



➤ January 26, 2022

OSHA & COVID-19 Vaccine Mandate

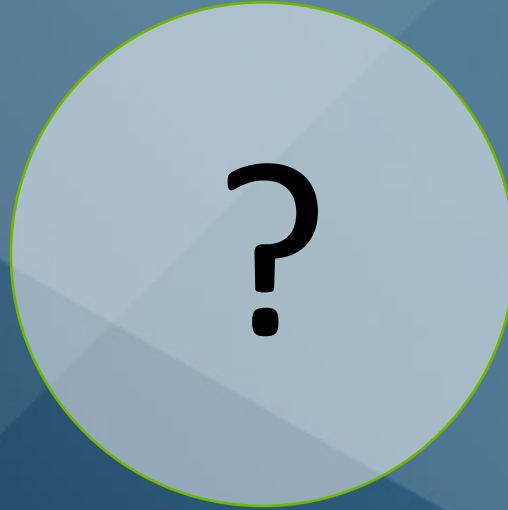


Presentation By:
Joe Aitchison

Before We Begin



We are recording today's webinar



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➤ Presenter



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Joe provides Business & HR client advisory services and HR out-source services nationally. He is a Human Resource professional with over twenty five years business management and HR consulting experience. He has worked with multi plant International Tier I Automotive Manufacturing, retail, food processing, health care, legal administration and professional services.

Mr. Aitchison is recognized as a leader in human resources and has obtained a lifetime certification as a senior professional in human resource management, SHRM – Senior Certified Professional and Healthcare Reform Specialist by the Healthcare Reform Center & Policy Institute. Mr. Aitchison serves on several for profit and not for profit boards.

➤ Today's Topics: COVID-19 Vaccine

- Vaccines – where do we stand today
- Latest State of Affairs on OSHA – COVID-19 ETS
- OSHA guidelines for recording & reporting Covid-19 cases
- Insights into OSHA's regulatory agenda
- Managing suspected or confirmed COVID-19 cases in the workplace
- Review of OSHA's position on vaccines
- EEOC updates on Vaccines & Employer Compliance
- Benefits and Risks of mandating vaccines at work by employers
- EEOC's position on mandating vaccines
- Implement strategically sound policies and remain compliant with COVID Guidelines if you mandate vaccinations
- Exceptions to Vaccines workplace requirements
- Employer guidance when an employee refuses to vaccinate
- Employer Risk – Complaints & Litigation
- Sample Pandemic Vaccine Policies
- Reviewing various scenarios and examples

OSHA's Emergency Temporary Standard

[COVID-19 Vaccination and Testing ETS - Frequently Asked Questions | Occupational Safety and Health Administration \(osha.gov\)](#)

Covers Employers having 100 or more EEs

12.A. What are the effective date and the compliance dates for 1910.501?

The effective date for the ETS is November 5, 2021, which is the date the ETS was published in the Federal Register. Although the ETS becomes effective immediately, employers are not required to comply with the requirements of the ETS until the compliance dates, as follows:

Requirement	December 6, 2021	January 4, 2022
Establish policy on vaccination (paragraph (d))	X	
Determine vaccination status of each employee, obtain acceptable proof of vaccination, maintain records and roster of vaccination status (paragraph (e))	X	
Provide support for employee vaccination (paragraph (f))	X	
Require employees to promptly provide notice of positive COVID-19 test or COVID-19 diagnosis (paragraph (h))	X	
Remove any employee who received positive COVID-19 test or COVID-19 diagnosis (paragraph (h))	X	
Ensure employees who are not fully vaccinated wear face coverings when indoors or when occupying a vehicle with another person for work purposes (paragraph (i))	X	
Provide each employee information about the ETS; workplace policies and procedures; vaccination efficacy, safety and benefits; protections against retaliation and discrimination; and laws that provide for criminal penalties for knowingly supplying false documentation (paragraph (j))	X	
Report work-related COVID-19 fatalities to OSHA within 8 hours and work-related COVID-19 in-patient hospitalizations within 24 hours (paragraph (k))	X	
Make certain records available (paragraph (l))	X	
Ensure employees who are not fully vaccinated are tested for COVID-19 at least weekly (if in the workplace at least once a week) or within 7 days before returning to work (if away from the workplace for a week or longer) (paragraph (g))		X

On November 12, the U.S. Court of Appeals for the Fifth Circuit issued an order staying enforcement and implementation of the federal Occupational Safety and Health Administration's (OSHA) COVID-19 "vaccine or test" emergency temporary standard (ETS). The order was issued after an expedited briefing and in response to a petition filed by various employers, states, religious groups, and individual citizens seeking a temporary stay of the ETS pending judicial review to determine if a permanent injunction of the ETS should issue. While the Fifth Circuit will not necessarily be the final word on the matter, the ruling signals that at least one federal appellate court has made a preliminary determination that the challenge to the ETS will likely succeed on the merits. Pending review, **the ruling effectively nullifies the ETS as OSHA is barred from both enforcing and implementing it.**

[2021-11-23-BST-v.-OSHA-Mtn-to-Transfer.pdf \(lhc-assets.s3.amazonaws.com\)](#)

