



2021

## COVID-19

# Employer Vaccine and Workplace Considerations

As of August 2021



**Gallagher**

Insurance | Risk Management | Consulting

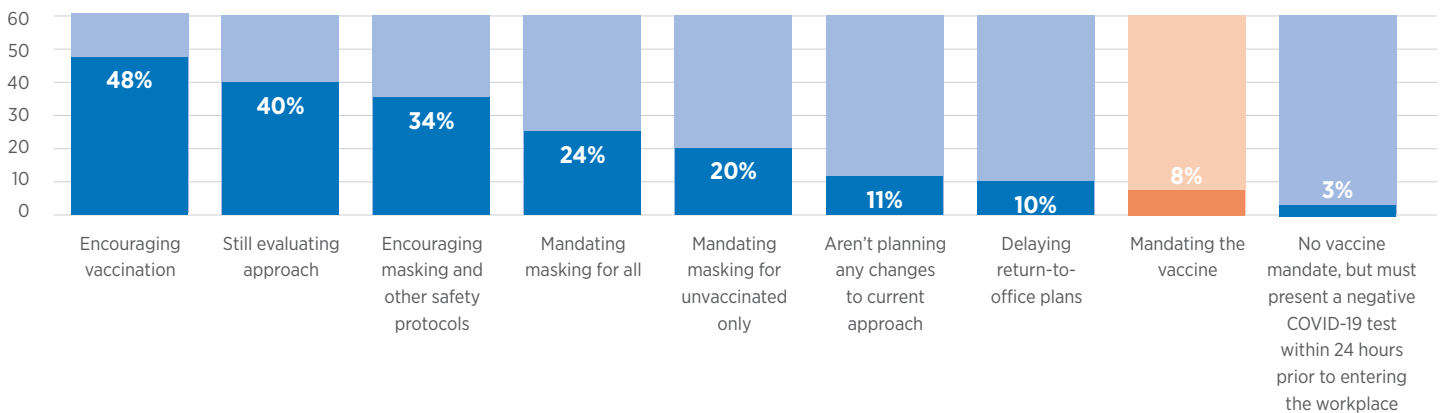
# Executive Summary

With COVID-19 cases surging at the same time many employers are planning for their employees to return to the office, a strategy that keeps their workforces safe and healthy, protects their businesses while being compliant, and is sensitive to varying employee beliefs regarding vaccines is critical.

As regions throughout the world deploy vaccines at various levels of efficiencies, and variants of COVID-19 are being transmitted throughout the US population, employers are feeling pressure. Should employers mandate the vaccine? And if they do, what will be the impact on their culture, how will these decisions impact attraction and retention and their employer brand/reputation, and will these decisions potentially undermine Diversity, Equity and Inclusion efforts? How can organizations navigate this complex and rapidly evolving issue?

When asked on August 4 how employers were responding to vaccine planning, many (40%) were still evaluating their approach.

## MANY EMPLOYERS ARE STILL EVALUATING THEIR APPROACH, FEW READY TO MANDATE THE VACCINE



Gallagher National Town Hall: August 4, 2021; data represents responses from 331 unique organizations.

Despite the changing sentiments regarding vaccines, one thing is clear. Employers have much to consider when determining which policy will work best for their people and their organizations. Every organization must assure their work environment is safe and healthy for employees and in compliance with applicable laws. Organizations also seek to maintain a culture focused on engagement, inclusivity, transparent communication and effective change management strategies as the vaccine administration conversation evolves.

This guide from Gallagher is designed to help employers navigate considerations and actions in determining the right path forward for their organizations. We will cover these steps in the following pages so that you can make your workplace work better.



# The Path Forward for Your Organization

COVID-19 variants will continue to evolve. The following questions and considerations should be part of every employer’s response plan.

