importance of getting vaccinated, provide incentives or mandate the vaccine.** This decision will be influenced by their industry, culture and legal interpretations for their locations. A culturally appropriate awareness education campaign may assist in increasing the number of employees who choose to be vaccinated regardless of the approach taken. With the surge of the Delta variant, more employers are moving toward mandating the COVID-19 vaccine with reasonable accommodations for workers coming into the office. *(See establishing a vaccine policy section later in the document.)*

## Workers' compensation considerations

An employee vaccinated as part of a COVID-19 vaccination program who is injured as the result of an adverse reaction may have a compensable workers' compensation claim.

- Evaluating if the vaccine program was mandatory, recommended and/or associated with employee rewards will all be part of the process of determining if the injury, disease or death resulting from the vaccine is considered to arise out of or in the course of their employment. The specific case facts and applicable workers' compensation acts will ultimately determine the compensability of claims that may result.

## OSHA guidance

On Aug. 13, 2021, the federal Occupational Safety and Health Administration (OSHA) issued [updated guidance](#) on how employers can protect workers from COVID-19 in the workplace, as well as Emergency Temporary Standards (ETS) that only apply to healthcare services and healthcare support services. [Click here](#) to see if your workplace is covered by the COVID-19 ETS. An ETS fact sheet can be found [here](#). The vast majority of businesses will not be covered by the ETS; the focus of the updated guidance is on how employers can protect unvaccinated or otherwise at-risk employees in the workplace.

OSHA continues to strongly encourage employee vaccination and acknowledges that employers can follow the CDC guidance when employees are fully vaccinated. OSHA also addresses how employers can protect unvaccinated and at-risk workers from COVID-19 in the workplace including taking the following measures:

- Granting employees paid time off to be vaccinated
- Instructing employees to stay home from work if they have COVID-19 or symptoms of COVID-19, or are unvaccinated and are exposed to someone who tested positive for COVID-19
- Implementing physical distancing for unvaccinated and at-risk employees in communal work areas
- Providing workers with face coverings, unless a respirator or other PPE is required
- Educating and training employees on company COVID-19 policies and procedures
- Suggesting that unvaccinated customers, visitors or guests wear face coverings
- Maintaining and improving ventilation systems
- Performing routine cleaning and disinfection
- Recording and reporting COVID-19 infections and deaths
- Implementing protections from retaliation and establishing an anonymous COVID-19 complaint process
- Following other OSHA mandates (e.g., PPE, respiratory protection, sanitation, bloodborne pathogens; employee access to medical and exposure records, etc.)

While employers had concerns about the recording of employee reactions to the vaccine when incentivized or mandated by the employer, OSHA recently put those concerns to rest. OSHA confirmed that it will not enforce the recording requirement in 29 CFR 1904 to require any employers to record worker side effects from COVID-19 vaccination through May 2022.

Keep in mind there may be stricter state and local laws you must comply with.

## Monitor state and local statutes and laws

State and local law anti-discrimination protections may be broader than federal law. For instance, Montana became the first state to recognize an individual's vaccination status as a protected category. [Montana House Bill 702](#) prohibits employers from requiring employees to disclose their COVID-19 vaccination status and bars employers from mandating the vaccine. Additionally, other states have pending legislation that would prohibit employers from mandating the vaccine. Be sure to check the status of any applicable state or local laws before proceeding with a vaccine mandate.

If you operate in states with different laws or regulations, your policy may need to vary state to state in order to remain compliant.

## Labor issues

If employees are unionized, a vaccination program may be a mandatory subject of bargaining.

- Protected concerted activity: Even in the absence of a union, if employees collectively refuse to be vaccinated without an ADA-qualifying reason or religious objection, this action may qualify as "protected concerted activity" and subject the employer to potential liability if adverse employment actions are taken.

## Establish a written vaccination program

- Ensure compliance with federal guidance, state and local regulations.
- Identify the scope of the workforce covered and explain the business justification including language demonstrating the policy is consistent with CDC guidance.
- Set forth the process for obtaining the vaccine and deadline for being vaccinated.
- Discuss compensable time issues.
- Identify the process for providing proof of the vaccine.
- Include clear policies for an accommodation process.
- Set forth how noncompliance will be addressed.

