

# COMPLIANCE UPDATE



## **CORONAVIRUS (COVID-19): VACCINATION OPTIONS AND RESPONSIBILITIES**

Now that vaccinations for COVID-19 are available and being rolled out, employers are confronted with how, or if, to address the vaccination of their employees. As with everything relating to COVID-19, many of these issues are complex and require consideration of various factors that affect the particular workplace.

For example, federal guidance provides that employers may generally require employees to get vaccinated, subject to certain exceptions. However, a state-specific distribution plan may affect an employer's plan to mandate or encourage its employees to get vaccinated against COVID-19. Employers should understand the various issues with which they may have to grapple should they choose to implement a COVID-19 vaccination plan in their workplace.

Below are several issues that employers may encounter as they determine whether to address COVID-19 vaccinations.

### **Factors to Consider**

To determine its position on the vaccination of its employees, an employer should consider several factors. For employers operating in more than one state, this analysis may be complicated by additional considerations, including any differences in state guidance and restrictions.

### **Federal, State and Local Guidance and Restrictions**

Initially, an employer should consult legal authority and guidance from federal, state and local agencies on issues relating to vaccinations and the workplace. This information will guide employers as they look to determine what they may and may not do when it comes to addressing the vaccination of their employees.

For instance, employers should be mindful that the federal Equal Employment Opportunity Commission (EEOC) has issued guidance indicating that employers may mandate COVID-19 vaccines. That being said, the EEOC made it clear that employers must provide reasonable accommodations to employees who decline to get vaccinated due to a disability under the Americans with Disabilities Act (ADA) or a sincerely held religious belief under Title VII of the Civil Rights Act (Title VII).

In addition, the General Duty Clause under the Occupational Safety and Health Act (OSH Act) requires employers to rid the workplace of all known hazards. The Occupational Safety and Health Administration (OSHA) has recognized COVID-19 as a known hazard, so employers may determine that a vaccination mandate is an appropriate measure to protect against the virus.

Note also that several federal laws prohibit retaliation against employees who object to or refuse to get vaccinations based on medical concerns (under the ADA), health and safety concerns (under the OSH Act) and religious grounds (under Title VII).

Also be mindful that the federal National Labor Relations Act (NLRA) provides certain rights and protections to employees in unionized *and* nonunionized workplaces. Under Section 7 of the NLRA, employees have the right to engage in "concerted activities" for the purpose of "mutual aid and protection." This NLRA provision may protect the

rights of employees who engage in concerted activities about a vaccination policy, including protesting or complaining to management about a mandatory vaccination policy; organizing or otherwise working on office communications or flyers among co-workers concerning a vaccination mandate; or simply discussing the vaccine with co-workers.

Individual states may also have laws relating to an employer's ability to require or recommend vaccinations for its workforce. For example, Oregon prohibits an employer from requiring an employee to get vaccinated as a condition of employment unless that immunization is required by federal or state law, rule or regulation. Meanwhile, a number of states require certain health care personnel to get particular vaccinations, such as those for influenza and Hepatitis B. Some states also have laws that limit the reasons an employee may present for refusing a vaccination, e.g., medical or religious/personal belief. While there currently are no state laws or regulations addressing an employer's right to specifically mandate COVID-19 vaccines, employers should expect states, as well as municipalities, to take action to either ban or require vaccine mandates.

Importantly, employers must also consult their state's vaccine distribution plan. Each state has its own distribution plan establishing the order in which groups of individuals become eligible to receive the COVID vaccine. Employers will have to determine when their mandate, if any, would be triggered for each employee and how long that employee will have to get vaccinated once they become eligible. In addition, monitor the state's vaccine availability, as it also affects an employee's ability to get vaccinated.

### **Nature of Business and Industry**

Consider the nature of the business and industry when deciding how (or whether) to address the vaccination of employees. For example, employers in the health care field and other high-risk settings may determine that a vaccination mandate is appropriate given the increased chance of exposure to COVID-19. Other employers with essential workers (e.g., those in transportation and childcare) and those with frequent contact with the public (e.g., retail) may also decide that a policy mandating or encouraging vaccination is a proper course to take.

That being said, an employer that requires its employees to receive the COVID vaccine should ensure its rationale is job-related and consistent with business necessity. Employers should also make sure that any mandate is applied consistently across the workforce, and any exceptions and accommodations are handled in a legally compliant and nondiscriminatory manner.

### **Past Experience With Health and Safety Protocols**

Whether employees have complied with COVID-related health and safety measures in the past may give employers a good indication of how they may react to a policy mandating or encouraging vaccinations. For example, if an employee resisted (and continues to resist) a face-covering requirement, they may likely object to a workplace policy that requires them to be vaccinated against COVID-19.

An employee's noncompliance or raised objections to a safety measure may be tied to a number of reasons, e.g., lack of understanding of COVID-19 risks; personal, social or political beliefs. Perhaps several employees do not believe in the health risks associated with COVID-19 or do not understand the dangers in transmitting the virus. Regardless of the reason, expect a similar reaction if implementing a vaccination requirement. In a situation where a large segment of the workforce resisted the implementation of COVID safety measures, consider a policy encouraging vaccines in order to eliminate the need to discipline or terminate those employees for noncompliance with a mandate.

## **Onsite/Remote Employees**

Take into account whether employees are working remotely and for how long. A vaccination policy requiring employees to get vaccinated will likely be met with resistance if most (or all) employees are working remotely and have no interaction with each other or the public.