➤ SCOTUS Determination - January 13, 2022

The U.S. Supreme Court reached split decisions on the mandates issued by:

1. The Occupational Safety and Health Administration (OSHA) and,
 2. The Centers for Medicare & Medicaid Services (CMS).
- The Court allowed the CMS vaccination mandate for healthcare workers to go into effect by staying injunctions preventing its enforcement
 - The Court stayed enforcement of the OSHA ETS for large private employers
 - The Court did not review the federal contractor vaccination mandate,
 - The federal contractor vaccine mandate remains on hold since the December 17, 2021, decision by the U.S. Court of Appeals for the Eleventh Circuit to maintain a nationwide stay (or freeze) of the mandate until—potentially—as late as April 2022.
 - The federal contractor vaccination mandate has been challenged in at least eight lawsuits, with five resulting in preliminary injunctions against enforcement and three others yet to be decided. Most importantly, one of the granted preliminary injunctions, issued by a federal court in Georgia, has, by design, nationwide effects, and was already upheld on appeal

➤ OSHA's ETS - It's Not Over Until It's Over

Although unlikely, but possible, the Mandate could be reinstated by the 6th District Court

- The Supreme Court temporarily stayed the rule. The court determined that COVID-19 is a risk that occurs in many workplaces, it is not an “occupational hazard” that can be regulated in this manner by OSHA. While this does not permanently end the dispute, it frees employers from the current compliance deadlines and signals that future implementation of the rule is unlikely.

What could happen or what happens next?

COVID-19 Vaccination and Testing ETS

Statement from Secretary of Labor Marty Walsh on Supreme Court ruling on OSHA emergency temporary standard on vaccination, testing

(January 13, 2022)

WASHINGTON – U.S. Secretary of Labor Marty Walsh issued the following statement on the Supreme Court ruling on the department's Occupational Safety and Health Administration's emergency temporary standard on vaccination and testing:

“I am disappointed in the court's decision, which is a major setback to the health and safety of workers across the country. OSHA stands by the Vaccination and Testing Emergency Temporary Standard as the best way to protect the nation's workforce from a deadly virus that is infecting more than 750,000 Americans each day and has taken the lives of nearly a million Americans.

“OSHA promulgated the ETS under clear authority established by Congress to protect workers facing grave danger in the workplace, and COVID is without doubt such a danger. The emergency temporary standard is based on science and data that show the effectiveness of vaccines against the spread of coronavirus and the grave danger faced by unvaccinated workers. The commonsense standards established in the ETS remain critical, especially during the current surge, where unvaccinated people are 15-20 times more likely to die from COVID-19 than vaccinated people. OSHA will be evaluating all options to ensure workers are protected from this deadly virus.

“We urge all employers to require workers to get vaccinated or tested weekly to most effectively fight this deadly virus in the workplace. Employers are responsible for the safety of their workers on the job, and OSHA has comprehensive [COVID-19 guidance](#) to help them uphold their obligation.

“Regardless of the ultimate outcome of these proceedings, OSHA will do everything in its existing authority to hold businesses accountable for protecting workers, including under the [Covid-19 National Emphasis Program](#) and [General Duty Clause](#).”

➤ New York City Vaccine Mandate

<https://www1.nyc.gov/assets/counseltothemayor/downloads/Workplace-FAQ.pdf>

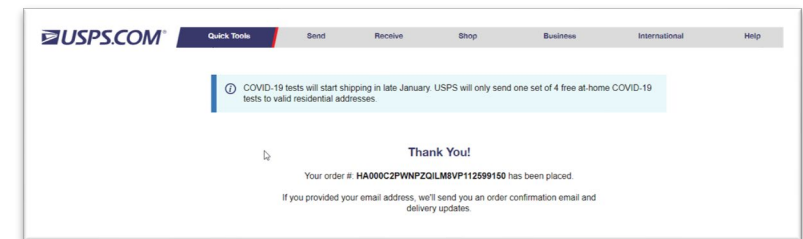
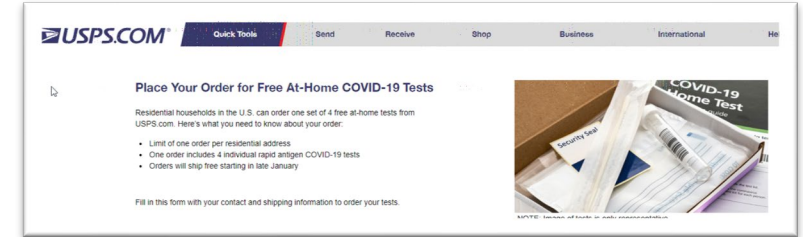
Effective date is December 27, 2021, employees will need only one vaccine dose administered by that date. Workers will then have **45 days** to show proof of their second dose (for Pfizer or Moderna vaccines).