## Determine the organization’s vaccine policy.

<p>What is an employee vaccine policy and what should it include?</p>	<p><b>An employee vaccine policy documents your organization’s guidelines with regard to the COVID-19 vaccines and your workforce.</b></p> <p>The document should include policies and procedures that address issues directly related to vaccination requirements, incentives and verification that are in compliance with applicable laws, and in alignment with the organization’s culture.</p> <p>Consider initiating a COVID-19 response committee to develop and implement your employee vaccine policy. Stakeholders should include the HR team, legal counsel, senior leadership, middle management, front-line supervisors and employees. Leadership must ensure coordination with health insurance providers, community leaders and public health officials.</p>
<p>How do we effectively implement a vaccination strategy?</p>	<p><b>After your organization develops a vaccination strategy, consider the following implementation tactics and questions.</b></p> <ul style="list-style-type: none"><li>• <b>Communication:</b> How and when will the COVID-19 response committee communicate with employees about the vaccine policy, status and instructions? Who from senior leadership will lead the communication efforts?</li><li>• <b>Administration:</b> Will you contract with an outside vendor to administer the vaccine? If administered on-site, where, how and who will administer the vaccine? If administered off-site, where and when should employees go to be vaccinated? What documentation do they need?</li><li>• <b>Verification:</b> If the organization chooses to require vaccination before returning to the workplace, how will you track who has received the required doses and when? If employees receive the vaccine off-site, what documentation will verify they have complied with the required policy?</li><li>• <b>Recordkeeping:</b> How can the organization use current HR information systems (HRIS) to assist in appropriately tracking, collecting and storing sensitive employee data in compliance with the Americans with Disabilities Act (ADA) and other applicable state or local laws?</li></ul>
<p><b>Key Takeaway:</b> Will you require the vaccine for all new hires?</p>	

Has the Equal Employment Opportunity Commission (EEOC) published guidance on whether organizations can require all their employees to be vaccinated against COVID-19 before returning to work?

Yes. The EEOC issued a series of [FAQs](#), which specifically address mandatory and voluntary employer vaccination programs. In those FAQs, the EEOC addresses ADA and Title VII concerns. Specifically, the EEOC states that an employer may require a COVID-19 vaccine for all employees entering the workplace, even if it knows that some employees may not obtain a vaccine because of a disability. Under the ADA, an employer may require an individual with a disability to meet a qualification standard applied to all employees, such as a safety-related standard requiring COVID-19 vaccination, if the standard is job-related and consistent with business necessity. If a particular employee cannot meet such a safety-related qualification standard because of a disability, the employer may not require compliance for that employee unless it can demonstrate that the individual would pose a “direct threat” to the health or safety of the employee or others in the workplace. A “direct threat” is a “significant risk of substantial harm” that cannot be eliminated or reduced by reasonable accommodation.

The EEOC’s guidance also stresses that employers should make reasonable accommodations for individuals who are unable to be vaccinated due to sincerely held religious beliefs, practices or observances (as established under Title VII) unless doing so would pose an undue hardship.

In addition to the ADA and Title VII, state and local law may impose restrictions upon an organization’s ability to mandate vaccinations.

**As you evaluate whether or not to mandate, consider:**

- **Federal law and laws** at the, state, county and local levels, considering all locations of your organization, as laws vary by state
- **Current policies and agreements** to include Infectious Disease Prevention, disability, leave, attendance, PTO and/or collective bargaining agreements (<https://www.eeoc.gov/coronavirus>)
- **Reasonable accommodations** for employees who are unable to receive vaccinations due to medical or religious reasons, or other reasons as agreed upon by the organization
- **Your culture** and whether or not mandating the vaccine is in alignment with your values and norms

**Key Takeaway:** Think about whether a vaccine mandate is in line with your values and culture, and if it will unintentionally undermine any DEI efforts.

If an organization can mandate a vaccine, should it?

**Many eagerly awaited the arrival of the vaccines.**

However, others have had and continue to have misgivings. Thus, consider the following when determining whether to mandate employee vaccinations:

- Will a vaccine mandate alter how our organization is perceived?
- What communications will help employees understand the benefits of the vaccine, where to get vaccinated and any cost involved?
- Are we required to provide time off for employees to get the vaccine by any state or local law? Even if we are not required to provide time off, will we offer time off for employees to get the vaccine and recover from any potentially mild side effects?
- Could we help the vaccination effort by encouraging our employees and making it easier for them to get vaccinated, while not mandating the vaccine?

If organizations mandate the vaccine, what should/can they do if an employee refuses to get vaccinated?

**Proceed with caution.**

If an employee refuses to obtain a vaccination due to a disability, the employee may be entitled to an exemption from the requirement or a change in work (i.e., a reasonable accommodation). If the employee refuses to obtain a vaccination due to a sincerely held religious belief, practice, or observance, the individual must be provided with a reasonable accommodation under Title VII unless it would pose an undue hardship.

If the refusal is due to a reason other than a disability or a sincerely held religious belief, practice, or observance, consult with legal counsel when determining how to respond.

What happens if an employer cannot exempt or provide a reasonable accommodation to an employee who cannot comply with a mandatory vaccine policy because of a disability or sincerely held religious practice or belief?