## **NLRA/Unions**

### **Unionized Employers**

When employees are represented by a union, the first step the employer needs to take before establishing any policy or plan regarding mandating or administering a COVID-19 vaccination is to review the following provisions of its collective bargaining agreement (CBA):

- Management rights;
- Health and safety;
- Other applicable provisions; and
- Pertinent past practices that are in effect.

In some workplaces, a CBA may already address vaccination requirements. For example, hospitals and health care providers regularly require employees who work closely with patients to receive an annual influenza vaccine.

If there is no provision clearly establishing the right of management to unilaterally require vaccinations or set policy in that area, a unionized employer may be required under the NLRA or by the terms of the CBA to negotiate with the union before issuing a policy. It is important to carefully review the terms of the CBA to determine the extent of an employer's duty to bargain over implementing a vaccine program.

If bargaining is required, the negotiations with the union should happen before announcing a vaccination policy or program.

In the event that OSHA or a state agency issues regulations requiring employers to ensure employees are vaccinated, such a rule would likely preempt a more permissive CBA provision. For example, in *United Steelworkers of America v. Marshall* (+ 647 F.2d 1189, 1236 (D.C. Cir. 1980)), the court held that a duty to bargain with unions over safety and health matters does not excuse employers from complying with OSHA safety standards.

Even where a CBA permits an employer to unilaterally implement a vaccination policy, unions would likely seek to bargain over related issues, such as how a program would be administered, discipline, insurance coverage or company co-payments, or safety concerns.

### **Nonunionized Employers**

Nonunionized employers also must be aware of the how vaccinations are addressed in the workplace. Even without a union representing them, employees have rights under Section 7 of the NLRA to engage in concerted activities for the purpose of mutual aid or protection. *See* *Objections and Refusals to Get Vaccinated*.

In addition, a nonunion employer should consider how a union may attempt to use the issue of a COVID-19 vaccination program (either for or against) as an opportunity to organize the workplace. If employees have the perception that the employer is ignoring their concerns or not answering their questions on this issue, they may see a union as an ally that can help.

As with many of the workplace issues that have risen during the COVID-19 pandemic, providing frequent and transparent communication can help to prevent workplace vaccination policies and related issues from being used in an organizing campaign or to limit such a campaign's effectiveness.

### **Operations in Multiple States**

As addressed above, employers with operations in multiple states have to take careful note of differences in state guidance, laws and vaccine-distribution plans. Some states also have specific vaccination requirements for certain industries. Be sure to review state and local law to ensure the vaccination policy complies with the laws of applicable jurisdictions.

On another note, employers with operations in several states may have workforces with different social and political opinions about COVID-19 and related safety and health measures. If a workforce in one state raised objections or was noncompliant with certain safety measures because of their stance on COVID-19, consider whether a mandate is indeed necessary. However, if an employer chooses to have worksite-specific policies, it should have a business justification for making such a distinction.

### **Vaccination Policies**

Employers that wish to take a position on the vaccination of their employees should adopt a policy to communicate and enforce their stance. Specifically, employers may implement one of the following policies:

- Mandatory;
- Voluntary;
- Hybrid; and
- No policy.

Each policy has advantages and disadvantages that should be considered when determining how to approach COVID-19 vaccinations in the workplace.

### **Mandatory Policy**

An employer may consider developing and implementing a mandatory COVID-19 vaccination policy. Under the current guidance issued by the EEOC, a COVID-19 vaccine mandate is permissible as long as it addresses certain issues, including a procedure to handle requests for an exemption and/or a reasonable accommodation based on a disability or sincerely held religious belief. The policy should set forth the right of employees to request such an accommodation as well as the fact that an accommodation may not be provided if it poses an undue hardship on the employer.

Ensure that such a mandate is job-related and consistent with business necessity. This may largely depend on the industry and the risk of transmission and infection in the workplace. For example, employers in the health care, manufacturing and retail industries may argue that such a mandate is necessary to protect their employees and the public. Accordingly, employers with employees who are at risk for infection or who pose a risk to others will have more of a business justification for a vaccination mandate. Conduct an individualized assessment of the workplace, including potential risk of transmission and alternatives to the vaccination, to determine whether a vaccination mandate is necessary.

In addition, determine whether there are any state or local prohibitions on requiring that employees be vaccinated. While Oregon may currently be the only state that prohibits an employer from requiring an employee to get

vaccinated as a condition of employment, it would not be surprising if other states or localities enact their own laws in response to issues raised by the COVID-19 vaccines.

As with any workplace mandate, consider the consequences for employees who do not comply. How likely is it that the workforce will comply with a vaccination mandate? Employees may have various reasons (other than a disability or religious belief) for objecting to getting the COVID-19 vaccine. For example, an employee may have concerns about the quick development of the vaccine or may oppose it based on their personal beliefs about the virus itself. Regardless of the reason, ensure that any adverse action taken against those who do not comply with the mandate is consistent across the workforce. Implementing a mandatory vaccination policy in a piecemeal fashion could give rise to claims of discrimination. If faced with the possibility of terminating a large segment for refusing to receive the COVID-19 vaccination, consider instead a policy encouraging vaccination.

### **Voluntary Policy**

As an alternative to a vaccination mandate, consider a policy that makes vaccination against COVID-19 voluntary. This policy would encourage employees to receive the COVID-19 vaccination as well as educate them about the benefits and protections associated with the vaccine. A policy that encourages vaccination by setting out facts based in science, law and public health guidance will strengthen the position of an employer that is unable (or unwilling) to implement a vaccination mandate but still wishes to protect the health and safety of its employees.