- Booster shots will *not* be required for employees to be considered “fully vaccinated,” meaning that two doses of the Pfizer or Moderna vaccines or one dose of Johnson & Johnson will be sufficient.
- The standards for medical accommodations and religious exemptions will be the same as those already applicable for employees who are covered by vaccine mandates imposed by private employers.
- The City will accept attestations from employers that they verified their employees’ vaccination status through visual inspection of vaccination cards or passport applications like NYC Covid Safe, Excelsior Pass, and the CLEAR Health Pass or through storage of photos.
- The mandate will apply to work anywhere in the City, including outdoors, with the exception of home-based work.
- The mandate will apply to sole proprietors, including those who market themselves as independent contractors to others.
- It is unclear whether entities and individuals will be responsible for mandating vaccination for independent contractors they engage.
- The mandate will apply to everyone who performs work in New York City with any regularity, not individuals who come into the City intermittently.

➤ COVID Test Kits

COVID Test Kits are (when) available

- No Cost when for **personal use**
 - Order from USPS at: <https://special.usps.com/testkits>
 - 1st order of 4 is at no cost
- No cost when provider for personal use through your health benefit provider
 - May require Attestation (Employer ethics policy) & not for resale or other distribution
 - Not for use by employers for work required testing.
 - May be provided at not cost at time of purchase (med coverage card) “or paid and submitted for reimbursement
 - Not a reimbursable expense under a FLEX card if reimbursed under the group health plan.



OSHA COVID-19 Guidelines

Last Update / Post August 2021

Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace | Occupational Safety and Health Administration (osha.gov)

- **Recording and reporting COVID-19 infections and deaths:** Employers are responsible for recording work-related cases of COVID-19 illness on their Form 300 logs if the following requirements are met:
 - (1) the case is a confirmed case of COVID-19;
 - (2) the case is work-related (as defined by 29 CFR 1904.5); and
 - (3) the case involves one or more relevant recording criteria (set forth in 29 CFR 1904.7) (e.g., medical treatment, days away from work).
- Employers must follow the requirements in 29 CFR 1904 when reporting COVID-19 fatalities and hospitalizations to OSHA. More information is available on OSHA's website. Employers should also report outbreaks to health departments as required and support their contact tracing efforts.

Note: Recoding a COVID-19 Illness does not, of itself, mean that the employer has violated any OSHA Standard

Implementing protections from retaliation and setting up an anonymous process for workers to voice concerns about COVID-19-related hazards.

➤ OSHA COVID Guidelines

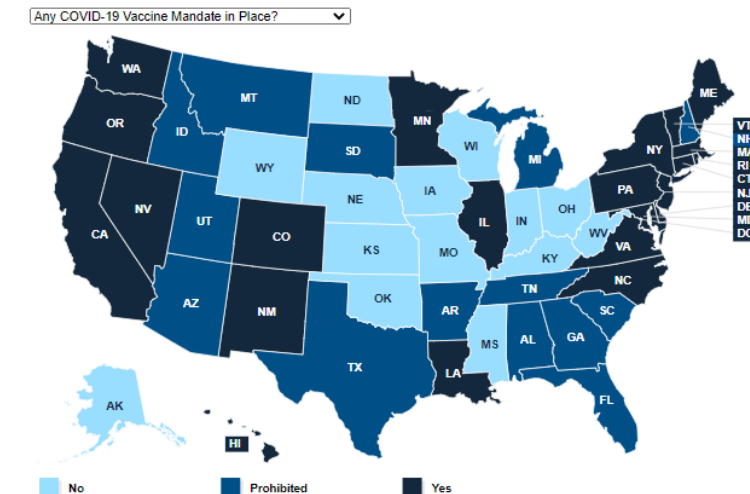
- Making a COVID-19 vaccine or vaccination series available at no cost to all eligible employees.
- **Do not distinguish between workers who are vaccinated and those who are not.**
- **Other applicable OSHA Standards:** All of OSHA's standards that apply to protecting workers from infection remain in place. These standards include:
 - respiratory protection ([29 CFR 1910.134](#)),
 - sanitation ([29 CFR 1910.141](#)),
 - protection from bloodborne pathogens: ([29 CFR 1910.1030](#)),
 - OSHA's requirements for employee access to medical and exposure records

High Risk Employers / Geographic Hot Spots



- **OSHA's Investigation Plan for COVID-19 Complaints**
- OSHA announced that it will focus on high risk employer inspections in geographic areas experiencing either sustained elevated levels or a resurgence in community transmission of COVID-19 cases based on available resources.
 - Employers having:
 - High number of COVID-19 related fatalities
 - AN Environment where there is an imminent danger of exposures
 - **A high number of complaints** or known COVID-19 cases
 - OSHA's primary focus is high risk workplaces such as hospitals and other healthcare providers
 - 27 States filed federal lawsuits – Requiring Federal Contractors; Employers with 100+ Employees & Certified Medicare and Medicaid Providers to be c or Test.