**Even if an employer determines that a direct threat exists to the employee's own health due to his or her disability, the employer still cannot exclude the employee from the workplace—or take any other adverse action—unless there is no way to provide a reasonable accommodation (without undue hardship).**

The ADA regulations require an employer to consider whether there are reasonable accommodations that would eliminate or reduce the risk so that it would be safe for the employee to return to the workplace while still permitting performance of essential functions. This determination can involve an interactive process with the employee. If there are no worksite accommodations that achieve this balance, then an employer must consider accommodations such as telework, leave of absence, or reassignment (perhaps to a different job in a place where it may be safer for the employee to work or that permits telework). An employer may only bar an employee from the workplace if, after going through all these steps, the facts support the conclusion that the employee poses a significant risk of substantial harm to himself or others that cannot be reduced or eliminated by reasonable accommodation.

Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from getting a COVID-19 vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship. Employers also may receive religious accommodation requests from individuals who wish to wait until an alternative version or specific brand of COVID-19 vaccine is available to the employee. Such requests should be processed according to the same standards that apply to other accommodation requests.

Under Title VII, courts define "undue hardship" as having more than minimal cost or burden on the employer. This is an easier standard for employers to meet than the ADA's undue hardship standard, which applies to requests for accommodations due to a disability. Considerations relevant to undue hardship can include, among other things, the proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, whose vaccination status could be unknown or who may be ineligible for the vaccine. According to the EEOC, if an employee cannot be accommodated, employers should determine if any other rights apply under the EEO laws or other federal, state, and local authorities before taking adverse employment action against an unvaccinated employee. However, employers should consult their employment attorneys before taking action.



In addition to the ADA and Title VII, are there Occupational Health and Safety Administration (OSHA) requirements when determining whether to adopt mandatory vaccination requirements?

**Yes, employers must also consider their obligations to provide a safe workplace under OSHA requirements.**

On August 13, 2021, OSHA updated its COVID-19 guidance for employers. The update was made in response to the CDC's updated guidance on COVID-19 safety precautions. The CDC updated its recommendations for fully vaccinated people to reduce the risk and spread of infection by:

Wearing a mask in public indoor settings in areas of substantial or high transmission; Choosing to wear a mask regardless of level of transmission, particularly if individuals are at risk or have someone in their household who is at increased risk of severe disease or not fully vaccinated; and Getting tested 3-5 days following a known exposure to someone with suspected or confirmed COVID-19 and wearing a mask in public indoor settings for 14 days after exposure or until a negative test result.

OSHA has adopted analogous recommendations. In general, OSHA notes that their recommendations are advisory in nature and informational in content and are intended to assist employers in providing a safe and healthy workplace. OSHA also reiterates in their guidance that employers have an obligation to provide a safe workplace under the requirements of the Occupational Safety and Health Act. Section 5(a)(1) of the Occupational Safety and Health Act imposes a general duty on employers to furnish employment and a place of employment that are free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees.

In this updated guidance, OSHA strongly encourages employers to provide paid time off to workers for the time it takes for them to get vaccinated and recover from any side effects. They recommend that employers consider working with local public health authorities to provide vaccinations for unvaccinated workers in the workplace. They suggest that employers consider adopting policies that require workers to get vaccinated or to undergo regular COVID-19 testing – in addition to mask wearing and physical distancing.

The OSHA website contains a list of 11 action steps for employers – including for example, providing face covering or surgical masks as appropriate for certain workers and suggesting or requiring that unvaccinated customers, visitors, or guests wear face coverings in public-facing workplaces. More detailed information including the 11 action steps is available on the OSHA webpage, *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*.

<p>If an employer mandates vaccinations, would it need to revisit collective bargaining agreements?</p>	<p><b>Potentially. In addition to EEOC and OSHA requirements, employers should be aware of potential collective bargaining agreement implications.</b></p> <p>If necessary, employers may be required to work with union representatives to create a mandatory vaccination program and may be required to make adjustments to their collective bargaining agreements.</p>
<p>What privacy issues related to the vaccine should an employer be concerned about?</p>	<p><b>Under the Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule, an employer cannot use protected health information (PHI) from its health plan for employment purposes, such as deciding whether an individual can return to the workplace without a written authorization from the employee.</b></p> <p>Claims data showing which employees received vaccinations from your employer-sponsored health plan would be PHI. Unless employees sign written authorizations permitting their employers to use their vaccination claims data for such purposes, those employers cannot simply take vaccination claims data from their health plans to determine which employees have received their vaccines and thus should be permitted to return to the workplace.</p> <p>Additionally, assuming that federal and state law permit an employer to require employees to show documentation that they have received COVID-19 vaccinations prior to returning to the workplace, then that employer must maintain the privacy and confidentiality of that documentation.</p> <p>Under ADA guidance, an employer must treat the information as confidential medical information, but may store vaccination and other COVID-19-status-related information (such as daily temperature check logs) in existing medical files.</p> <p>Employers also should take care to ensure that any vaccination program would comply with applicable state and local law, including state and local privacy law.</p>
<p>When should an employer stop mandating testing, masks, contact tracing and other measures?</p>	<p><b>Employers should prepare to remain flexible and open to changing guidance as more is learned about COVID-19. All employers should continue to follow the guidelines put in place by organizations like the Centers for Disease Control and Prevention (CDC) and the World Health Organization (WHO), as well as local health guidelines.</b></p> <p>This includes guidance on practice and duration concerning continued cleaning, personal hygiene, social distancing, personal protective equipment and reporting of COVID-19 cases in the workplace.</p>