A voluntary policy will also be easier to implement in a workplace where resistance to a vaccination mandate is likely. For example, rather than terminating or otherwise disciplining an employee who does not get vaccinated, an employer may require them under the policy to comply with other safety measures, e.g., wear a face covering or work remotely, if possible. A voluntary policy would help an employer avoid losing a number of its employees who fail to comply, thereby securing the productivity and continuity of the organization.

### **Hybrid Policy**

Depending on the industry or type of workplace, an employer may consider a hybrid policy that would require one segment of its workforce to get the COVID-19 vaccine while making it voluntary for others. For instance, an employer may require employees who have close contact with the public to get vaccinated against COVID-19 while making it voluntary for employees working in administrative offices in a separate building.

If considering a hybrid policy, have a legitimate business reason for making a distinction between the different groups of employees. In light of the risk of claims of discrimination and unequal treatment by implementing and enforcing this type of policy, perhaps consider instead a voluntary policy that strongly encourages all employees to get vaccinated against COVID-19.

### **No Policy**

Silence can be as clear and powerful as any written policy. An employer's decision not to have a COVID-19 vaccination policy conveys to employees that it does not want to take a stand on the topic. While an employer may think that this may be the easy way out since it eliminates the need to address issues relating to enforcement, accommodations and tracking, the reality is that the absence of a policy may expose the employer to allegations that it failed to take steps to protect the health and safety of its employees.

### **What to Include**

#### **Rationale**

A COVID-19 vaccination policy should state the employer's position, whether it is requiring employees to get the vaccine or encouraging them to do so. In addition, a mandatory and hybrid policy should detail the reason(s) a

vaccination mandate is job-related and consistent with business necessity, e.g., protecting employees with direct contact with patients.

Provide support for the position taken and base it in fact. For example, explain how the policy follows current public health guidance and/or complies with state or local law. Communicating the reasons for implementing the policy may preemptively answer and assuage some questions and concerns. It also conveys that the employer is seeking to protect the health and safety of its employees, as well as their families. Also, by providing the rationale for a particular position, it would prove difficult for employees to feign ignorance or put forth a reason for not complying.

### **Coverage**

Explicitly state who is covered under the policy. For example, does the policy cover all employees? Those qualified as essential workers by state or local authorities? Employees with direct contact with the public? Be specific about who is covered and why. Also, if certain employees are excluded from the policy, explain the reasons for why they are not covered.

Additionally, consult the state vaccination distribution plan(s), as it will affect when coverage for employees is "triggered." This is especially important for mandatory and hybrid policies. The timeline and descriptions of each group as outlined by the state plan should be addressed in the policy to inform employees when they become eligible for the vaccine and, therefore, covered by the policy.

If there are multiple policies covering multiple workforces, be sure to also identify which policy covers which workplace. Each policy should also reflect the eligibility requirements for the particular state vaccination distribution plan.

If there are employees working remotely, address how/if they are covered under a vaccination policy. If they are excluded from a mandatory vaccination policy, ensure that the basis for the exclusion is detailed in the policy, e.g., no contact with the public or fellow employees.

### **Proof and Tracking of Employee Vaccinations**

For mandatory and hybrid policies, address how employees will prove that they have received a COVID-19 vaccination. According to EEOC guidance, requesting proof that the employee has been vaccinated is permissible under the ADA, as it is not likely to elicit information about a disability and therefore is not a disability-related inquiry. However, subsequent questions may run the risk of eliciting information about a disability and would be subject to the pertinent ADA standard that they be "job-related and consistent with business necessity."

Be sure to address how employees are to submit proof of vaccination. Include a contact name and details (e.g., mailing address, email address, fax number) for the person/department responsible for tracking employees' vaccinations. Also, address:

- Whether employees are to submit proof after each dose or after they have been fully vaccinated;
- When proof must be submitted based on the state vaccination distribution plan and the employee's eligibility to receive the vaccine; and
- Whom to contact with any questions.

It is also important to state that proof of an employee's vaccination will be kept confidential in accordance with the ADA.

**Accommodation/Exemption Procedure**

All vaccination policies must state an employee's right to request an accommodation or exemption based on a disability under the ADA or a sincerely held religious belief under Title VII. Address how the employer will engage in the interactive process to determine:

- If a reasonable accommodation may be provided; and
- If there is an undue hardship for the employer, under either the ADA or Title VII;

It is also important to specify:

- Whom to contact to request a reasonable accommodation, e.g., Human Resources;
- How to submit the request, e.g., mailing or email address;
- Where to access any forms that must be completed; and
- Whom to contact with any questions or concerns.

The policy should also address that an employee may request a reasonable accommodation or exemption without fear of retaliation.

**Distribution of Vaccines**

Some employers may choose to distribute vaccines on site while others would prefer to refer employees to third-party sites, such as a pharmacy or health care provider. Regardless of the approach taken, consider addressing this in the policy. However, it is important to note that there are a litany of challenges to distributing and administering COVID-19 vaccines, including cold-storage requirements, personal protective equipment (PPE) and medical training for those who administer the vaccines. Consider which distribution plan, if any, is appropriate and feasible.

**Wage and Hour Issues**

A policy, regardless of whether it mandates or encourages vaccination, should address compensation (or lack thereof) and employee expenses associated with an employee's vaccination. Be transparent on whether employees will be compensated for the time spent getting vaccinated as well as reimbursement of expenses. In addition to the federal Fair Labor and Standards Act (FLSA), state and local law may apply, so ensure that the policy language and compensation practices comply.

