



# Moving Past the Pandemic

Implementing Mandatory Vaccine Programs  
for Your Employees

**Best Practices**

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# Today's Topics

- ▶ COVID-19 Vaccination Overview
- ▶ To Mandate or Recommend?
- ▶ EEOC Guidance and Related Issues
- ▶ Third Party and Off-Site Workforce Issues
- ▶ Wage and Hour Issues
- ▶ Incentives to Vaccinate
- ▶ Impact of the Anti-Vax Movement
- ▶ Workplace Safety/Workers Compensation/Privacy Issues
- ▶ Employee Relations
- ▶ Practical Takeaways

# COVID -19 Vaccination Overview

# Key Issues

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## COVID-19 Vaccine

- ▶ The Available COVID-19 Vaccines
- ▶ Evolving Priorities for Vaccine Access
- ▶ For Employers - To Mandate or Recommend?

# Available COVID -19 Vaccines

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- ▶ The Emergency Use Authorization (“EUA”)
- ▶ Medical Issues Tied to Vaccines
- ▶ The Effectiveness of the Current Vaccines
- ▶ The FDA’s Continued Role

# Vaccine Access – California

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## Phase 1a

- Healthcare personnel
- Long-term care residents

## Phase 1c

- Persons 50-64
- Persons 16-49 with underlying health conditions
- Employees in:
  - Water & Wastewater
  - Defense
  - Energy
  - Chemical/Hazardous Materials
  - Communications/IT
  - Financial Services
  - Government Operations

## Phase 1b

- Persons 65+
- Employees in:
  - Education
  - Emergency Services
  - Food & Agriculture
  - Transportation
  - Industrial, Commercial, Residential, & Sheltering
  - Critical manufacturing
- Congregate settings with outbreak risk

## Phase 2

- Persons 16+, not in Phase 1

# Employer Involvement

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## Avenues

- ▶ Vaccine Administration Management System (VAMS)
- ▶ Point of Dispensing/Distribution (POD)
- ▶ State Immunization Provider Registration



# The Key Question: To Mandate or Recommend?



# EEOC Position on Vaccinations

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## December 16, 2020 Guidance

- ▶ Vaccinations are not a medical examination under the ADA.
- ▶ Vaccination does not have to be job related or consistent business necessity.
- ▶ Employers can mandate vaccines or request proof of vaccination.\*
- ▶ Employees can request to be excused based on disability, other medical reasons, or religious practices/religious beliefs.

\*Continue to be mindful of ADA issues if mandating vaccination.

# EEOC “Recommended” Vaccinations

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If a vaccination is offered to employees on a **voluntary basis**, the ADA requires that the decision to answer pre-screening disability-related questions must **also be** voluntary.

If the employee chooses not to answer questions, the employer **may decline** to administer the vaccine but **may not** retaliate against, intimidate, or threaten the employee for refusing to answer questions.

# EEOC “Mandatory” Vaccinations

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Mandatory vaccinations are **permissible** but care must be taken based on excluding an employee from the workforce who indicates that they cannot receive a COVID-19 vaccination due to a disability.

# EEOC “Mandatory” Vaccinations

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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 could not be eliminated or reduced by reasonable accommodation.”

# EEOC “Mandatory” Vaccinations

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## “Direct Threat”

- ▶ Duration of the risk;
- ▶ The nature and severity of the potential harm;
- ▶ The likelihood that the potential harm will occur;
- ▶ The imminence of the potential harm

# EEOC “Mandatory” Vaccinations

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## Obligation To Accommodate

If employer determines employee poses a direct threat, employer **cannot exclude** employee from the workplace unless there is no way to provide a **reasonable accommodation**.

# EEOC “Mandatory” Vaccinations

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## Assess Interplay with Other Rights

Employer needs to determine if other leaves/rights/policies apply:

- ▶ Remote work
- ▶ FFCRA
- ▶ FMLA/CFRA
- ▶ Employer leave of absence

# EEOC “Mandatory” Vaccinations

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**Lawful to  
Exclude**

If employee cannot be vaccinated for COVID-19 because of a disability and there is **no reasonable accommodation possible**, then it would be **lawful** for the employer to exclude the employee from the workplace.\*

\*This does not mean to automatically terminate the worker—consult your legal counsel!



# EEOC “Mandatory” Vaccinations

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## *Religious Accommodations*

If an employee indicates they are unable to receive a vaccination because of a sincerely held religious belief or practice, care must be taken before excluding the employee from the workforce.



# Third Party & Off -Site Workforce

# Third Party & Off -Site Workforce

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Can a customer/client request that employees provide proof of COVID-19 vaccination when on-site?

**YES**

# Wage & Hour Issues

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Is an employer required to pay an employee  
for time spent getting vaccinated?

**MAYBE**

# Incentive Programs

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## Employer incentive programs:

- ▶ Cash awards to employees can incentivize employees to engage in certain behaviors.
- ▶ A “wellness plan” is generally established.
- ▶ Programs are generally subject to EEOC regulations – most vaccine incentive programs are not.

# Impact of the Anti -Vax Movement

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**“Protected Concerted Activity”**



A group of workers protesting mandatory vaccination could be viewed as a **protected concerted activity** under the NLRA.

# OSHA Standards

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**Does the duty to provide a safe workplace include providing a COVID-19 vaccine?**



**To be determined!**

# Workers' Compensation

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**Do workers' compensation benefits reach injuries related to a mandatory COVID-19 vaccine?**



**Most Likely Yes**



# Privacy Issues

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Even though the EEOC does not consider a vaccine a “medical examination”, be mindful of issues related to the **privacy of medical information.**

# Employee Relations

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## *The Employee Perspective*

*Should you mandate that employees receive the vaccine?*

# Employee Relations

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**COVID Fatigue**

**Financial Insecurity**

**Political  
Polarization**

**Lasting Health  
Implications**

**Changed  
Family/Living  
Circumstances**

**Misinformation**

# Employee Relations

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Different categories of workers will be eligible at different times depending on:

**Location**

**Age**

**Nature of Work**

**Specific Job  
Responsibilities**

**Pre-Existing Health  
Conditions**

# Employee Relations

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## Engage with Your Employees

- ▶ Remember the EUA status of the vaccines – they are authorized but experimental.
- ▶ Focus on facts.
- ▶ Assume hesitation from employees.
- ▶ Consider obstacles in advance.

# Key Takeaways

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- ▶ Engage and **support** the public health effort.
- ▶ Assess how your workforce will **fit** into the phased vaccination plans.
- ▶ Determine **costs** associated with vaccinations, if any.
- ▶ Consider accounting for vaccination time as **hours worked**.
- ▶ Continue existing COVID-19 protocols and **prepare** for additional guidance.
- ▶ Develop positive, accurate and **fact-based** messaging.

# Employment Attorney

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At least **two** check-ins per year

2

**Experienced** team of attorneys

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Early **liability** assessment



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KEEP IN  
TOUCH



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Any Questions?