<p>What should an employer do if someone gets COVID-19 in the workplace after the vaccine has been deployed?</p>	<p><b>Employers should continue to follow the guidelines put in place by organizations like the CDC and the WHO, as well as local health guidelines.</b></p> <p>This includes guidance on reporting COVID-19 cases in the workplace and implementation of contact tracing. At this time, how an organization treats its employees who test positive for COVID-19 should not change due to vaccine availability.</p>
<p>What's the best way to cascade the policy internally?</p>	<p><b>Leadership, education and training to cascade the what, why, where and when of the policy is critical.</b></p> <p>Employees will turn to their managers first with questions and concerns. Training to ensure that managers are well-positioned to answer questions quickly and correctly will reduce employee stress and contribute to building trust.</p>

Understand the impact of the vaccine policy on employee benefits.

<p>Are group health plans required to cover COVID-19 vaccinations?</p>	<p><b>Yes. Under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, non-grandfathered group health plans must cover COVID-19-related preventive services without cost sharing.</b></p> <p>This means that plans must cover COVID-19 vaccination and its administration without cost sharing, regardless of how the administration is billed and regardless of whether an individual must receive one or more doses of the vaccine. This includes coverage of the administration of the immunization in instances where a third party, such as the federal government, pays for the vaccine. For example, if there is no cost to the provider because the vaccine is provided for free by the federal government to the provider, a group health plan would not be required to reimburse the provider for the cost of the vaccine itself. However, the plan would pay for the office visit related to administration of the vaccine.</p>
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## Can employers incent employee vaccination?

**Due to the seriousness of the COVID-19 pandemic and the importance of vaccination in decreasing the spread of the virus, employers have considered incentives for employees to receive vaccinations. Incentivized vaccination programs raise significant legal questions, some of which do not have clear answers.**

The federal agencies responsible for the HIPAA nondiscrimination and wellness program rules for employer-sponsored health plans have not addressed how an incentive tied to COVID-19 vaccination would be treated under those rules.

Generally, however, employers should pay attention to the existing rules, as well as the GINA nondiscrimination requirements. Under HIPAA, consideration should be given over whether an incentivized program could be classified as a participatory or health-contingent wellness program, and then the applicable rules for the particular type of program would apply if the program is found to fall within either category. Note that if an incentive program is participatory or health-contingent, then the ADA rules related to wellness programs would also apply.

In recent [FAQs](#), the EEOC indicated that, under the ADA, an employer may offer an incentive to employees to voluntarily provide documentation or other confirmation that they received vaccinations on their own from a pharmacy, public health department, or other health care provider in the community. The EEOC confirms that requesting documentation or other confirmation showing that an employee received a COVID-19 vaccination in the community is not a disability-related inquiry covered by the ADA. Therefore, an employer may offer an incentive to employees to voluntarily provide documentation or other confirmation of a vaccination received in the community. However, the employer is required to keep vaccination information confidential pursuant to the ADA. In addition, the EEOC also confirms that an employer may offer an incentive to employees to voluntarily receive vaccinations administered by the employer or its agent. However, any incentive (which includes both rewards and penalties) must not be so substantial as to be coercive. Because vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information. Unfortunately, the EEOC did not give any examples or guidelines as to what might constitute a “coercive” incentive.

Finally, in recent FAQs, the EEOC also confirmed that employers may incent employees to obtain vaccinations without running afoul of the Genetic Information Nondiscrimination Act (GINA) as long as an employer does not acquire genetic information while administering the vaccines, but employers may not provide incentives to employees in exchange for requiring employee family members to be vaccinated unless the entity administering the vaccine is neither the employer, nor the employer’s agent.

However, it should be carefully noted that none of the EEOC’s new guidance specifically addresses incentives that are tied to a group health plan; this guidance instead appears to contemplate incentives available on an employment basis, irrespective of group health plan enrollment.