## ADA implications are twofold

### PRESCREENING QUESTIONS

While neither the vaccine itself nor the act of administering the vaccine is a medical exam, the Equal Employment Opportunity Commission (EEOC) advises that the prescreening questions may implicate the Americans with Disabilities Act (ADA)'s provision on disability-related inquiries because the questions are likely to elicit information about a disability.

- If you mandate the vaccine and administer the vaccine, you must show that the prescreening questions are “job-related and consistent with business necessity.”

### REASONABLE ACCOMMODATIONS

In the event an employee identifies a medical reason, including pregnancy, to not be vaccinated and you are mandating the vaccine, a reasonable accommodation must be considered.

- Can a reasonable accommodation reduce the direct threat without undue hardship?
- Engage in the **interactive process** and make an **individualized assessment**.
  - Consider (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood the potential harm will occur; and (4) the imminence of the potential harm.
  - If there is a direct threat, can it be reduced to an acceptable level by providing an accommodation such as wearing a mask, social distancing, modifying shifts, periodic COVID-19 testing, teleworking and reassignment?
    - Other considerations include: How many employees were vaccinated, is there contact with customers, and what is the communitywide vaccination rate?
  - While an **employee who refuses the vaccine** on account of an ADA-covered condition may be “excluded” from the workplace, the EEOC cautions it is temporary and does not mean automatic termination.
    - Consider remote work options or a leave of absence.

## CAN YOU MANDATE THE COVID-19 VACCINE?

**Yes, in some circumstances.** From a federal employment law standpoint, the recent guidelines from the Equal Employment Opportunity Commission (EEOC) indicate that under the Americans with Disabilities Act (ADA), an employer may mandate the vaccine when a worker poses a **“direct threat”** to themselves or others by their physical presence in the workplace absent the vaccine.

- A “direct threat” is a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”
- The key inquiry is whether an unvaccinated employee exposes others to the virus at the workplace.
- **The vaccine cannot be mandated for remote employees.**
- **Pregnancy accommodations:** Any of the currently authorized COVID-19 vaccines can be offered to people who are **pregnant or breastfeeding**.
  - Provide the same accommodations to pregnant employees as provided to other disabled employees who object to receiving the vaccine until they can be vaccinated.
  - State law may afford additional protections to pregnant employees who object to a mandatory vaccine policy.
- **Title VII religious accommodations:** An employer must provide a reasonable accommodation to an employee’s sincerely held religious belief that prevents them from being vaccinated unless it would pose an undue hardship — more than a de minimis cost or burden on the employer (less stringent standard than the ADA).
  - A similar interactive process involving individualized, fact-based inquiry.
  - The definition of religion is broad and may protect beliefs the employer is unfamiliar with. If there is an objective basis for questioning the sincerity of a religious belief, the employer may request more information to substantiate the belief.
- **Other exemptions:** If an employer chooses to allow an employee an exemption from a mandatory vaccination policy for a reason not otherwise protected by federal, state or local law, all similarly situated persons should be treated the same to avoid claims of discrimination based on other protected characteristics such as age, sex and race.

## HOW CAN EMPLOYERS AVOID ADA IMPLICATIONS WITH THE PRESCREENING PROCESS?

- If you have a mandatory vaccine program, have employees vaccinated “in the community” through a pharmacy, clinic or personal healthcare provider.
- Make the vaccination program voluntary if the vaccine is administered by the employer or its agent so the employee has the choice to answer the prescreening questions.