**Noncompliance**

As with any workplace policy, it is important to address actions taken for noncompliance, especially given the likelihood that employees may object to or refuse the vaccine. The fact that disciplinary measures may be taken against an employee who violates a vaccination mandate should be communicated to all employees at the time the policy is implemented. This will put everyone on notice that noncompliance will not be tolerated.

**Distribution of Policy**

Once a policy is prepared, distribute it to all employees covered under the policy, either electronically or by printed copy. Consider also posting the policy on an intranet site and/or in places accessible to employees, e.g., break room. However, if employees do not have access to a computer, distribute the policy by other means, e.g., by mail.

Distribution of the policy will serve as notice to employees of the employer's position on COVID-19 vaccinations. It is good practice to have employees acknowledge that they have received a copy of the policy.

**Accommodation and Discrimination Issues**

The EEOC updated and expanded its technical assistance publication (Section K) to include guidance for employers on the administration of the COVID-19 vaccine.

**Medical Examinations and Disability-Related Inquiries**

The EEOC provides that the administration of the COVID-19 vaccine to an employee by an employer is not considered a medical examination under the ADA because they are not seeking information about an individual's impairments or current health status.

However, an employer (or a third party with whom the employer contracts to administer the vaccine) that asks any prescreening medical questions of its employees must show that these questions are job-related and consistent with business necessity. In order to demonstrate that the questions meet this standard, an employer needs to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and does not receive the vaccination will pose a direct threat to the health and safety of themselves or others.

However, the EEOC provided two scenarios in which an employer may ask disability-related screening questions without needing to satisfy the job-related and consistent with business necessity standard:

1. The employer offers the vaccine to employees on a voluntary basis, and an employee's decision to respond to the questions is also voluntary; or
2. An employee receives an employer-required vaccination from a third party that does not have a contract with the employer (e.g., pharmacy or other health care provider).

In addition, it is not a disability-related inquiry for an employer to ask its employees to show proof of receipt of a COVID-19 vaccination. However, if an employer seeks information from the employee, such as questioning why they did not receive the vaccine, it may rise to a medical inquiry under the ADA and would be subject to the job-related and consistent with business necessity standard.

Employers need to keep in mind that they must keep confidential any medical information obtained through their vaccines program.

**Disability-Related Accommodations**

The ADA allows an employer to have a qualification standard that requires that an individual not pose a direct threat to their own or others' health or safety. However, it does not permit an employer to exclude an employee from the workplace or terminate an employee solely because the employee cannot be vaccinated due to a disability. An employer may only exclude the employee from physically entering the workplace or take certain actions if the unvaccinated employee poses a direct threat or a significant risk of substantial harm to their own health or others' that cannot be eliminated or reduced by a reasonable accommodation.

Employers should conduct an individualized assessment of the following factors in determining whether a direct threat exists:

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



Managers and supervisors should be aware of how to communicate with an employee who advises the employer that they have a medical condition that prevents them from receiving the COVID-19 vaccine. Once they become aware, employers must engage in the interactive process with the employee and consider whether there are any reasonable accommodations that would either eliminate or reduce the risk so that the employee does not pose a direct threat.

This may include taking the following steps:

- Obtaining documentation about the employee's disability; and
- Considering accommodation options in light of the employee's position, such as allowing the employee to telework.

Also, understand that an employer may not be required to provide an accommodation if doing so would create an undue hardship (i.e., significant expense or difficulty to the employer's businesses operations under current circumstances). An employer must assess each accommodation request based on the facts and circumstances as well as the particular job and workplace. The EEOC has acknowledged the following may be relevant considerations when conducting the undue hardship analysis with respect to the COVID-19 vaccine:

- The number of employees who have already received the COVID-19 vaccine; and
- The amount of contact with others, whose vaccination status could be unknown.

The EEOC further provides that employers may rely on Centers for Disease Control and Prevention (CDC) recommendations when determining whether an accommodation that would not pose an undue hardship is available.

Be mindful that it is unlawful to disclose that an employee is receiving an accommodation or to retaliate against an employee for requesting an accommodation.

An employer may only exclude an employee if the employer concludes that by being unvaccinated, the employee poses a direct threat, but this does not mean the employer may automatically terminate the worker. Before taking any actions, determine whether the employee is protected under any EEO laws or other federal, state and local authorities. This is the same analysis as when considering physically excluding employees from a worksite due to a current COVID-19 diagnosis or symptoms. Keep in mind that some workers may be entitled to telework or be eligible to take leave under federal, state or local law or under an employer's policies.

### **Religious Accommodation**

If an employee indicates that they are unable to receive a COVID-19 vaccination because of a sincerely held religious belief, observance or practice, the employer must provide a reasonable accommodation. An accommodation is not reasonable if it poses an undue hardship under Title VII of the Civil Rights Act, which courts have defined as more than a *de minimis* cost or burden. Note that the threshold for undue hardship under Title VII is lower than that under the ADA.

Factors relevant to evaluating whether an accommodation would pose an undue hardship include:

- The type of workplace;
- The nature of the employee's duties;
- The cost of the accommodation in relation to the size and operating costs of the employer; and
- The number of employees who would need a particular accommodation.

Costs to be considered include not only direct monetary costs, but also the burden on the conduct of the employer's business.