COVID-19 Vaccine Mandates, as of January 11, 2022



Reference: Kaiser Family Foundation
[State COVID-19 Data and Policy Actions – Policy Actions | KFF](#)

➤ OSHA letter - Employer Notice (EE Complaint) *(Excerpt)*

RE: OSHA Complaint No. []

Dear Employer:

On [Date], the Occupational Safety and Health Administration (OSHA) received notification of alleged workplace hazard(s) at your worksite concerning [Potential illness: an employee exhibiting signs and symptoms of respiratory illness, such as, fever, cough, and/or shortness of breath, possibly indicating infection by SARS-CoV-2 (severe acute respiratory syndrome coronavirus 2), which is the virus causing the current coronavirus disease 2019 (COVID-19) pandemic.] or [PPE shortage: employees not provided with adequate personal protective equipment (PPE), such as respiratory protection, gloves, and gowns.] The specific nature of the complaint is as follows:

<< ENTER COMPLAINT INFORMATION >>

Currently, there is an outbreak of COVID-19, also known as Coronavirus. **At this time, OSHA is prioritizing its enforcement resources, and OSHA does not intend to conduct an on-site inspection in response to the subject complaint at this time.** However, because allegations of violations and/or hazards have been made, we request that you immediately investigate the alleged conditions and make any necessary corrections or modifications. Please advise me in writing, no later than [Date Response Due], of the results of your investigation. **You must provide supporting documentation of your findings.** This includes any applicable measurements or monitoring results; photographs/video that you believe would be helpful; and a description of any corrective action you have taken or are in the process of taking, including documentation of the corrected condition.

➤ OSHA EE Complaint Letter *(Excerpt)*

This letter is not a citation or a notification of proposed penalty which, according to the Occupational Safety and Health Act, may be **issued only after an inspection or investigation of the workplace**. It is our goal to assure that hazards are promptly identified and eliminated. Please take immediate corrective action where needed. Depending on the specific circumstances at your worksite, several OSHA requirements may apply to the alleged hazards at your worksite, including:

- 29 CFR Part 1904, Recording and Reporting Occupational Injuries and Illness.
- 29 CFR § 1910.132, General Requirements - Personal Protective Equipment.
- 29 CFR § 1910.133, Eye and Face protection.
- 29 CFR § 1910.134, Respiratory Protection.
- 29 CFR § 1910.141, Sanitation.
- 29 CFR § 1910.145, Specification for Accident Prevention Signs and Tags.
- 29 CFR § 1910.1020, Access to Employee Exposure and Medical Records.
- Section 5(a)(1), General Duty Clause of the OSH Act.

If we do not receive a response from you by [Date Response Due] indicating that appropriate action has been taken or that no hazard exists and why, an OSHA inspection may be conducted. **An inspection may include a review of the following: injury and illness records, hazard communication, personal protective equipment, emergency action or response, bloodborne pathogens, confined space entry, lockout/tagout, and related safety and health issues.** Please also be aware that OSHA conducts random inspections to verify that corrective actions asserted by the employer have actually been taken.

➤ OSHA EE Complaint Letter *(Excerpt)*

The CDC is recommending employers take the following steps to prevent the spread of COVID-19:

- **Actively encourage sick employees to stay home**
- **Accommodate employees through social distancing or telework (if possible)**
- **Emphasize respiratory etiquette and hand hygiene by all employees**
- **Perform routine environmental cleaning**
- **Check government websites (CDC, State Department) for any travel advisories (where applicable)**
- **Plan for infection disease outbreaks in the workplace**

You are requested to post a copy of this letter where it will be readily accessible for review by all of your employees, and to return a copy of the signed Certificate of Posting (attached) to this office. In addition, you are requested to provide a copy of this letter and your response to a representative of any recognized employee union or safety committee that exist at your facility. Failure to do this may result in an on-site inspection. The complainant has been furnished a copy of this letter and will be advised of your response. Section 11(c) of the Occupational Safety and Health Act provides protection for employees against discrimination because of their involvement in protected safety and health related activity.

If you have questions regarding this issue, you may contact me at the address in the letterhead. I appreciate your personal support and interest in the safety and health of your employees.

Sincerely,
[Enter AD name]
Area Director

➤ OSHA Recording - COVID-19 Events

Employer COVID-19 Work Related Determination (employer questions)

OSHA is exercising enforcement discretion to assess employers' efforts in making work-related determinations.

OSHA Investigations will include the following considerations:

- Did the employer:
 1. Ask the employee how they believe they contracted COVID-19
 2. While respecting employee privacy, did the employer discuss with the employee his work and out-of-work activities that may have led to the COVID-19 illness; and
 3. Review the employee's work environment for potential SARS-CoV-2 exposure.
 4. Assess other workers in the same work environment contracting COVID-19 illness.

➤ OSHA Recording - COVID-19 Events

COVID-19 illnesses are likely work-related when:

1. Several cases develop among workers who work closely together and there is no alternative explanation.
2. If it is contracted shortly after lengthy, close exposure to a particular customer or coworker who has a confirmed case of COVID-19 and there is no alternative explanation. **(Contact Tracing)**
3. If his job duties include having frequent, close exposure to the general public in a locality with ongoing community transmission and there is no alternative explanation.

An employee's COVID-19 illness is likely not work-related if:

1. If the worker is the only one to contract COVID-19 in her vicinity and her job duties do not include having frequent contact with the general public, regardless of the rate of community spread.
2. if worker, outside the workplace, closely and frequently associates with someone (e.g., a family member, significant other, or close friend) who
 - has COVID-19;
 - is not a coworker, and
 - exposes the employee during the period in which the individual is likely infectious.

