

# COVID-19 Vaccine & Compliance – Unraveling Legal Complexities

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# Overview: DOL & State OSHA Responses to COVID-19

- After issuing shifting/conflicting guidance during 2020, OSHA issued new guidance on 1/29/21, followed by a COVID-19 NEP and an OSHA C-19 enforcement plan on 3/12/21

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  - January 29<sup>th</sup> Employer Compliance Guidance: <https://www.osha.gov/coronavirus/safework>
  - NEP Link: <https://www.osha.gov/enforcement/directives/dir-2021-01cpl-03>
  - Enforcement Memorandum: <https://www.osha.gov/memos/2021-03-12/updated-interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>
- MSHA issued new guidance 3/21 as well, tracks with OSHA/CDC elements but includes unique recommendations for mining work environments: <https://www.msha.gov/protecting-miners>
- CalOSHA, MI-OSHA, OR-OSHA & Virginia OSHA have COVID ETS
  - Virginia **finalized permanent rule** on COVID-19 – effective 1/27/21
  - CalOSHA had ATD standard but now adopted ETS and working on additional rules and policy
  - OR-OSHA has proposed permanent COVID-rule to replace ETS (expiring 5/4)
  - MIOSHA adopted COVID ETS in October 2020 – in effect for 6 mo. (further action TBA)
- In total, 14+ states have adopted some form of worker safety protections in addition to separate executive orders requiring face masks in the workplace, which have been issued by some governors

# Overview: Vaccine Issues

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- No COVID-19 OSHA ETS currently requires the vaccine – but the US will need vaccination level between 70-90% to reach “herd immunity”
- Vaccine(s) have only emergency use FDA clearance, which complicates mandates for vaccines in most industries
- Laws implicated: OSHA, ADA, Title VII (religion, ethnicity), GINA, ADEA, NLRA
- CDC guidance on Vaccine Rollout: CDC is working on federal government distribution plan and will make recommendations on who gets the vaccine first
  - States will control ordering vaccines AND can implement their own distribution plans, which makes requires across multi-state operations complicated
- Issues with supply & wait time (wage/hour) – and whether worker can delay getting second shot on time
  - J&J “once & done” vaccine is game-changer

# Vaccine Basics

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- Vaccines work by prompting immune system to generate antibodies that then neutralize the virus by preventing it from attaching to cells – you cannot “catch” COVID from vaccine nor does it alter DNA
- Workers will still need to wear masks and SD where dictated in workplace and public because vaccinated individual may still be capable of spreading COVID to non-protected individuals
- Mutations of COVID-19 SO FAR do not seem to adversely impact efficacy of vaccine – but both shots are required to reach full 90%+ immunity from vaccine
  - Some immunity seen 10 days after first dose but no idea how long immunity will last at this time
- Two Emergency Use Authorizations granted: Pfizer and Moderna, which are not “mix and match”; and Johnson & Johnson “one-shot” vaccine which needs less stringent refrigeration
  - Controversy over Astra Zeneca vaccine

# Vaccine Basics

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- Possible side effects:
  - Mild flu-like symptoms such as fatigue and headache
  - Pain at administration site on arm
  - Anaphylaxis is rare but has been reported (early data showed 21 cases out of 2 mil vaccines)
  - Bells Palsy as possible complication
  - Some foreign data suggest higher adverse effects from vaccine in elderly (75+) including death within a few days, but most had preexisting significant health conditions
- In study of 3000+ adults aged 18-34 hospitalized with COVID, 20% required ICU care and 3% died
  - Long-COVID issues often occur among previously healthy workers, including the younger sectors
- Health conditions associated with COVID-19:
  - Heart failure
  - Kidney failure
  - Strokes
  - Irreparable lung damage
  - Severe neurological or cognitive disorders including memory loss, chronic fatigue

# Key HR Issues

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- Where will vaccinations be given – workplace, MD's office, pharmacies?
- On or off the clock – FLSA and union issues for O/T and sick leave
- Paid leave (or job preservation with unpaid leave) for workers with vaccine complications
- What about worker's compensation for those with serious vaccine complications?
- Employer questionnaires screening workers which could reveal confidential health info (ADA/GINA implications)
- Medical inquiries must be job-related and consistent with business necessity unless:
  - Vaccination and screening questions are voluntary (EE can refuse without retaliation)
  - EE received ER-required vaccine from third party that does not have a contract with the employer
  - Employers must keep any employee medical info obtained in course of vaccination program confidential

