

# FAQs regarding implementing a mandatory COVID-19 vaccine program

August 13, 2021



The information contained in this document is current as of August 13, 2021. Please note that this is not legal advice. If you have any questions about the matters covered by this document, please contact a [Reed Smith employment lawyer](#).

## Table of Contents

Q: Can employers adopt a mandatory employee vaccination policy?	2
Q: Are there state or local laws that address mandatory COVID-19 vaccination policies?	2
Q: If an employer adopts a mandatory employee vaccination policy, how should it respond to an employee who indicates that they are unable to receive a COVID-19 vaccination because of a disability or a sincerely held religious belief, practice, or custom?	2
Q: If an employer adopts a mandatory employee vaccination policy, how should it respond to an employee who indicates that they are unable to receive a COVID-19 vaccination because of a pregnancy, childbirth, a related medical condition, or breastfeeding?	2
Q: What are some examples of possible reasonable accommodations that may be appropriate for employees who cannot be vaccinated?	2
Q: Can employers require that new hires be vaccinated before commencing employment?	3
Q: Can employers ask or require an employee to show proof of receipt of a COVID-19 vaccination?	3
Q: Are there any particular implications for employers under the National Labor Relations Act or for unionized workforces?	3
Q: Can I relax face covering and social distancing requirements when my employees get vaccinated?	3
Q: Do I have to provide paid leave for employees to get the vaccine or to recover from the vaccine?	3
Q: What approaches are other national companies taking with respect to the vaccine?	3
Q: Am I liable to an employee who has an adverse reaction to the COVID-19 vaccine after mandating vaccination?	3

**The information contained in this document is current as of August 13, 2021. Please note that this is not legal advice. If you have any questions about the matters covered by this document, please contact a [Reed Smith employment lawyer](#).**

Late last year, the U.S. Food and Drug Administration (the FDA) issued the first approvals for a COVID-19 vaccine. Shortly thereafter, the U.S. Equal Employment Opportunity Commission (the EEOC) issued guidance on the interplay between federal anti-discrimination law and vaccine-related issues, including the permissibility of mandatory employer vaccination policies. The below FAQs address some of the more salient questions surrounding such policies and their implementation, as well as other workplace issues triggered by the vaccine. There are undeniably more questions than answers at present with respect to vaccine-related workplace issues. **Before taking any material workplace action with respect to the vaccine, therefore, please consult with a [Reed Smith employment lawyer](#).**

**Q: Can employers adopt a mandatory employee vaccination policy?**

A: Generally speaking, yes. In guidance issued in late May 2021, the EEOC took the position that mandatory vaccination policies are generally permissible under federal anti-discrimination laws. Just a few weeks later, in June 2021, a federal court – in the first ruling on this issue – echoed this sentiment in concluding that such policies are generally permissible. The following month, the U.S. Department of Justice issued a detailed memo reaching the same conclusion.

The two primary exceptions to the general permissibility of employer-mandated vaccination policies are for employees with disabilities and for those with a sincerely held religious belief, practice, or custom. If an employee refuses to be vaccinated and objects to a mandatory vaccination policy on one of these grounds, the employer must engage in the so-called interactive process with the employee and, subject to the “undue hardship” standards discussed below, provide the employee with a reasonable accommodation in line with applicable law.

In addition to legally required accommodations, the EEOC also cautions employers to be cognizant of any potential disparate impact created by a vaccine mandate.

**Q: Are there state or local laws that address mandatory COVID-19 vaccination policies?**

A: Employers must pay attention to state laws in the jurisdiction(s) where they operate. Several states have introduced legislation attempting to limit private employers’ ability to mandate COVID-19 vaccines. To date, such efforts have been without success other than in Montana.

**Q: If an employer adopts a mandatory employee vaccination policy, how should it respond to an employee who indicates that they are unable to receive a COVID-19 vaccination because of a disability or a sincerely held religious belief, practice, or custom?**

A: As noted, the employer must engage in an interactive process with the employee. When an employee objects to vaccination, they are requesting an accommodation under Title VII of the Civil Rights Act of 1964 (Title VII) (for a sincerely held religious belief, practice, or custom) or the Americans with Disabilities Act (ADA) (for a disability). The employer must provide a reasonable accommodation unless the accommodation would pose an undue hardship. Undue hardship is defined under Title VII as an accommodation that poses a “more than *de minimis*” cost or burden. For the ADA, undue hardship is more onerous to establish and is defined as creating significant difficulty or expense for the employer.

**Q: If an employer adopts a mandatory employee vaccination policy, how should it respond to an employee who indicates that they are unable to receive a COVID-19 vaccination because of a pregnancy, childbirth, a related medical condition, or breastfeeding?**

A: The employer may need to accommodate the employee. In its May 2021 guidance, the EEOC stated that “[e]mployees who are not vaccinated because of pregnancy may be entitled (under Title VII) to adjustments to keep working, if the employer makes modifications or exceptions for other employees.” Further, in many jurisdictions, pregnancy, childbirth, related medical conditions, and breastfeeding constitute legally protected disabilities and require that employers provide accommodations. As a result, employers may be required to engage in the same accommodation-related interactive process described in the above FAQs, under these scenarios as well.

**Q: What are some examples of possible reasonable accommodations that may be appropriate for employees who cannot be vaccinated?**

A: In the context of a mandatory vaccination policy, reasonable accommodations for employees who cannot be vaccinated due to a disability; religious belief, practice, or observance; or pregnancy and are exempted from the policy could include: (1) minimizing contact with coworkers; (2) eliminating contact with the public; (3) making arrangements for remote working; (4) using safety equipment such as face masks; (5) reassigning; (6) periodic testing.

