



COVID 19 RESOURCES FOR NONPROFIT

VACCINE GUIDANCE FOR THE RETURN TO THE WORKPLACE

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**THE INFORMATION IN THIS GUIDANCE IS TIMELY AS OF
MAY 24, 2021 AND IS SUBJECT TO CHANGE.**

COVID-19 VACCINE GUIDANCE

CAN WE REQUIRE EMPLOYEES TO GET VACCINATED?

Yes, the Equal Employment Opportunity Commission (EEOC) stated that federal employment civil rights laws do not preclude employers from mandating COVID-19 vaccines, so long as employers provide reasonable accommodations to those who cannot get the vaccine because of a disability or sincerely held religious beliefs. The EEOC specifically stated that under the Americans with Disabilities Act (“ADA”), an employer can have a qualification standard, such as a vaccination requirement, that includes “a requirement that an individual shall not pose a direct threat to the health or safety of individuals in the workplace.” This position is consistent with earlier guidance issued by the EEOC and OSHA regarding the influenza vaccine, which provided that employers could mandate vaccination, subject to similar exceptions. Multiple state authorities have issued similar guidance as well, though there is pending legislation in other states that if enacted, would prohibit employers from making it mandatory that employees receive a COVID-19 vaccine.

While organizations can generally require employees to get vaccinated, there are many considerations to take into account before making it mandatory that employees receive a COVID-19 vaccine. For example, employers may wish to consider the following practical considerations when deciding whether or not to mandate vaccines for its employees:

- It may make sense to consider waiting until there is more data available regarding the effectiveness of vaccines in stopping transmission of COVID-19 variants.
- Further, if mandating that employees receive vaccines, then the time spent getting vaccinated and possibly dealing with side effects may be deemed compensable time that employees need to be paid for.

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- Organizations may want to consider that a vaccination mandate may be met with employee pushback. Organizations that impose a vaccine mandate will also need to have a system in place to address concerns over the mandate and must provide consistent accommodations to those who cannot be vaccinated due to a disability or sincerely held religious beliefs. Some of the employee pushback may be easier to address once the COVID-19 vaccines receive full licensing approval from the FDA (the vaccines are currently approved solely on an emergency use authorization).
- Finally, organizations should be aware that if they make it mandatory that employees receive a COVID-19 vaccination and some employees refuse to be vaccinated who do not need to be or are not eligible for an accommodation based on disability or religious beliefs, the organization may be left with few options other than unpaid leave or even terminating employment.

CAN WE REQUIRE CONTRACTORS VISITING OUR WORKSITE SITE TO GET VACCINATED PRIOR TO VISITING OUR WORKPLACE?

Yes. There is nothing in the law that prohibits an organization from requiring contractors or third parties entering its premises to be vaccinated, provided that it has a non-discriminatory policy that is applied consistently.

CAN WE ASK EMPLOYEES IF THEY HAVE BEEN VACCINATED?

Yes, regardless of whether an organization mandates that employees be vaccinated, organizations can ask or even require that employees inform the organization if they have received a COVID-19 vaccine or are planning to do so. One of the primary reasons to require employees to report if they are vaccinated is that pursuant to current CDC guidance (which is becoming widely adopted at the state level), vaccinated individuals do not need to quarantine after exposure to COVID-19. Organizations can avoid disruptions to work that might otherwise occur if multiple individuals have to quarantine due to one person at work testing positive. It is likely that over the coming months, there will be additional guidance and relaxation of COVID-19 requirements at the federal or state level for people who are fully vaccinated as well.

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However, employers should not ask any other questions about an individual's health status and/or reasons for not getting vaccinated, as these types of questions can be prohibited under the ADA (unless there is a business necessity to know the requested information). For example, a manager should not ask an employee for reasons why the person chose not to get vaccinated (which may be due to a disability or sincerely held religious belief).

CAN WE REQUIRE PROOF OF VACCINATION?

