



June 2021

COVID-19 Vaccinations: Employer Guidance

With New York reopening and vaccinations widely available, we wanted to provide an update on the vaccine-related landscape for employers as set out by the EEOC, CDC, OSHA and New York State. After the CDC issued May 2021 guidance reducing the mask requirements for people who are fully vaccinated against COVID-19, the EEOC, OSHA and New York State all updated their guidance to employers.

In considering this guidance, it is important to note that COVID-19 vaccines currently only have emergency approval from the FDA. The EEOC guidance in particular includes a caveat that it is beyond their jurisdiction to discuss the legal implications of the Emergency Use Authorization. According to news reports, two of the three COVID-19 vaccines currently available in the U.S. have been submitted to the FDA for full approval. It is possible that requirements will change once full approval is granted.

<p>Can employers require that their employees be vaccinated for COVID-19?</p>	<p>Yes, with some caveats, according to the EEOC.</p> <p>The EEOC has stated that employers may require all employees <i>physically entering the workplace</i> to be vaccinated for COVID-19, subject to the reasonable accommodation provisions of Title VII and ADA for employees who do not get vaccinated due to disability or religion, and other EEO considerations, including concerns with disparate impact.</p> <p>Note that the EEOC guidance, which can be found here, specifically states that the EEOC can only comment on the permissibility of employer vaccine mandates under federal discrimination laws. Employer vaccine programs may be impacted by other federal, state or local regulations.</p>
<p>What are the reasonable accommodation exceptions?</p>	<p>Title VII and the ADA may require an employer to provide reasonable accommodations for employees who, because of a disability or a sincerely held religious belief, practice, or observance, do not get vaccinated, unless providing an accommodation would pose an undue hardship on the operation of the employer’s business. The EEOC provides</p>



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	additional detailed guidance here . Please contact us for more information.
What are the disparate impact considerations?	The EEOC states that employers that impose a vaccine mandate “should keep in mind that because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others, some employees may be more likely to be negatively impacted by a vaccination requirement.” The EEOC provides additional detailed guidance here . Please contact us for more information.
Can employers request that employees provide documentation from a doctor, pharmacy or other third-party to verify their vaccination status?	Yes, according to the EEOC. Employers may request documentation of vaccination status, but must maintain the confidentiality of this information and store it separately from the employee’s personnel file.
Can employers encourage employees and their family members to get vaccinated?	Yes, according to the EEOC. Employers may encourage employees and their family members to become vaccinated by providing them with information “to educate them about COVID-19 vaccines, raise awareness about the benefits of vaccination, and address common questions and concerns.”
Can employers incentivize employees to get vaccinated?	Yes, according to the EEOC. Employers may offer employees incentives to either: <ul style="list-style-type: none">- voluntarily provide documentation that they and their families have been vaccinated, or- voluntarily receive a vaccine administered by the employer (themselves or through a third party) as long as they are “not so substantial as to be coercive.” However, employers may not offer employees incentives for their family members to become vaccinated.



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<p>Can employers administer the vaccine to employees, either themselves or through a third party?</p>	<p>Yes, with some caveats, according to the EEOC.</p> <p>For mandatory vaccinations:</p> <ul style="list-style-type: none">- If employers are mandating that the COVID-19 vaccination be administered by the employer, they must “have a reasonable belief, based on objective evidence” that an unvaccinated person would pose a direct threat to the workplace, and must ensure that pre-screening questions are “job related and consistent with business necessity.” <p>For voluntary vaccinations:</p> <ul style="list-style-type: none">- If employers are providing vaccinations on a voluntary basis, they do not have to ensure that pre-screening questions are “job related and consistent with business necessity” as long as answering the questions is voluntary for the employee.- Employers may offer voluntary vaccinations only to certain groups of employees as long as they comply with federal employment nondiscrimination laws.- Employers may offer voluntary vaccinations to family members of employees.-
<p>Do NYS employers need to maintain restrictions such as masking and social distancing if their employees are fully vaccinated?</p>	<p>Under New York State’s current guidance, offices can either:</p> <ol style="list-style-type: none">1. Maintain the current masking and social distancing requirements, or2. Adhere to the new CDC guidance in which fully vaccinated individuals do not need to wear masks or distance, but unvaccinated individuals do. <p>Offices that choose the first option are no longer subject to capacity restrictions. Capacity is only limited by the space available to maintain the required 6 feet of social distance.</p> <p>Offices that choose the second option will need to differentiate between vaccinated and unvaccinated</p>



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	<p>individuals, and can do so either by requiring proof (paper form, digital application, or the State's Excelsior Pass) or by relying on an honor system of self-reporting.</p> <p>Offices may also apply the CDC guidance to a separate, designated part of their establishment rather than the entire establishment.</p> <p>These standards apply to businesses that do not congregate patrons and/or that operate below the State's social gathering limit of 250 indoors or 500 outdoors (e.g., retail, food services, offices). Different standards apply to businesses that operate above the State's social gathering limit.</p>
<p>Is there any guidance limiting the employer programs described above?</p>	<p>OSHA's current guidance states that employers should not distinguish between vaccinated and unvaccinated workers, and "workers who are vaccinated must continue to follow protective measures, such as wearing a face covering and remaining physically distant". OSHA's website reflects that they will be updating their guidance once their review of the new CDC guidance is complete. In the meantime, they have directed people to refer to the CDC guidance for information on measures appropriate to protect fully vaccinated workers.</p>

This alert is for general information purposes and should not be construed as legal advice. If you would like information about this alert, please contact one of the firm's attorneys:

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