# Other Issues

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- Can employers “incentivize” getting the vaccine – and is this economic coercion (medical ethics issues)
- Use of social media by employer to encourage vaccines among remote workers
- Third party liability if administer vaccine to contractors/temps and they have adverse reaction
  - States are working on COVID liability protection bills for employers (but will vaccine be covered?)
- Worker’s comp implications: If employers impose vaccine mandate, they will likely need to pay for the vaccine, the time receiving it will be compensable work time, and medical complications from vaccine will be covered as worker compensable illnesses
- OSHA and EEOC (under President Trump) said that employer can mandate the vaccine, but those policies may be overturned in Biden administration – must monitor guidance and EO’s rigorously
- If employer mandates vaccine as term/condition of employment – CBA implications in union workplaces
  - Adding a new T/C of employment in open shop can still require some “consideration” (which again raises the medical ethics issue)

# What About Objections to Vaccinations?

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- 12/20: 55% of surveyed NY Firefighters said they would NOT get the COVID vaccine, acc'd to Firefighters Assn.
- 40% of LA County's frontline workers have reportedly declined the opportunity to take the vaccine (Forbes report)
- Chicago's Loretto Hospital CCO reported 40% of hospital staff said they would NOT get vaccinated as of 12/20
- Kaiser Family Foundation found 29% of healthcare workers were hesitant to receive the vaccine – citing concern about side effects and lack of faith in the government to ensure vaccines were safe
- In Sept 2020, Pew Research Group found 51% of US adults said they would “definitely or probably” get a COVID-19 vaccine – DOWN from 72% willing to get a vaccine in May 2020 poll
- Vaccine skepticism highest among Black Americans where <43% said they'd get the vaccine (*Tuskegee*)
  - Frontline workers are disproportionately Black & Hispanic, and those segments account for 65% of fatalities to date
  - POC are more than twice as likely to test positive as their white counterparts



# EEOC Guidance on Mandatory Vaccines

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- Policy issued 12/16/2020 (subject to change with new EEOC leadership):  
<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- Guidance addresses how vaccination interacts with ADA, Title VII and GINA
- Main thrust is mandatory vaccine programs are NOT PROHIBITED under federal employment laws so long as employees are permitted to seek valid disability-based or religious exemptions & requesting proof of vaccine is NOT a medical exam prohibited under ADA.
- EEOC currently says that if worker cannot be vaccinated because of disability/religious belief and there are no feasible reasonable accommodations available, employer may lawfully exclude worker from physical workplace
- Employer should avoid termination or other adverse actions before carefully evaluating whether worker may work remotely or has protected rights under OTHER employment laws or regulations at federal, state or local level (including state OSHA COVID ETS)
  - Don't forget about FMLA, which may require intermittent leave and could be triggered by new federal Executive Orders or emergency ETS – stay alert!

# EEOC Guidance on Vaccinations

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- Vaccinations are NOT considered to be “Medical Examinations” under the ADA
- Certain pre-screening questions may implicate ADA provisions
- To avoid being considered a medical exam, do NOT seek info about employee’s disability or current health conditions in the administration of a vaccine
- Any questions on pre-screening form must be “job-related and consistent with business necessity”:
  - If employer offers vaccination to employees on a voluntary basis, ADA requires that the employee’s decision to answer pre-screening, disability-related questions also must be voluntary
  - If employee chooses not to answer these questions, the employer may decline to administer the vaccine but may not retaliate against, intimidate, or threaten the employee for refusing to answer any questions.
- The ADA requires employers to keep any employee medical information obtained in the course of the vaccination program
- If worker received an employer-vaccination from third party that does not contract with employer, such as worker’s own health care provider or a pharmacy, ADA restrictions on disability-related inquiries would not apply to the third party questionnaires
- **REMEMBER**: Requesting receipt of proof of vaccine alone is not likely to implicate protected information, and so is not a disability-related inquiry under the ADA ... but questions about WHY a worker DID NOT get a vaccine might elicit info about a disability and then trigger ADA coverage

# Religious Belief/ADA Exemptions

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Can employers compel workers to take (flu) vaccine regardless of medical condition or religious beliefs?