An individual seeking a religious accommodation must make the employer aware of both the need for the accommodation and that it is being requested for religious reasons. If there is no feasible reasonable accommodation available, and an employee cannot receive a COVID-19 vaccine because of a sincerely held religious belief, an employer may exclude the employee from the workplace. As with a disability, this does not mean the employer may automatically terminate the worker. If the employee's position can be performed remotely, the employee may be entitled to telework.

*Religious belief* is defined broadly under Title VII and includes not only traditional organized religions but also religious beliefs that are new, uncommon, not part of a formal church or sect, only subscribed to by a small number of people, or that seem illogical or unreasonable to others. An employee's belief or practice can meet the definition of "religious" under Title VII even if the employee is affiliated with a religious group that does not espouse or recognize that belief or practice, or if few or no other people adhere to it. Title VII also protects individuals who are discriminated against or need accommodation because they profess no religious beliefs.

In general, the EEOC advises employers to assume that an employee's request for a religious accommodation is based on a sincerely held religious belief. However, if an employer has an objective basis for questioning either the religious nature or the sincerity of a belief, practice or observance that an employee invokes as a reason preventing them from receiving a COVID-19 vaccination, the employer may make a limited inquiry into the facts and circumstances of the employee's claim that the belief or practice is religious, sincerely held and gives rise to the inability to receive the vaccine.

Whether a practice is religious depends on the employee's motivation, and the same practice can be engaged in by one individual for religious reasons and by another person for reasons that are not religious as defined by Title VII. Social, political or economic philosophies, as well as mere personal preferences, are not protected as religious beliefs under Title VII.

Factors that might undermine an employee's claim of a sincere religious belief include whether:

- The employee has behaved in a manner markedly inconsistent with the claimed religious belief;
- The accommodation sought is a desirable benefit likely to be sought for unprotected reasons;
- The timing of the request renders it suspect; and
- The employer otherwise has reason to believe the accommodation is not being sought for religious reasons.

## **GINA**

Title II of the Genetic Information Nondiscrimination Act (GINA) prohibits an employer from using genetic information to make decisions related to the terms, conditions and privileges of employment and from acquiring or disclosing genetic information in most circumstances. Accordingly, an employer or a doctor working for an employer is prohibited from asking questions about the genetic information of an employee or an employee's family members.

According to the EEOC, merely administering a COVID-19 vaccine to employees or requiring employees to provide proof of COVID-19 vaccination does not implicate Title II of GINA because it does not involve the use of genetic information to make employment decisions or the acquisition or disclosure of genetic information. This is true regardless of whether the vaccine uses messenger RNA (mRNA) technology.

However, GINA prohibits employers and doctors working for them from asking pre-vaccination medical screening questions that may elicit genetic information (such as family medical history). The definition of *genetic information* under GINA includes:

- Information about an individual's genetic tests;
- Information about a family member's genetic tests;
- Information about the manifestation of disease or disorder in a family member (i.e., family medical history);
- Information about requests for or receipt of genetic services or the participation in clinical research that includes genetic services by an individual or the individual's family member; and
- Genetic information about a fetus carried by an individual or a family member or about an embryo legally held by an individual or a family member using assisted reproductive technology.

If answers to pre-vaccination medical screening questions are likely to elicit genetic information, employers that require COVID-19 vaccination can avoid violating GINA by asking employees to provide proof of vaccination rather than administering the vaccine themselves. GINA does not prohibit an employee's own health care provider from asking questions about genetic information. In this situation, employers should warn employees not to provide genetic information as part of the proof of vaccination. The EEOC has stated that as long as an appropriate warning is provided, any genetic information the employer receives in response to a request for proof of COVID-19 vaccination will be considered inadvertent and will not violate GINA.

The following language is not mandatory but may be used in a notice provided to employees to warn them against including genetic information with proof of vaccination:

"The Genetic Information Nondiscrimination Act of 2008 (GINA) prohibits employers and other entities covered by GINA Title II from requesting or requiring genetic information of an individual or family member of the individual, except as specifically allowed by this law. To comply with this law, we are asking that you not provide any genetic information when responding to this request for medical information. 'Genetic information' as defined by GINA, includes an individual's family medical history, the results of an individual's or family member's genetic tests, the fact that an individual or an individual's family member sought or received genetic services, and genetic information of a fetus carried by an individual or an individual's family member or an embryo lawfully held by an individual or family member receiving assistive reproductive services."

### **Pregnant Employees**

Both the ADA and the Pregnancy Discrimination Act (PDA) provide protections to pregnant employees. Under the PDA, employees affected by pregnancy, childbirth and related medical conditions must be treated the same as other employees who are similar in their ability or inability to work. Certain pregnancy-related medical conditions may also qualify as disabilities under the ADA and be entitled to reasonable accommodations.

If an employer requires the COVID-19 vaccination and an employee expresses an inability to receive the vaccine because of pregnancy or a pregnancy-related medical condition, the employer should consider reasonable accommodations in the same way it would do so for an employee unable to receive the vaccine for another reason related to a disability. A pregnant employee may be entitled to job modifications, including remote work, changes to work schedules or assignments, or a leave of absence to the extent that these modifications would be provided for other employees who are similar in their ability or inability to work.

However, an employer cannot require pregnant employees to take more stringent precautions against COVID-19 than other employees or exclude a pregnant employee from the workplace out of concern for the health of the employee or the fetus. This applies to the employer's approach to vaccinations as well. For example, if an employer encourages but does not require its employees to receive the COVID-19 vaccine, it cannot require the vaccine for pregnant employees only.