The information contained in this document is current as of August 13, 2021. Please note that this is not legal advice. If you have any questions about the matters covered by this document, please contact a [Reed Smith employment lawyer](#).

**Q: Can employers require that new hires be vaccinated before commencing employment?**

A: Generally speaking, yes. Subject to the accommodations discussed above, mandatory vaccination policies may apply to new hires, and job offers can be made contingent upon a new hire's receipt of the vaccine. However, employers should exercise caution to limit vaccination-related inquiries to solely the new hire's vaccination status.

**Q: Can employers ask or require an employee to show proof of receipt of a COVID-19 vaccination?**

A: Generally speaking, yes. Requesting proof of receipt of a COVID-19 vaccination is permissible. Employers should be careful to not elicit disability-related information when requesting proof of receipt because such inquiries are restricted under the ADA. Generally, copies of employees' vaccination cards or self-attestations of vaccination status are acceptable methods of proof. Employers should ensure that any proof of vaccination is treated like medical information under the ADA and kept confidential and stored separately from employees' personnel files.

**Q: Are there any particular implications for employers under the NLRA or for unionized workforces?**

A: Yes. The National Labor Relations Board (NLRB) has previously found that an employer must collectively bargain over a flu-prevention policy requiring immunization. As a result, employers with unionized workforces may be required to bargain over a mandatory COVID-19 vaccination policy, depending on the applicable collective bargaining agreement. While the NLRB has not specifically addressed the issue, all employers, regardless of whether or not they have a unionized workforce, should be aware that employees raising concerns regarding vaccination policies may be engaging in protected, concerted activity under the National Labor Relations Act (NLRA).

**Q: Can I relax face covering and social distancing requirements when my employees get vaccinated?**

A: It depends – right now, likely not. Given the current level of transmission, the CDC, as of July 27, 2021, revised its guidance to recommend mask wearing indoors in public in areas with “substantial or high transmission” for all individuals, including fully vaccinated individuals. In addition, several local and state governments have re-implemented social distancing and face covering measures for all individuals, regardless of vaccine status. Therefore, before relaxing any social distancing and face covering requirements, employers should check federal, state, and local guidance to ensure compliance.

**Q: Do I have to provide paid leave for employees to get the vaccine or to recover from the vaccine?**

A: It depends on whether the employer has mandated a COVID-19 vaccine and on the law in the jurisdiction where the employer operates. For mandatory vaccines, time spent getting the vaccine may be considered compensable time for nonexempt employees under federal and state wage and hour laws. While there is no federal law requiring paid leave for voluntary vaccines or for recovering from vaccine side effects, state and local laws may require it. For example, California requires paid sick leave for employees attending a vaccine appointment or recovering from vaccine-related side effects. Moreover, the American Rescue Plan Act of 2021 provides a tax incentive for employers with less than 500 employees that provide paid sick leave for employees who voluntarily decide to get vaccinated.

**Q: What approaches are other national companies taking with respect to the vaccine?**

A: We are seeing a variety of approaches, but it is clear that private employers are becoming increasingly active in mandating or strongly encouraging employees to receive COVID-19 vaccines. We are seeing some employers require COVID-19 vaccines while others are implementing a “soft” mandate – that is, requiring employees to be vaccinated or to undergo routine testing. Still others have decided to adopt a mandatory vaccination policy for only portions of the workplace (for example, those working in public-facing departments). The decision may depend on the current number of employees vaccinated and whether or not the workforce is at increased risk – for example, a large number of public-facing employees. Other employers have elected to offer incentives to employees to encourage vaccination without a mandate. Employers must be careful that whatever incentive they offer is not so substantial as to be “coercive” – that is, so lucrative that an employee who is not inclined to disclose their medical information to receive a vaccine feels compelled to do so. Whatever approach an employer elects, it should be customized to the employer's workplace and needs.

**Q: Am I liable to an employee who has an adverse reaction to the COVID-19 vaccine after mandating vaccination?**

A: Although the law varies among the states, most states' workers' compensation laws consider employer-mandated vaccines to be “part of work,” and therefore liability for any adverse reactions likely falls within the exclusive scope of workers' compensation. In addition, the Occupational Safety and Health Administration has signaled its support for COVID-19 vaccinations by suspending employers' obligation to report any adverse side effects related to COVID-19 vaccinations until May 2022. This is a novel, untested area of the law, and it is possible that a court or government agency could adopt an unexpected legal interpretation in this regard.

**Reed Smith is a dynamic international law firm, dedicated to helping clients move their businesses forward.**

Our belief is that by delivering smarter and more creative legal services, we will not only enrich our clients' experiences with us, but also support them in achieving their business goals.

Our long-standing relationships, international outlook, and collaborative structure make us the go-to partner for the speedy resolution of complex disputes, transactions, and regulatory matters.

For further information, please visit [reedsmith.com](https://www.reedsmith.com).



This document is not intended to provide legal advice to be used in a specific fact situation; the contents are for informational purposes only. "Reed Smith" refers to Reed Smith LLP and related entities. © Reed Smith LLP 2020

- ABU DHABI
- ATHENS
- AUSTIN
- BEIJING
- BRUSSELS
- CENTURY CITY
- CHICAGO
- DALLAS
- DUBAI
- FRANKFURT
- HONG KONG
- HOUSTON
- KAZAKHSTAN
- LONDON
- LOS ANGELES
- MIAMI
- MUNICH
- NEW YORK
- PARIS
- PHILADELPHIA
- PITTSBURGH
- PRINCETON
- RICHMOND
- SAN FRANCISCO
- SHANGHAI
- SILICON VALLEY
- SINGAPORE
- TYSONS
- WASHINGTON, D.C.
- WILMINGTON

**[reedsmith.com](https://www.reedsmith.com)**