Yes. There are a number of options available to employers to verify vaccination status, including:

- Asking each employee/contractor to upload or email a digital copy of the CDC's COVID-19 Vaccination Record Card;
- Using managers or HR (or for contractors, the vendor agency) to verify each employee's CDC's COVID-19 Vaccination Record Card and record their vaccination status, without collecting the Card itself;
- Asking employees/contractors to complete a form, either physically or electronically, providing vaccination information (name, date of vaccination(s), manufacturer, etc.);
- Using a third party (e.g., a wellness program administrator or an on-site health care provider);
- Using a vaccine passport program once these initiatives are developed further; or
- Relying upon an honor system or self-reporting as to each employee's/contractor's status.

An organization's decision on which system to use will depend on the nature of its workforce and the resources available. If vaccine documentation is collected or viewed, the information must be treated as a confidential medical record under the ADA and applicable state law. This means that records should be kept confidential and stored separately from an employee's personnel file, and that information regarding vaccination status should only be shared on a need-to-know basis.

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IF WE BRING VACCINATED AND UNVACCINATED PEOPLE BACK TO OFFICE, CAN WE ONLY REQUIRE UNVACCINATED PEOPLE TO WEAR MASKS?

Yes, effective May 19, 2021, New York State adopted the CDC’s Interim Public Health Recommendations for Fully Vaccinated People permitting vaccinated individuals to remove masks when working indoors. Unvaccinated individuals, under both CDC and New York State guidance, must continue to wear masks. New York State guidance strongly recommends wearing a mask in indoor settings where vaccination status of individuals is “unknown.” The guidance further specifically states that the recommendation applies “across commercial settings, including retail, food services, offices, gyms and fitness centers, amusement and family entertainment, hair salons, barber shops and other personal care services, among other settings.” However, the state clarified in the final published guidance that while businesses can request proof of vaccination, it is not required and businesses can rely on self-reporting of vaccination status (e.g., an honor system).

In addition, businesses (including offices, restaurants, retailers, and other businesses not operated mass-congregate events) may eliminate the six feet of required social distancing for fully vaccinated individuals, and may permit vaccinated individuals to stop following social distance requirements: (a) within the entire establishment; or (b) just in a separate, designated part of the establishment for vaccinated individuals only. However, for areas where the vaccination status of individuals is unknown, individuals must continue to maintain six feet of social distancing.

CAN WE BRING BACK ONLY VACCINATED EMPLOYEES IN THE FIRST PHASE?

Yes, this is permissible, so long as the employer provides reasonable accommodations to those who cannot get vaccinated due to a disability or sincerely held religious objection. Thus, an employer can impose a blanket rule that only vaccinated individuals can return to in-person work, but if someone with a disability or religious objection asks to be allowed to return, then the employer needs to engage in the interactive process and perform an individualized assessment for those with disability issues and consider whether there is undue hardship when conducting the analysis for those with religious objections. Scientific knowledge is evolving and what it shows regarding transmission rates for vaccinated individuals, etc.,



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may change over time. Currently, the science is getting more definitive that COVID-19 vaccines do significantly reduce transmission of SARS-COV-2, the virus that causes COVID-19. If that is indeed the case, then it gives employers a stronger argument in preventing unvaccinated individuals from conducting in-person work.

To the extent organizations do bring back vaccinated employees in the first phase, organizations should implement training and communications to managers reminding them of Do's and Don'ts when communicating with employees. For example, managers should not ask what condition or circumstance let the employee get vaccinated if they were vaccinated before the general population nor should they ask unvaccinated employees what their reasons are for not getting vaccinated. The primary practice point is that other than working in person vs. remote, vaccinated employees should be treated the same way as unvaccinated employees. There is the potential for a discrimination claim if an employee who cannot be vaccinated due to a disability or sincerely held religious belief feels that they are treated worse than vaccinated employees. For example, if managers are giving better opportunities, evaluations, or promotions to employees who can work in person because they were vaccinated, that could lead to liability.

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This piece was written as an addendum to our existing advisory on Nonprofit Return to the Workplace, which may be found [here](#).

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