# □ Assess employee sentiment and deploy proactive communications.

<p>What are the most important messages to convey to employees?</p>	<p><b>Employers should lead with an authentic message that reinforces that the organization cares for their employees' health and safety as a top priority.</b></p> <p>Other important messages:</p> <ul style="list-style-type: none"><li>• Stay vigilant regarding social distancing, masks, good ventilation, and hygiene.</li><li>• Don't forget to receive your annual flu shot in addition to the COVID-19 vaccine.</li><li>• Your organization will commit to frequent, transparent communication to keep employees well educated and informed.</li><li>• We're all in this together and we'll get through it.</li></ul>
<p>What's the appropriate tone to strike with messaging?</p>	<p><b>It's important to understand how the workforce perceives the vaccine and related issues.</b></p> <p>A survey or series of surveys can help collect timely, accurate and evolving data points on employees' comfort levels in returning to the workplace with a vaccination, as well as their perceptions or attitudes related to taking the vaccine.</p> <p>Town hall-style meetings likely will help. Consider starting with a few senior leaders sharing their views, evolving into a question-and-answer format where employees can ask them questions.</p> <p>Understanding employee sentiment will ensure the tone of communications is appropriate for the workforce and balances empathy with business realities.</p>
<p><b>Key Takeaway:</b> Be clear on what your employees need to know, and what they need to do related to your policies and protocols.</p>	

# □ Organizations should ensure their liabilities are covered should they provide vaccines on-site.

If a company will be storing, transporting and/or dispensing the vaccine, what additional liabilities should they consider?

## **Organizations should consider addressing the following with their brokerage, legal, insurance and risk management team:**

1. Broad exclusions for COVID-19 and communicable disease in your policy terms that were put in place by carriers in the past year may mean that liabilities for storage, delivery, transport and dispensing of a vaccine are not covered.
2. Organizations or entities that transport, store, deliver or dispense the vaccine should focus on risk transfer (both legal and insurance/liability) to the asking party.
3. Risk mitigation and loss control actions are critical for those organizations and should be well documented.

For more information on this aspect, check out this article, [Employer Vaccination Policies & Employment Practices Liability](#).

## **Casualty coverage considerations:**

The liability risk arising out of vaccine distribution is largely unknown. Vaccine research has followed a shortened time frame due to the immediate need; thus, long-term effects are unclear. This means that the liability tail for bodily injury resulting from vaccination distribution is rather long. Further, insurers have begun placing exclusions on policies for liability claims arising out of the COVID-19 pandemic. Employers should carefully review their insurance policies for insurability of specific activities, and consult with their insurance brokers and legal counsel on any subjectivities. When possible, insureds should look to transfer the risk and related insurance obligations via contract to the asking party. The asking party may be able to obtain insurance or even have some form of immunity with regard to administration.

If an employer is asked to dispatch personnel (i.e., nursing students or medical center staff) to an area hospital or distribution center to assist in vaccination efforts, consider asking that personnel and students be “assumed” as representatives of the hospital. That means the asking party assumes all workers’ compensation and medical professional liability, and fully indemnifies the personnel. This will ensure the asking party assumes all training and supervisory responsibility for personnel. Compensation requirements should also be reviewed with general counsel.

Consider compliance requirements associated with distribution, including HIPAA and documentation standards for vaccination, subject to how the organization is involved in the storage and distribution of the vaccine.

<p>If a company will be storing, transporting and/or dispensing the vaccine, what additional liabilities should they consider? (cont.)</p>	<p><b>Property coverage considerations:</b></p> <p>If an employer plans to store a vaccine in company-owned equipment on company property, particularly in deep freezers, the employer should take careful consideration of the value and insurability of the stored product, and whether there is appropriate backup power and continuity plans for the freezers. Organizations should consider transferring full risk of property damage to the asking party via contract.</p> <p>If an asking party is simply using the employer’s campus as a distribution point, the employer should transfer all risk for third-party injuries to the asking party via contract. Consider compliance requirements associated with distribution including HIPAA and documentation standards for vaccination subject to how the organization is involved in storage and distribution of the vaccine.</p>
<p>Will carriers cease exclusions on communicable disease and COVID-19 when the vaccine has been deployed?</p>	<p><b>It’s unlikely that the vaccine will trigger an end to communicable disease or COVID-19 exclusions.</b></p>

Continue to prioritize employees’ health and safety, and ensure business continuity.

The COVID landscape will continue to evolve. Trust Gallagher to provide the insights, guidance and data to help organizations support the physical and emotional wellbeing of the workforce, and identify the right coverage for any additional liabilities to organizations as a whole. Contact your Gallagher consultant for more information.

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