## ISSUES TO CONSIDER WITH A MANDATORY VACCINATION PROGRAM

- Will every employee of the company be required to be vaccinated?
  - If so, can you meet the “direct threat” standard for every job classification?
  - Is a hybrid approach in which the vaccine mandate only applies to certain job classifications supported by CDC guidance?
- What if a large portion of your workplace refuses to be vaccinated?
  - If employees do not have a valid objection under Title VII or the ADA, will you terminate all employees who refuse to be vaccinated?
  - If persons who refuse are not treated consistently, this may lead to discrimination claims; need a clear process in your vaccination plan.
- Will you require employees to provide proof of the vaccine?
  - If so, caution employees to not provide health information.
    - The ADA and Genetic Information Nondiscrimination Act (GINA) are potentially implicated if medical information is provided.
- Even if the vaccine is not mandated, you may ask for proof of the vaccine.
  - With a voluntary policy, do not ask persons why they were not vaccinated, as that may elicit disability-related information.
- State or local laws may require paid time off for your employees to be vaccinated.
- Consider compensation issues for non-exempt employees under the Fair Labor Standards Act (FLSA).
  - Travel time to/from vaccination site.
  - Time spent being vaccinated.
- Will the program disparately impact or disproportionately exclude employees based on any protected characteristic (race, color, religion, sex, national origin or age)?
  - Note that some individuals and demographic groups may face greater barriers to receiving the COVID-19 vaccine than others.
- How will you address potential side effects from the vaccination?
  - The American Rescue Plan Act of 2021 (ARPA) allows employers with fewer than 500 employees to voluntarily provide emergency paid sick leave and benefit from a tax credit when leave is needed to recover from an illness associated with the COVID-19 vaccine.
  - State or local law may provide employees with paid time off to address any illness or side effects from the vaccination as well. California has enacted legislation that requires employers with 26 or more employees to provide such paid leave (capped at \$511/day).
  - Use a staggered schedule for vaccinations so not all employees are vaccinated the same day.
  - Provide additional PTO to employees experiencing ill side effects.
  - State or local paid sick leave laws would provide leave.
- What if an employee has a reaction to the first dose? Will you still require the employee to receive the second dose?
- When will the policy go into effect?
  - Have you surveyed your employees to determine how many are fully vaccinated?
  - Would you have less resistance if more time elapsed?
- What is the time frame or deadline by which employees must be vaccinated?
- **Potential exceptions:** What if an employee has had COVID-19 within the last 90 days?
  - This would potentially be a reason for delay and not an exemption from the policy.

## WHAT ARE THE ALTERNATIVES TO MANDATING THE COVID-19 VACCINE?

- Educate employees on the facts about the vaccine.
  - Informational Q&A (See more under the “Develop a vaccine communication plan” section below.)
  - Distribute updates through postings, email and social media.
- Encourage employees to be vaccinated.
- Provide employees with resources to find low-cost or no-cost transportation to vaccination sites when transportation is not readily available outside of working hours.
- Make it easy for employees.
  - Identify vaccination locations for employees (pharmacies, clinics, etc.).
  - Provide internet access to employees who don’t otherwise have access.
- Will you offer an incentive to employees to be vaccinated?
  - Consider whether incentives will help.
  - The EEOC’s May 2021 guidance clarified incentives for employers. To the extent an employer offers an incentive to employees to be vaccinated “in the community” (through a pharmacy, hospital, public clinic or personal healthcare provider), there are no limits on incentives. If the employer is administering the vaccine itself or through its agent, then incentives cannot be so “substantial” to be coercive. The EEOC did not define “substantial.”
  - If so, offer the same or equivalent incentive to persons with a valid objection to the vaccine.
- If offering paid time off as an incentive, note that several jurisdictions have passed new laws requiring employers to provide employees with paid time off to get the COVID-19 vaccination(s) as well as paid time off to the extent illness arises from the vaccination.
- Wellness programs and incentives.
  - When the incentive relates to health plan premiums, for example, the safe play is to view the vaccine program as an activity-based rather than participation-based wellness program, as some individuals might not be able to participate due to a health status factor, such as pregnancy or a history of severe reactions to vaccines, medications or allergens.
  - Federal rules cap the amount of an incentive for an activities-based wellness program, but those caps are almost certainly too large to come into play with respect to vaccine-related incentives. The rules also, however, require the employer to provide a reasonable alternative method for earning the incentive (or waive the vaccine requirement altogether) for those employees who do not or should not receive the vaccine due to a health status factor.
- Provide employees the option of receiving a vaccine or submitting to weekly testing requirements.
  - Consider applicable state laws that may require you to cover the cost of testing (CA, VA).
  - Consider whether you must pay for time spent by employees taking a mandatory COVID-19 test.