COVID-19 is a respiratory illness and should be coded as such on the OSHA Form 300 when the criteria is met and the employee tests positive.

➤ Employee Contracts COVID-19 & is Hospitalized

Under 29 CFR 1904.39(b)(6), employers are only required to report in-patient hospitalizations to OSHA if the hospitalization "occurs within twenty-four (24) hours of the work-related incident." For cases of COVID-19, the term "incident" means an exposure to SARS-CoV-2 in the workplace.

Employee COVID -19 Hospitalization is recordable when:

1. Hospitalization due to COVID-19 must occur within 24 hours of an exposure to SARS-CoV-2 at work.
2. The employer must report such hospitalization within 24 hours of knowing:
 - The employee has been in-patient hospitalized “and”
 - The reason for the hospitalization was a work-related case of COVID-19.

Note: if an employer learns that an employee was in-patient hospitalized within 24 hours of a work-related incident and determines afterward that the cause of the in-patient hospitalization was a work-related case of COVID-19, the case must be reported within 24 hours of that determination. Reference 29 CFR 1904.39(a)(2), (b)(7)-(b)(8).

➤ Total OSHA Claims

[COVID-19 Response Summary | Occupational Safety and Health Administration \(osha.gov\)](#)

COVID-19 Response Summary - Enforcement

- Inspections with COVID-19 related Violations
- Summary Data for Federal and State Programs
 - Complaints, Referrals and Closed Cases
 - Federal Inspections Opened
 - State Inspections Opened
- Detailed Data for Federal Program
 - Complaints by Selected Essential Industry
 - Complaints by Selected Industry
 - Complaints and Referrals by Region
 - Inspections by Region
- Complaints and Referrals by Date

NOTE: The data below includes all valid complaints and referrals received since February 1, 2020, with the N-16-COVID-19 additional code.

Summary Data for Federal and State Programs - Enforcement

Complaints, Referrals and Closed Cases (totals to date)

2022

January						
	Federal Summary			State Summary		
Date	Complaints	Referrals	Closed	Complaints	Referrals	Closed
1/17/2022	18,062	2,841	18,841	61,091	9,150	62,970
1/09/2022	17,809	2,809	18,603	60,577	9,108	62,548
1/02/2022	17,412	2,789	18,404	60,104	9,073	62,085

OSHA – COVID-19 Liability Issues For Employers



Whistleblower Complaints Filed - Federal (totals to date*)

2022

January							
Through Date	Total Number of Complaints Filed	New Complaints Since Last Report	Pending	Screenings		Dockets	
				Screened and Referred to State Plans	Screened and Administratively Closed	Docketed for Investigation	Docketed and Completed
1/16/2022	6,279	61	27	1,332	3,372	1,548	1,126
1/09/2022	6,218	40	16	1,323	3,344	1,535	1,113

Whistleblower Complaints Filed - State Plans (totals to date)

2022

January							
Through Date	Total Number of Complaints Filed	New Complaints Since Last Report	Pending	Screenings		Dockets	
				Screened and Administratively Closed	Docketed for Investigation	Docketed and Completed	
1/16/2022	2,358	13	43	1,025	1,295	901	
1/09/2022	2,345	12	44	1,016	1,289	895	

OSHA Whistleblower Claims:

<https://www.whistleblowers.gov/covid-19-data>

Civil Litigation (*COVID-19 Labor & Employment Litigation Tracker | Littler Mendelson P.C.*)

As of January 14, 2022 COVID-19 Labor & Employment Litigation Since March 12, 2020, there have been 4,892 lawsuits (including 533 class actions) filed against employers due to alleged labor and employment violations related to the coronavirus. Approximately 2,675 cases involve retaliation claims.

➤ OSHA Whistleblower

Definition:

- A whistleblower is defined as someone who informs the authorities about a person or organization engaged in illegal or unacceptable behavior. OSHA's whistleblower laws protect employees from employer retaliation, such as dismissal, discipline, harassment, and demotion.

➤ Avoiding OSHA Whistleblower & Retaliation Claims

Practical Considerations for Employers

COVID-19 related employee retaliation termination / layoff complaints are increasing

- **Encourage employees to report health and safety concerns.** Ensure that employees have multiple avenues to immediately raise their concerns.
- **Employees should never be disciplined or terminated because they raised or escalated complaints about a potential violation of health and safety laws or procedures.**
- There may be independent, non-retaliatory reasons for taking adverse action against an employee who also previously raised health and safety concerns, but any decision regarding an adverse action should not be part of the decision.
- If independent reasons justify disciplinary action against an employee who recently raised health or safety concerns, the employer should ensure the reasons are properly documented, consistent with the company's policies and procedures, and that other employees who have engaged in similar conduct—but who have not complained of health and safety concerns—received the same disciplinary action.
- **MAKE SURE to document any and all S&H concerns and complaints.** Include date, time, who made and received the complaint and information of the specific complaint
- **Confirm that your policies and procedures provide information on escalating complaints to the appropriate member of management** for review, investigation and action plan.
- Review and update the company's policies and procedures that prohibit retaliation
- Provide complaint procedure training for managers & supervisors.