### **Privacy Concerns**

Any workplace policies and procedures that affect employee privacy concerns should comply with all applicable laws, including provisions in state constitutions or statutes, or remedies available to employees through court claims (such as invasion of privacy tort claims).

Invasion-of-privacy claims relate to the publication of private, embarrassing information about the employee, or intrusion into the employee's personal affairs. When defending against these claims, an employer must show how its requests relating to an employee's vaccination status fall within the public interest and how the activities relate to legitimate business interests. A privacy challenge in state court regarding a voluntary vaccination program, as opposed to a mandatory one, would be more difficult for an employer to prove.

Some states, like California, require that an employer provide an employee with specific information regarding any personal information that will be collected and the business purpose for collecting such information.

Employers should consider:

- Appointing a centralized person or team to process information regarding vaccinations, including any objections (whether the objections are personal, religious or related to a disability);
- Limiting the sharing of personally identifiable information regarding vaccinations to those with a legitimate need to know;
- Ensuring the safe and secure storage of information related to vaccinations (e.g., vaccination forms or cards; reasonable accommodation requests) and keeping related records in accordance with applicable record retention policies and laws (e.g., ADA, the OSH Act); and
- Documenting the business reasons for any actions taken.

Additional privacy protections may be the subject of legislation in upcoming terms, so employers should remain vigilant of evolving compliance requirements in this area.

### **Employee Leave and Time Off Considerations**

Keep in mind that employees may be entitled to protected leave to get vaccinated under federal, state and local leave laws. Similarly, an employee may be eligible for protected leave to recover from any potential adverse reaction to a COVID-19 vaccine. For instance, the paid sick leave laws in Arizona, California and Massachusetts allow eligible employees to take leave for preventative care and receiving a COVID-19 vaccine may qualify. Further, Maine and Nevada require covered employers to provide paid time off for *any* reason; no qualifying reasons are required for taking leave.

If an employer is required to provide leave, make sure eligible employees are aware that they make take paid leave to be vaccinated or to recover from illnesses related to receiving a vaccine. These communications should include:

- Which employees are eligible for leave;
- Qualifying reasons for leave (if applicable);
- Minimum leave increments;
- Accrual rates; and
- Employee notice requirements.

Also, the time an employee takes to receive a COVID-19 vaccine or time off as a result of an adverse reaction from receiving a vaccine may be covered under an employer-provided policy such as a paid time off policy or sick leave policy. Apply these policies fairly, consistently and equally to avoid any appearance of unfair treatment and to avoid possible discrimination claims. Further, managers and supervisors should remind employees of these policies.

Even if it is not legally required or financially feasible to provide paid time off, consider offering unpaid leave to employees for their time to receive a vaccine or for their recovery from an adverse reaction if the employer is not directing employees to receive the vaccine. This time may ultimately be less costly to employers than finding coverage for their employees who are diagnosed with COVID-19 or need to quarantine or isolate due to exposure.

As vaccines for COVID-19 continue to be rolled out, monitor legal developments that emerge as new leave laws may be passed and existing laws, including temporary leave laws may be amended.

### **Wage and Hour Issues**

Wage and hour issues could come into play with a vaccination program, including working time and expense reimbursement.

### **Working Time**

The federal Fair Labor Standards Act (FLSA) generally requires that employers pay employees for any time they spend in "physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and [its] business."

More specifically, FLSA regulations require employees to be paid for time spent waiting for and receiving medical attention on the premises or at the direction of the employer during the employee's normal working hours on days when they are working.

It is not clear whether COVID-19 vaccinations constitute *medical attention* under the FLSA; there are only 12 court rulings that cite the regulation, none of which mention vaccinations. But even if vaccinations are not counted as working time under the medical-attention regulation, it is likely they would qualify under the broader "physical or mental exertion" standard.

As a result, employers that require employees to get vaccinated will almost certainly need to pay nonexempt employees their hourly wage and, potentially, overtime, for:

- Time spent waiting to get vaccinated;
- Time spent getting vaccinated; and
- Time spent after getting vaccinated waiting to determine there was no immediate adverse reaction.

If vaccinations are not provided at the worksite, employers may also need to compensate employees for the time they spend traveling to and, potentially, from the vaccination site.

On the other hand, if an employer simply encourages rather than requires employees to get vaccinated and leaves it up to employees to decide when and how to get the vaccine, then they probably will not have to pay them for that time.

### **Expense Reimbursement**

The safest course of action is to cover any employee expenses associated with vaccinations. Doing so will help the employer to not only shield itself from liability, but also to maximize the number of employees who get vaccinated.

Employers that consider having employees cover some or all of the costs of vaccination should:

- Be sure deductions from pay do not reduce employees' pay below the minimum wage (and any overtime owed); and
- Review state and local laws that may require employers to bear the cost of vaccinations as a business expense.

For example, the California labor code requires employers to indemnify employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of their duties, or of their obedience to the directions of the employer. A mandatory vaccination program would almost certainly fall under this requirement. It is not clear, however, whether a voluntary vaccination program would be covered. For example, if a vaccination program were not mandatory but strongly encouraged, then an employee might have a case they were obeying the employer's directions in getting vaccinated and have grounds to seek reimbursement.

### **Workers' Compensation Issues**

In general, if an employer mandates COVID-19 vaccination for its employees, an injury or illness resulting from the vaccine, such as an allergic reaction, is likely to be considered work-related and compensable. There is also a possibility that a vaccine-related injury or illness could be considered work-related if an employee's job involves heightened risk of COVID-19 exposure, even if the employer does not mandate the vaccination.

