

COVID-19 EMPLOYMENT UPDATE

MANDATORY VACCINATIONS AND QUARANTINE QUESTIONS

Please watch our April 21st Jaffe video on Mandatory Vaccinations and Quarantine Questions for additional information related to these topics. You can access the video here: <https://youtu.be/SrVL9RqQVC0>. This information is provided as an update to Jaffe's February 4th video on Employment and Vaccinations located on our COVID-19 Resource Center. The information from our earlier video is still relevant and should be viewed together with this April 21st Update.

MANDATORY VACCINATIONS

EMPLOYERS ARE ASKING: Can I require my employees to get vaccinated against COVID-19? Does a vaccinated employee still have to follow safety protocols? Does a vaccinated employee still have to quarantine after exposure to COVID-19? Once my employees are vaccinated, can't they all come back to work in the office?

EEOC ISSUES GUIDANCE ON MANDATORY VACCINATIONS: The EEOC issued guidance at the end of 2020 on mandating COVID-19 vaccinations. However, the EEOC did not state specifically that employers are allowed to mandate vaccinations. Rather, the EEOC said that employers mandating the vaccine should ensure that the mandate is based upon objective facts and related to job duties and workplace needs. Further, employers who decide to mandate vaccinations must comply with federal anti-discrimination statutes – like Title VII and the ADA – and provide reasonable accommodations for those employees who are unable to get vaccinated for protected reasons.

First, in order to mandate the vaccination, it must be job-related, consistent with business necessity or justified by a direct threat. The CDC has already determined that COVID-19 meets the direct threat standard which affords employers latitude to mandate the vaccine. Indeed, the EEOC has also acknowledged that COVID-19 meets the direct threat standard. Notwithstanding, the EEOC's current position is that employers should strongly encourage, rather than mandate, vaccinations.

Second, an employer who implements a mandatory vaccine policy may be obligated to accommodate (1) an employee's sincerely held religious belief under Title VII and (2) an employee's disability or medical condition under the ADA. To avoid potentially significant liability, an employer must provide the appropriate carve-outs for covered employees needing religious or disability accommodations. Employers should consult an attorney with any questions about how to engage in these accommodation discussions and decisions.

WHAT SHOULD EMPLOYERS DO: There are several factors that employers should consider when deciding whether to mandate vaccinations in their workplace. These factors include legal requirements, risk of liability, and the human impact of these mandates. Having a vaccinated workforce does not exempt employers from remote work requirements or safety protocols. Making vaccinations mandatory might make the workplace safer and reduce employee absenteeism, but it brings with it a host of other complications. On the other hand, employers who strongly encourage vaccinations can experience the benefits of a healthier and more productive workforce without the legal and human resource ramifications. Here are some pros and cons to consider:

Mandate		Strongly Encourage	
Pros	Cons	Pros	Cons
Some employees will be pleased to see an employer who is taking COVID seriously and forcing employees to vaccinate for the safety of everyone.	Some employees will be very upset that their employer is forcing them to be injected (considered highly invasive) with a relatively unknown substance that many still question as effective / safe / healthy....	Employees will be pleased that employer is not forcing them to choose between their job or getting vaccinated. Gives them independence to make their own decision.	Some employees will want employer to take a hardline approach and force everyone to get vaccinated.
Likely to decrease spread of COVID-19, particularly in manufacturing or consumer-facing industries, with widespread vaccination. Limits absenteeism due to COVID.	Employer must be prepared to discipline / terminate those employees who refuse to get vaccinated without good reason (religion or medical condition).	Can be just as effective in decreasing spread of COVID by strongly encouraging the vaccination and leading by example.	Does not guarantee widespread vaccination.
Fully vaccinated employees, who received their final dose in the preceding 3 months and who are not suffering symptoms, do not need to quarantine if exposed to COVID-positive individual.	Fully vaccinated employees must still follow workplace mandates (social distancing, masks, disinfecting, etc.). So, many people ask: why force employees to get the vaccine?	Fully vaccinated employees, who received their final dose in the preceding 3 months and who are not suffering symptoms, do not need to quarantine if exposed to COVID-positive individual.	
	Employer MUST engage in the interactive process with any employee who claims to be unable to get vaccinated due to a sincerely held religious belief or medical condition / disability. Employers risk discrimination or retaliation claims if the analysis is done incorrectly.	Can use reasonable incentives, like free PTO for vaccination days or one free day if feeling sick after second dose.	Cannot use monetary incentives (like cash or gift cards) to incentivize employees because that is viewed as discriminatory against those who cannot get vaccinated due to religious or health reasons.
	Must determine whether employer will partner with another company and provide onsite vaccinations. If not, must consider how to manage time off to get vaccinated.	Would only require proof of vaccination without the potential for receiving any other health information.	
	If onsite vaccinations, employer risks becoming privy to employee health information.	Do not need to engage in interactive process for religious or medical accommodation and avoids legal risk of failed or incorrect analysis.	
	Will not allow employers to return employees to work any sooner if State continues to mandate remote work where feasible (i.e., vaccine is not an exemption from state remote work requirements).		

OVERALL: For some industries where employees work closely together or closely with the public (like manufacturing, health care, retail, food service, etc.) it might make more sense to mandate vaccinations. In these industries, employers might find that the pros outweigh the cons to ensure widespread vaccination. However, even in these industries, and certainly in office settings or industries with continued remote work, the recommended approach is to strongly encourage employees to get vaccinated. Employers can achieve the results of a fully vaccinated workforce by strongly encouraging vaccinations, leading by example and using reasonably (not cash or gift cards) modest incentives (such as, for example, free PTO to get the vaccine or one free day off after the second dose for those employees who are feeling sick from the vaccine). Strongly encouraging vaccinations creates a healthy work environment without the risks created by mandating vaccinations. Jaffe can assist in preparing communications to employees to encourage vaccinations.

QUARANTINE QUESTIONS

DO FULLY VACCINATED EMPLOYEES, WHO ARE EXPOSED TO COVID, STILL HAVE TO QUARANTINE? No, so long as the vaccinated employees meet several requirements. First, employees must be fully vaccinated. This means that 2 full weeks have passed since the employee received the final dose of the vaccine. Second, the employee must have received the final dose of the vaccine with the 3 months preceding exposure to COVID. Third, the vaccinated employee must not be suffering any symptoms of COVID after exposure. If the vaccinated employee meets all of these requirements, the employee does not have to quarantine. Review CDC guidance as there may be exceptions to this general rule.

DO EMPLOYEES WHO RECOVERED FROM COVID STILL HAVE TO QUARANTINE AFTER RETURNING TO WORK? No, so long as the employee meets several requirements. First, the employee must be fully recovered from COVID per CDC guidance. Second, the exposure to a COVID individual must have occurred within 3 months after the employee recovered from COVID. Third, the employee must not be suffering any symptoms of COVID following exposure. If the employee meets all of these requirements, the employee does not have to quarantine. Review CDC guidance as there may be exceptions to this general rule.

DO FULLY VACCINATED EMPLOYEES STILL HAVE TO FOLLOW SAFETY PROTOCOLS? Yes! Receiving the vaccine does not exempt employees from following health and safety protocols. All employees, including those who are vaccinated, must still follow all safety requirements: health questions upon entry, social distancing, use of masks, sanitizing, disinfecting, etc.

Please watch our video for more detailed information. For questions related to COVID-19 vaccinations, updates, and any other COVID-related issues, please contact Jaffe’s COVID-19 employment law experts:

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