➤ Employer Regulatory Issues

COVID-19 Vaccines Regulatory Issues

- ✓ OSHA
- ✓ DOL
- ✓ AADA
- ✓ EEOC/DCR – Religious Discrimination
- ✓ GINA
- ✓ Collective Bargaining Agreements
- ✓ State Law
- ✓ ARPA (American Recover Plan Act)
- ✓ The Coronavirus Aid, Relief, and Economic Security (CARES) Act
- ✓ Workers' Compensation



➤ ADA & Religious Accommodations

Employee Disability (ADA) & Religious Accommodations (Title VII)

Note: EEOC Added “Section L” to prior guidance on Religious Accommodation 11/1/7/2021 ([What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#) | U.S. Equal Employment Opportunity Commission ([eEOC.gov](#)))

An employer is required to accommodate employees who have a **disability or a sincerely held religious** belief that prevents them from being vaccinated, unless doing so (accommodating) is an employer “undue hardship.”

The employer must show that an unvaccinated employee would pose a direct threat due to 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 Employer is required to conduct an individualized assessment to determine whether a “direct threat” exists identifying the following **four factors**:
 1. The duration of the risk;
 2. The nature and severity of the potential harm;
 3. The likelihood that the potential harm will occur;
 4. The imminence of the potential harm.

OSHA – Whistle Blower Exception: OSHA allows employers to mandate employee vaccinations – **HOWEVER OSHA’s whistleblower protection** provision allow any employee who refuses a vaccine because of a reasonable belief that he or she has a medical condition that creates a serious health condition should be allowed reasonable accommodation

➤ ADA & Religious Accommodations

To be eligible to receive workplace reasonable accommodations under the federal ADA for a COVID-19 Vaccine related condition:

- Employee must have an “actual” or a “record of” a disability, as defined by the ADA Amendments Act.
- There must be some connection between the impairment and specific need for accommodation.

➤ EEOC & Pregnancy

Pregnant Employees and Mandatory Vaccinations

- Under Title VII, an employer must ensure that pregnant employees are not discriminated against compared to other employees similar in their ability or inability to work.
- Pregnant employees may be entitled to a job modification, including telework, changes to work schedules or assignments, and leave to the extent that such modifications are provided for other employees.

Job ➤ Accommodation Network

Reference – EEOC Job Accommodation Network : <https://askjan.org/topics/COVID-19.cfm>
Funded by DOL/ODEP – West Virginia University

CORONAVIRUS DISEASE 2019 (COVID-19)

Accommodation and Compliance: Coronavirus Disease 2019 (COVID-19)

Introduction

Coronavirus (COVID-19) related workplace issues vary widely. JAN does not provide public health, safety, or legal advice, but does offer Americans with Disabilities Act (ADA) compliance assistance and practical job accommodation strategies for returning individuals with disabilities to work during the COVID-19 pandemic. These strategies can enable workers with disabilities to return to the work environment, work at home, or access leave when other accommodations are not reasonable.

JAN Resources

- [Engaging in the Interactive Process During the COVID-19 Pandemic](#)
- [The ADA and Managing Reasonable Accommodation Requests from Employees with Disabilities in Response to COVID-19](#)
- [Accommodation Strategies for Returning to Work During the COVID-19 Pandemic](#)
- [Masks for COVID-19 Management and ADA Accommodations](#)
- [Coronavirus \(COVID-19\), Stress, and Mental Health Conditions](#)
- [Accommodations for Educators Who are Deaf or Hard of Hearing](#)
- [Teleconference Accessibility and Hearing – Keeping Deaf and Hard of Hearing Employees in the Loop](#)
- [Mandatory Flu Vaccination Requirements 2.0](#)
- [Make Telework Work](#)

Employers should refer to **COVID-19 related technical assistance guidance** provided by the Equal Employment Opportunity Commission (EEOC) when making disability-related inquiries or requiring medical examinations, analyzing direct threat and safety issues, and engaging in the interactive process under the ADA, the Rehabilitation Act, the **Pregnancy Discrimination Act (PDA)**, and other relevant federal laws enforced by the EEOC.

EEOC Resources

- [What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws](#)
- [Pandemic Preparedness in the Workplace and the ADA](#)
- [COVID-19 "Ask the EEOC" Webinar and accompanying transcript](#)

➤ National Labor Relations ACT – COVID Vaccines

- Section 7 of the NLRA entitles 2 or more (non-supervisory) employees to engage in "**concerted activities**" for the purpose of "mutual aid and protection."
- This means that employers cannot interfere with employees' complaining about or opposing the vaccination policy or retaliate against them for doing so.
 - This doesn't exempt employees from the vaccination requirement
 - Cannot discipline them for "saying" that they want to be exempt for a non-disability and non-religious reason, including even if they say that they think vaccinations are part of some massive, unproven conspiracy
- Employer is refrained from taking disciplinary actions against employees who:
 - Speaks on behalf of other employees
 - Discusses with coworkers issues with a mandatory vaccination program
 - Protests against a mandatory vaccination policy
- Employer can discipline for failure to obtain the Mandatory Vaccine – "but not" for any concerted (protected) activities.

➤ State Laws – COVID-19 Vaccines

States “HAVE” the authority to mandate Vaccinations if they choose to do so.