However, an employer should balance the risk of a small number of workers' compensation claims related to the COVID-19 vaccine against the risk of workers' compensation claims from employees who contract COVID-19 on the job. States have adopted a variety of measures pertaining to workers' compensation for COVID-19 cases, some of which include a rebuttable presumption that certain workers who contract COVID-19 did so on the job and are entitled to workers' compensation. In some cases, an employer can rebut the presumption of an occupational cause for a COVID-19 case by showing that its policies adhered to all applicable public health guidelines, including recommendations for vaccination.

Employers may wish to consult with their workers' compensation carriers for guidance in formulating a vaccination policy and determining how to handle any cases of adverse reactions to the vaccine.

## **Objections and Refusals to Get Vaccinated**

An employee may object to being vaccinated based on reasons that are not covered under Title VII or the ADA, which focus on employment discrimination based on religion and disability. Often, an employee will object based on personal opinions or preferences, such as:

- Mistrust of a vaccine, based on shortened research and development time and innovative methodology, or based on the employee's prior negative experience with a relatively new vaccine;
- The fact that the vaccine is approved only for emergency use and has not received full approval by the Food and Drug Administration (FDA);
- Concern regarding adverse reactions to the vaccine, such as for those with severe food allergies; or
- Personal choice based on social or political beliefs, such as a view that COVID-19 may not be a particularly virulent strain and, therefore, the vaccine may not be necessary.

Employers have a variety of options when responding to employee objections on vaccination, from engaging in encouragement and education initiatives to instituting a vaccine mandate that is enforced with disciplinary measures.

While an employer may take different steps when responding to individual employee objections, it is important for the employer to act consistently and fairly. For example, if one employee was terminated for failure to get vaccinated, but another was allowed to work remotely on a full-time basis, the employer may face a discrimination claim.

An employer should consider carefully any vaccination mandates that may result in mass terminations for cause. If an employer requires vaccination, then it may explore options for discipline based on the employee's violation of a work rule or policy. While this may be a harsh result, it may make sense for an employer in a particular industry based on safety and business reasons.

However, when considering the options, take into account not only applicable law, but also employee relations considerations. Requiring employees to be vaccinated, and then terminating those who do not comply, may contribute to employee turnover if the move is perceived to be unnecessary or unfair. For example, if other measures, such as remote work or social distancing, have kept the workplace safe, then a vaccination mandate may appear to an employee (and, consequently, to any court reviewing an employee's claim) as unwarranted and arbitrary.

### **NLRA protected activity**

Employees who resist receiving a vaccination (whether for safety concerns or other employment-related issues) may claim protection under the NLRA, which protects the rights of all employees (including nonunionized employees) to engage in concerted activity regarding the terms and conditions of their employment.

Section 7 of the NLRA protects certain concerted activity regarding working conditions, which could include protests or other group action (such as a strike, work slow-down or petitioning) regarding an employer's vaccination policy or program. Employees may engage in concerted activity to protest either against a mandated vaccination policy or in favor of the mandate. For instance, some employees may refuse to return to work until all employees have received the COVID-19 vaccine.

### **Ways to Encourage Vaccinations**

#### **Information Sharing**

An employer must focus on a centralized approach to corporate communications regarding vaccination. Building an employee education campaign that includes all relevant information (such as any associated costs or related incentives) is pivotal for increasing the proportion of the overall workforce that is vaccinated.

Employ various communications channels (e.g., emails, posters and related acknowledgments, and direct mailers) to help spread the word, but ensure that the topic is included in all vital communications, including regular benefits communications. Training and/or information sessions, such as town hall sessions (whether remote or in-person), help to build engagement and participation.

Communicate early and often with employees regarding the benefits, availability and efficacy of the vaccine. Consider the following:

- Present the information in readily digestible formats, such as posters that include graphics, short newsletters, and traditional mailers;
- Trumpet any perks or incentives associated with vaccination;
- Include links and references to applicable policies and handbook statements, so that employees may explore additional information;
- Communicate real-world examples of the positive consequences of vaccination to keep the subject top-of-mind for employees and reinforce an employer's preferences regarding vaccination;
- Share stories regarding co-workers' vaccination experiences (with permission). For example:
  - A profile regarding an executive being vaccinated; or
  - A peer's positive experiences with the vaccine, from getting answers to benefits questions on vaccination coverage, to the process of scheduling the vaccination appointment and, finally, disclosing any side effects and/or other challenges.

Utilizing feedback surveys during and after the communications campaign will help the organization improve communications channels and future strategies.

### **Group Health Coverage for Vaccines**

Another good way to encourage COVID-19 vaccinations is to:

- Determine if and how they are covered by existing employer-sponsored group health plans;
- Develop a strategy for coverage if changes to plans are necessary; and
- Communicate to employees the details of vaccine coverage under applicable plans.

There are already rules in place that require many employer-sponsored health plans to cover COVID-19 vaccines.

The Affordable Care Act (ACA) requires nongrandfathered group health plans to provide coverage for certain preventive care services with no cost sharing. More specifically, certain preventive care services must be provided without any co-payments, deductibles or co-insurance limits when the services are provided by an in-network provider.