- NO. Employee may get exemption under ADA based on disability that prevent them from taking vaccine
  - Triggers reasonable accommodation analysis under ADA and “direct threat to safety” affirmative defense assertion
  - Exposing other workers to an illness where any vaccine does not have 100% efficacy may be asserted but not certain
- Title VII of Civil Rights Act: once employer has notice of employee’s “sincerely held religious belief, practice, or observance” that prevents them from taking vaccine, employer must provide “reasonable accommodation unless it would impose undue hardship on employer (more than de minimis cost – lower standard than ADA)
- Neither OSHA nor MSHA have provided guidance on COVID-19 vaccinations in the workplace
  - COVID-19 ETS that will be required under new Executive Order could address this soon, however

# ADA & Direct Threat Defense

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- EEOC says that the ADA permits employers to implement a qualification standard (e.g. vaccination requirements) that includes a requirement that the individual shall not pose a direct threat to health or safety of individuals in workplace
- BUT ... if vaccine requirements excludes or tends to exclude individuals with disabilities, **employer must demonstrate** that unvaccinated worker would pose direct threat due to “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation”
- ***EEOC Guidance says unvaccinated employees are NOT automatically categorized as a direct threat – determination must be fact-intensive and worker-specific***
- Individualized assessment must include the following factors:
  - Duration of risk
  - Nature and severity of potential harm
  - Likelihood that potential harm will occur (triage – similar to state ETS VH/H/M/L risk classification system)
  - Imminence of potential harm
- If direct threat is found to be present, employer must still perform “reasonable accommodation” analysis

# Vaccinations & GINA

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- Genetic Information Non-Discrimination Act (GINA) is not implicated by the actual administration of the vaccine or requirement for proof of vaccine because it does not involve use of genetic information to make employment decisions – and does not involve acquisition or disclosure of workers’ genetic info
- Pre-vaccine screenings MAY implicate GINA by eliciting such information and in those cases employers may want to opt for proof of third-party vaccine rather than administering it onsite
- If employee is submitting info from their third-party health provider, warn them not to include any genetic information along with the proof of vaccine – then if it occurs will be considered “inadvertent” – not a GINA violation

# Labor Law & Union Implications

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- Employer decision to require some employee groups to be vaccinated as a condition of employment will likely require bargaining with labor organizations for represented workers
- EEOC guidance suggesting vaccines may be mandated does not address more restrictive terms under the NLRA – matters which affect T/C of employment are mandatory subjects of bargaining
- Employer may need to defend against ULP charge or a request for legal injunctive relief by a union to prevent employer's implementation of a unilateral vaccine mandate
- Time to begin negotiations is YESTERDAY – vaccine rollout has begun in most states for 1A/1B
- Prepare to negotiate related issues – including right to refuse vaccination under the Food, Drug & Cosmetic Act (statutory right to refuse vaccine but no process for accommodating workers who exercise such right) - as well as employer access to worker vaccine records and union access to same records
  - ✓ **Good practice is to get workers to sign declination of vaccine if offered to workforce at worksite**
- Do NOT summarily terminate such workers – consider whether they can consider to (safely) work but this is NOT an ADA accommodation process so do not blur the lines
  - Accommodations for non-vaccinated workers could include telework, enhanced PPE such as PAPRs, leaves of paid/unpaid absence

# Workers' Comp Implications

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- Employer must balance benefits from (mostly) vaccinated workforce against risks of potential workers' compensation benefits if worker experiences serious side effects
- If employer mandates vaccine, it is likely employer will pay for it, on compensable work time, and so medical complications from mandatory vaccine are going to fall under most WC systems
- Even if employer does not mandate vaccine but encourages it, workers who suffer vaccine-related injuries may fall under compensability in certain states such as California
- While mandatory vaccine programs may cause an uptick in vaccine-related claims, this will be later offset by reduction in claims for work-related COVID transmission in states that otherwise have a presumption of compensability (Calif, Illinois etc)
- If (revised) federal policy encourages vaccination and employer's policy is consistent with guidelines in effect at the time, this is helpful in rebutting claims
- If employers mandate vaccinations, must have process to track which workers received shot #1 and that booster is given at appropriate time
- Offering workers a few days of PTO to recover from vaccinations may reduce # of workers comp claims for vaccine related complications