- **U.S. Supreme Court case in 1905 called *Jacobson v. Massachusetts*.** That case centered on an outbreak of smallpox in Cambridge, Massachusetts, in **1902**. Cambridge introduced an ordinance requiring all adults be vaccinated or revaccinated against smallpox. If they didn't [get vaccinated], they would have to pay a fine of \$5.
- The Supreme Court ruled that states have under their police powers, which is under the Constitution, the authority to enact reasonable regulations as necessary to protect public health, public safety, and the common good. Vaccination mandates constitute exactly that kind of permissible state action to protect the public's health. The court said that sometimes individual interests might have to yield to state laws that endeavor to protect the health of everybody—the “common good.” The court said: “The rights of the individual may at times, under the pressure of great dangers, be subjected to such restraint to be enforced by reasonable regulations as the safety of the general public may demand.”

➤ Some States Establish Limited Liability

COVID-19 Limited Liability Laws

- Alabama
- Arkansas
- California—Small Business LT 25 EEs
- Iowa,
- Indiana
- Kansas,
- Louisiana,
- Massachusetts,
- Mississippi
- Nevada
- North Carolina,
- Nevada
- Oklahoma,
- Tennessee
- Utah
- Wyoming

Current federal law provides COVID-19 limited liability protection for health care and manufacturers of PPE.

Private & public sector employers should review state COVID-19 limited liability laws and executive orders.

- Some states limit liability for employers and others from claims relating to COVID-19 exposure.
- Provide immunity from liability for claims of exposure to, or infection from, COVID-19 **where an employer is acting in good faith in accordance with federal, state, or local guidance, and is not intentionally or recklessly negligent.**
- More states are drafting similar laws.

<https://www.jdsupra.com/legalnews/50-state-update-on-covid-19-business-2317578/>



➤ Workplace Vaccines

EMPLOYERS May Require Employee Immunizations but be prepared

- EEOC does allow employers to mandate vaccines in order to be lawful employers must
- Meet certain conditions in order to do so
 - Establish a Policy on requiring Vaccines
 - Include methods on how an employee can request an exemption or accommodation
 - Who to contact when requesting an accommodation
 - Exemption & accommodations include:
 - Religious objections to vaccines,
 - Pregnant workers,
 - Employees with disabilities that may prevent them from obtaining a vaccination
 - **“Fear”** that the Vaccination may result in a severe medical reaction or death. (Certified by a HCP)
- A word of caution regarding what health questions and employer may ask an employee about:
 - The Employees health & vaccination status.
 - How the employer uses the health information gained from the employee (HIPAA Privacy and possibly discrimination laws)..

Reference: https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term=

➤ Mandatory Vaccinations

Requesting Proof of Vaccination from a Third Party

- Employer may ask for Proof of vaccination without ADA concerns.

CAUTION

- If the employee was not vaccinated by a third party and the employer asks why and it is due to a medical condition, then the condition may be subject to ADA considerations.
 - Employer may ask if it is due to a medical condition and advise the employee not to disclose the medical condition
 - Employer can request the employee obtain a “release” from their HCP.

➤ Alternative – Implement a Voluntary Vaccination Program

Similar to a Flu Vaccination Program

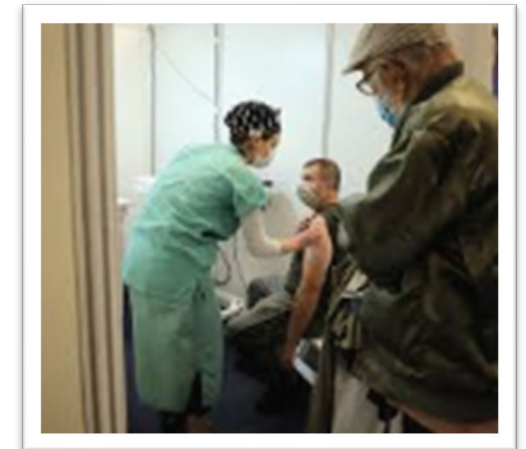
- Provide at no cost to the employee
- Include as part of an Employee Wellness program
 - Non-participant wellness guidelines may be applicable
- Conduct On-site during work hours / break times
 - Most vaccinations will be administered by a third party
- Consider incentives
 - PTO drawings for participants
 - Gift incentives / promotion giveaways



➤ COVID- 19 Vaccination Policy & Program Content

Develop Mandatory “or” Voluntary Company Policy & Forms

- Coronavirus Vaccination Policy Letter To Employees ~ Voluntary
- Coronavirus Vaccination Policy Letter To Employees ~ Mandatory
- Vaccination Policy ~ Voluntary
- Vaccination Policy ~ Mandatory
- Request for Accommodation ~ Medical Exemption From Vaccination
 - Religious Accommodation Request Form
 - Explanation of Reasonable Accommodations
- Third Party Proof of Coronavirus Vaccination Form
- Employee Coronavirus Wellness Program Policy



➤ COVID-19 Voluntary Vaccination Policy

VACCINATION POLICY: VOLUNTARY

Policy Purpose

In accordance with your employer's obligation to provide and maintain a workplace that is free of known hazards, we are adopting this policy to safeguard the health of our employees and their families; our customers, clients, vendors and visitors; and the community at large from Coronavirus. This policy will comply with all applicable state and federal laws and is based on guidance from the Centers for Disease Control and Prevention and public health and licensing, as applicable.