The Coronavirus Aid, Relief and Economic Security (CARES) Act takes this requirement under the ACA farther and provides for *rapid* coverage of preventive services and vaccines for COVID-19. More specifically, all nongrandfathered group health plans (as determined by the rules of the ACA) must cover any qualifying coronavirus



preventive service without cost sharing. A *qualifying coronavirus preventive service* is an item, service or immunization that is intended to prevent or mitigate COVID-19 and is an:

- Evidence-based item or service that has in effect a rating of "A" or "B" in the current recommendations of the US Preventive Services Task Force; or
- Immunization that has in effect a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention (CDC) with respect to the individual involved.

Such services must be covered no later than 15 days after the date on which one of the above recommendations is made. Under the ACA, the time frame for covering new recommendations is much longer (generally, at least a year later).

Additionally, interim final regulations issued by the IRS, the US Department of Labor and the US Department of Health and Human Services further clarify that non-grandfathered group plans may not charge employees for COVID-19 vaccinations regardless of whether the service is delivered by an in-network or out-of-network provider.

In addition to the vaccines themselves, the regulations also require plans to cover vaccine administration costs, even if the cost of the vaccine is paid for by a third party (e.g., the federal government).

For employers that may still have *grandfathered* group health plans (as defined by the ACA), although these plans are not subject to certain mandates of the ACA, CARES Act and related regulations, it is still important to:

- Take a look at how these plans currently cover vaccines;
- Determine what strategy to use regarding COVID-19 vaccines; and
- Strongly consider covering them to encourage employees to get vaccinated.

Regardless of the type of health insurance plan(s) offered, communicate to employees the details of COVID-19 vaccine coverage that such plans provide. This will help them understand what their insurance will cover and what they should expect, and potentially help motivate them to get the vaccine when they can. To facilitate this, contact the insurance providers to see if they have resources and information that can be passed on to employees.

### **Vaccine Coverage Outside Group Health Plans**

Employers may also consider offering a vaccine program to their employees *outside* of their group health plans. However, employers need to make sure they are taking into account all applicable laws and regulations and are not creating new compliance requirements for themselves by technically creating a new, separate group health plan subject to the Employee Retirement Income Security Act (ERISA), the ACA and various other laws and compliance requirements.

### **Wellness Programs**

Employers may want to consider providing COVID-19 vaccines through wellness programs, similar to how many organizations offer annual flu shots through such programs. If this is an attractive option, start researching to determine how COVID-19 vaccinations could be incorporated into existing wellness programs. It may be a good idea to contact any current wellness program vendors to see what they are offering and if any of their potential choices would be an appropriate fit.

However, when incorporating vaccine incentives into a wellness program, it is vital to:

- Comply with all applicable laws governing wellness programs; and
- Consider alternatives for employees who are unable to be vaccinated.

Also, be aware that proposed EEOC wellness rules could potentially impact incorporation of a COVID-19 vaccination program into wellness programs if they are implemented.

### **Other Incentives**

In addition to offering vaccines through employer-sponsored health insurance or wellness programs, there are other ways to incentivize employees.

One easy way is by being a resource for vaccine information. Get ready for questions from employees, and be prepared to help point them in the direction of where they can obtain more information on the approved vaccines and where they can actually get vaccinated (e.g., applicable state and local public health departments).

Other ways to incentivize employees include:

- Covering the cost of the vaccines (if not already covered by health insurance or the government);
- Providing vaccinations on site to make them as convenient as possible (e.g., onsite clinics);
- Partnering with a third party to provide vaccinations off site;
- Providing paid time off for employees to get vaccinated on their own;
- Having leaders and managers get vaccinated first to lead by example;
- Offering vaccines to employees' family members;
- Offering small bonuses, gift cards or other rewards to get vaccinated (but making sure to research any potential tax consequences and compliance issues involved with such incentives).

Regardless of the incentive chosen, any incentive program must comply with all applicable laws and not discriminate against employees that are unable to get the COVID-19 vaccine.

Additionally, be aware that some employees may view large vaccination incentives with suspicion. If a vaccine incentive is viewed as being excessive or too generous, it could actually make employees more wary of getting the vaccine if they feel like they have to be "bribed."

### **Work With a Union**

Whether or not a unionized employer has the right to unilaterally implement a vaccination policy or program, it is very beneficial to gain the support of the union to make the program successful.

The more employees feel that the employer has heard their voices and addressed their concerns about an issue, the less likely it is that they will oppose the announced program. In a unionized workplace, the employees' voice is the union. By discussing and reaching agreement with the union about the vaccination policy and program and the related issues, the employer will save time and effort in not having to address and resolve numerous individual complaints.

In addition, the union can agree to use its communications to support the program and encourage employees' voluntary participation. For example, a union may agree to cooperate with contact tracing efforts and notify workers of COVID-19 outbreaks faster.

### **Keep Informed**

As with everything relating to COVID-19, the issues revolving around vaccinations and an employer's place in this landscape is fluid. Monitor federal, state and local law, guidance and updates relating, but not limited, to:

- Rights of employers to mandate COVID-19 vaccinations;
- Compliance obligations relating to COVID-19 vaccinations;
- State vaccine-distribution plans, including eligibility timeline;
- State vaccine availability;
- Laws relating to mandate exceptions and restrictions;
- Health care coverage and wellness programs;
- Workers' compensation;
- Health and safety protocols; and
- Industry-specific regulations and guidance.

As the vaccination rollout continues, employers should expect additional information and guidance from government agencies to assist in determining and communicating their approach on vaccinations. As with any workplace policy, ensure that any new and updated policies or programs are timely communicated to all affected employees.