## IF YOU CAN MANDATE THE COVID-19 VACCINE, SHOULD YOU?

- Can you limit the mandate to certain high-risk locations, departments or work sites where alternative means of limiting transmission are not possible or practical?
- Would a voluntary vaccination program yield the same results?
- Would a strategy that encourages but does not require participation work better in your workplace, industry or culture?
- Is a mandatory vaccination program truly necessary given other alternatives such as masks, PPE and social distancing?
- Avoid the legal risks associated with a mandatory vaccine policy by educating and encouraging employees to be vaccinated.
- Have you surveyed your workforce to determine the number of fully vaccinated employees?

## *Develop a vaccine communication plan*

We recommend employers consider developing a vaccine communication strategy for their workforce based on vaccine hesitancy sentiment around the COVID-19 vaccine.

In spite of very high efficacy rates of the approved COVID-19 vaccines by Pfizer-BioNTech, Moderna and Johnson & Johnson, many people remain vaccine hesitant. Some of the more common reasons why people are deciding not to get vaccinated involve questions about vaccine safety, the speed at which the vaccines were approved and the novel mRNA platform that was used to develop the vaccines. It is important to highlight that approximately 10%-15% of the population remains undecided about getting vaccinated.

- **Lockton has developed [sample employee communications for you to adapt for your workforce](#).**
- A **vaccination rate tracker** from the CDC can be found [here](#).
- This **video series**, produced by the National Alliance of Healthcare Purchaser Coalitions, provides vaccine education initiatives and addresses issues related to vaccine hesitancy.

## *Vaccinating your workforce*

Continue sharing clear, complete and accurate information to promote vaccine confidence and help employees overcome potential barriers to vaccination. Refer to our [sample employee communications](#) to adapt to your workforce.

All Americans aged 12 and older are eligible to receive a COVID-19 vaccine. Vaccines are available at doctors' offices, retail pharmacies, hospitals and clinics, as well as state and local health departments. As vaccines continue to increase in availability, employers may want to consider hosting an on-site vaccination clinic, which may help increase vaccine uptake among employees. The CDC has [guidance](#) for hosting work site vaccination programs.

A clear, consistent and repeat communication strategy is the best practice for ensuring employees make the vaccination decision that is best for them.

- **The National Academy for State Health Policy (NASHP) has provided a [state-by-state list of resources to the state's public health sites](#). It is important to check frequently, as the phases are rapidly changing.**

## WHAT TO EXPECT IN THE FUTURE

- Full FDA approval of the Moderna COVID-19 vaccine is expected in October 2021.
- Employers are focusing on return-to-work policies for a hybrid workforce: those who are vaccinated and those who are not vaccinated. Many vendors have started offering on-site vaccinations with a minimum of 45 employees per site in many areas of the country. We expect this trend to continue through the fall.
- The shift toward vaccine mandates may be a step available to some, but not all, employers. [Read more about vaccine mandates and what employers need to know.](#)

## Sources

1. An emergency use authorization, or EUA, permits a drugmaker to bring a product to market at an earlier stage in the FDA's review process than is typical.
2. According to the CDC [COVID-19 vaccination tracker](#).
3. The federal Coronavirus Aid, Relief, and Economic Security (CARES) Act requires non-grandfathered group health plans to provide coverage of all COVID-19 related preventive care, including immunizations, within 15 business days after the USPSTF or ACIP recommends the vaccine. A vaccine is embraced by the mandate even if not listed for routine use on the immunization schedules of the CDC. Under federal regulations, an ACIP recommendation is considered in effect after it is adopted by the director of the CDC. That adoption is deemed to occur when the recommendation appears in the CDC's Morbidity and Mortality Weekly Report.



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