Policy Scope

Only those employees designated by the Human Resources Department are encouraged to receive vaccinations. This policy does not apply to customers, vendors or visitors.

Policy Procedures

Those employees who are encouraged to receive the Coronavirus vaccine will be notified by the Human Resources Department as to the vaccine covered by this policy and when the vaccine has to be taken. A vendor designated by the Human Resource Department will provide either onsite access to the vaccines or a list of locations to assist employees in receiving vaccines on their own.

Your employer will pay for all vaccinations covered by this policy. When not received onsite, vaccinations must be submitted through employees' health coverage where applicable and otherwise be submitted for reimbursement.

All employees will be paid for time taken to receive vaccinations. For offsite vaccinations, employees are to work with their supervisors to schedule appropriate time to comply with this policy.

Employees should provide proof of vaccination before the stated deadlines to be vaccinated have expired by providing a completed THIRD PARTY PROOF OF CORONAVIRUS VACCINE. Employees who do not provide timely proof of vaccination will be required to wear an approved face covering at all times while in the workplace and when engaging with customers, unless an approved exemption from wearing a face covering has been provided.

Please direct any questions regarding this policy to the Human Resources Department.

➤ COVID-19 Mandatory Vaccination Policy

VACCINATION POLICY: MANDATORY

Policy Purpose

In accordance with Employer's duty to provide and maintain a workplace that is free of known hazards, we are adopting this policy to safeguard the health of our employees and their families; our customers our clients, and visitors; and the community at large from the Coronavirus. This policy will comply with all applicable state and federal laws and is based on guidance from the Centers for Disease Control and Prevention and public health and licensing, as applicable.

Policy Scope

All employees are required to receive the Coronavirus vaccine unless a reasonable accommodation is approved by the Human Resources Department. Employees not in compliance with this policy will either work remotely or be placed on unpaid leave until their employment status is determined by the Human Resources Department.

Policy Procedures

Employees will be notified by the Human Resources Department regarding what type of vaccine is covered by this policy and when the vaccine(s) must be taken. A vendor designated by the Human Resources Department will provide either onsite access to the vaccine or a list of locations to assist employees in receiving the vaccine on their own.

The Employer will pay for the vaccine. When not received onsite, any vaccine must be submitted through the employees' health coverage where applicable and otherwise be submitted for reimbursement.

All employees will be paid for time taken to receive the vaccine. For any vaccine, administered offsite employees are to work with their supervisors to schedule appropriate time to comply with this policy.

Before the stated deadlines to be vaccinated have expired, employees will be required to provide either proof of vaccination or an approved reasonable accommodation to be exempted from the requirements. An employee must complete a THIRD PARTY PROOF OF CORONAVIRUS VACCINE to evidence proof of vaccination.

Reasonable Accommodation

For those employees who in need of an exemption from this policy due to a medical reason, or because of a sincerely held religious belief, they must submit a REQUEST FOR ACCOMMODATION: MEDICAL EXEMPTION FROM VACCINATION FORM or a RELIGIOUS ACCOMMODATION REQUEST FORM to the Human Resources Department to begin the interactive accommodation process as soon as possible after vaccination deadlines have been announced. Accommodations will be granted where they do not cause the employer undue hardship or pose a direct threat to the health and safety of others.

Once the accommodation is approved, the employer will engage in an interactive process of identify possible accommodations. If an employee believes that he or she has been treated in a manner not in accordance with this policy, please contact the Human Resources Department immediately. You may request an accommodation without fear of retaliation.

To assist you to understand the requirements for reasonable accommodations, an EXPLANATION OF REASONABLE ACCOMMODATIONS is attached.

➤ Summary - Mandatory Vaccinations

1. Can an employer Mandate Vaccinations?

- YES

2. Are there employee exceptions - who can be excluded from a mandated vaccination program?

- 1) Yes, Those employs that are not at risk (by class of employees & not Individual employees)
 - 1) Employees with qualifying disabilities
 - 2) Employees with sincerely held religious beliefs.

What employee Exemption documentation is required?

- ADA Accommodation - Requires Employee's HCP to identify medical / disability related conditions identifying reasons the employee cannot be vaccinated.
 - Employer is to conduct an individual assessment based on the disability / restrictions due to the disability (interactive process)
- Sincerely Held Religious Belief
 1. Documentation identifying the sincerely held religious belief upon which the employee relies upon to object to the vaccine;
 2. How or why the religious belief is negatively impacted by the vaccine

WHAT ABOUT THE ANTI-VAXXER?????

- No ADA Condition / No Sincerely Held Religious belief – Vaccine would be required as a condition of employment.

Before Q&A



HRCI/SHRM
certificate is in
the handout
section



Receive an email
tomorrow with
the certificate &
recording



Please
complete the
exit survey

Before Q&A



Receive an
email tomorrow
with the slides &
recording



Please
complete the
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