# Employee Vaccine Incentive Programs

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- OSHA: in Obama admin, position was that incentive programs that deprive a worker from getting a benefit (prize, bonus, gift card etc.) because of having an injury OR exercising ANY rights under Section 11(c) of the OSH Act were a violation of whistleblower protections
- OSHA can issue citation under 29 CFR 1904.36 for any retaliation against a worker for protected activity – including refusal of assignments that worker believes pose a risk to health/safety – civil penalties of up to \$136,532 per affected worker, plus “make whole” relief for worker as needed
- Where will vaccines – which CAN cause health complications in some workers – fall in this analysis?
- What about the medical ethics of “economic coercion” of \$\$ vulnerable low wage retail or frontline workers?
- Some Grocery Chains have announced “incentives” to offer workers compensation for getting vaccinated
  - Aldi is offering workers 2 hours with pay for each of the two vaccine doses, and says workers will not lose pay for missed hours from work and that it will help pay for the shots
  - Trader Joe’s and Dollar General are offering workers extra hourly wages to get the COVID-19 vaccine (but DG will not force workers to get vaccinated)
  - Online delivery company Instacart is offering a \$25 stipend for eligible workers and contractors



# Solutions

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- Employer can rebut any presumption of compensability by showing compliance with public health guidelines in place at the time of exposure,
- If federal guidance encourages vaccines, and employer's policy is consistent with those guidelines, that is helpful evidence
- Employers may consider different policies based on job duties and anticipated COVID exposure (triage using state ETS classifications)
- Employers who mandate or encourage vaccinations also need process in place for tracking which workers have been inoculated (initial/booster), or if they signed waiver for health/religious reasons
- Provide PTO for workers who get the shot for them to recover
- Have telemedicine options available for workers who have adverse reactions

# Solutions

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- Where feasible, have third party provider (e.g., pharmacy) administer the vaccine and coordinate verification process
- Evaluate industry conditions and practices (and culture!) to determine whether to implement mandatory vaccination program
- Consider what specific protections for workers may be required under unique state/municipal employment, OSHA or COVID-specific statutes and regulations – one-size-fits-all may not work!
- Stay abreast of changing guidance from EEOC, NLRB, OSHA as all have new political leadership
- Watch for additional COVID-19 Executive Orders impacting vaccine administration and paid leave requirements
- Consider that under new EO, workers who reasonably refuse a hazardous job will be entitled to unemployment insurance compensation and may also have rights under Section 11(c) of OSH Act (and Section 105(c) of Mine Act)

# Final Thoughts

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- When implementing vaccine mandates, employers must recognize they may lose some of their human resources due to vaccine resistance of various types, which can slow down production or create bad PR
- If you choose not to mandate vaccinations, remember OSHA imposes a “General Duty” to provide a workplace free from recognized hazards that can cause death or serious injury - follow OSHA/CDC guidance for your sector
- Do an individualized assessment as to whether the ADA “Direct Threat to Safety” affirmative defense applies
- Be mindful of vaccine availability and cost – don’t impose mandates that employees cannot satisfy
- Remember that Pregnancy is not a “disability” under the ADA but rules that are discriminatory against women who are, or may become, pregnant can violate Title VII and the Pregnancy Nondiscrimination Act
- Workplaces that will benefit most from mandatory vaccination programs are those where:
  - Work cannot feasibly be done remotely or through telework,
  - Workers are “public-facing” such as in retail establishments, sales positions, or restaurants
  - Workers interact with vulnerable populations (hospitals, senior care, congregate living)
  - Workers work where social distancing of 6+ feet is not feasible and barrier or other isolating methods cannot be maintained
  - Workers must work with others in confined areas (e.g., tunneling) where use of face masks may not be feasible



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# Questions???

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