

September HR Compliance Newsletter

September 2021

Eva the Compliance Diva Answers



is back by popular demand to answer your HR Compliance questions! Questions are based on inquiries by Employers, Managers, and Professionals!

Inquiry: *Hi Eva, thanks for selecting my question. I am an HR Manager working in a multi-site location. We have over 350 employees. We are considering having a vaccine program, but we are not sure whether to have a mandated vaccine or a voluntary program. What do you recommend as best practice and what are the risks of either program?*

Whitney, HR Manager

Eva's Response: *Hi Whitney, thanks for taking the time to reach out to me with your inquiry. Vaccine programs are now more than ever changing regularly. It is not easy to navigate all the changes. The decision to have any type of vaccination program there are many issues to consider. First, you need to consider any industry standards and obligations, State requirements, and company considerations.*

Do You Need a Mandatory Vaccine Program?

The answer depends on your business.

If you run a business where your employees can safely work remotely or socially distance, you may not need it right away.

On the other hand, if you run a retail business, school, a restaurant, or any similar business where employees circulate among each other or deal with the public, a mandatory vaccination program may be beneficial to your operation.

Many retail and customer-facing industries believe that it will be a good advertisement if they can say that their employees are all vaccinated.

Whatever the approach, employers should not jump in without weighing the costs and benefits.



Things to consider include administrative costs challenges to implementing a mandatory program, such as training and legal compliance.

Best Practices

- Each employer should evaluate its business needs in deciding as to possible vaccine mandates.
- Many employers may decide it is better to encourage vaccination rather than make it a condition of employment.
- On the other hand, some employers where employees have close contact with customers (i.e. restaurants and department stores) may reach a different conclusion.
- Check your industry standards and state vaccine requirements for access, availability, and distribution criteria
- Speak to your Leadership before implementing any program
- The first consideration is whether the COVID-19 vaccine will be mandatory or merely encouraged.
- Ensure you check the state requirements on criteria for vaccination mandate regarding audience.
- If vaccination is mandatory, ensure your human resources representatives are informed of and have processes in place to handle objections to the vaccine, whether based on religious beliefs or medical conditions, as discussed previously.
- Consider what accommodations may be available to employees with legitimate objections.
- Develop a written form for requests for exemptions to formalize the process, but keep in mind employers must make individualized evaluations when reviewing objections.
- To maintain employee morale, consider how you can lawfully separate bona fide objections from opportunists seeking to avoid work.



How will you Roll It Out?

- You will need to wait until vaccines are available to your workforce to institute a mandatory program.
- Even then, you may have to allow for a vaccine rollout over time, and only make the mandate applies to those employees who are eligible to receive a vaccine.
- In the early months of 2021, practical questions about fairness may arise.

- For example, if an employee wishes to comply but a vaccine is not available to them, should they be excluded from the workplace?
- Employers adopting a mandatory program will likely face, and should be prepared to handle several similar questions.

Other Factors to Consider

- Job descriptions should be updated to provide for essential functions, which may include travel, customer-facing positions, close interaction with other employees, or other factors that might compel mandatory vaccination;
- Employers should pay particular attention to recordkeeping given the ADA mandate that medical records be kept separate from general personnel files and the importance of data integrity and limited internal access to medical information.
- Employers should keep in mind that a vaccine is not a fail-safe for an employer's general obligation to provide a safe working environment, and COVID-19 has taught some hard workplace lessons regarding the prevention against and mitigation of easily transmittable but hard to discern dangers such as viruses and bacteria in the workplace.
- To some, a COVID-19 vaccine will be a welcome development that will permit employees to return to the pre-pandemic paradigm. Others, however, may legitimately believe that a vaccine threatens their health or spiritual well-being.

Vaccine Program Factors

- For those employers that would like to make this a voluntary vaccination program, the following strategies may be considered:
- Lead by example. key executives can lead the way by getting vaccinated.
- Reach out to your insurance carrier to determine whether employees will be asked to cover any administrative expenses of administering the vaccine.
- Initiate a survey requesting employee's feedback
- Onsite or offsite vaccine programs are decisions to be made by the Employer.
- If you decide to have mandated or voluntary vaccine programs, it is best practice to have employees get their vaccine by their healthcare provider or by a pharmacy that offers vaccines since it would avoid a risk of employees not asking HIPPA, GINA and ADA approved questions



Factors Employers Must Consider When Establishing a Vaccination Policy

The following are the considerations that should be front of mind as you prepare your COVID-19 vaccination program and policy.

- Will you require the vaccine as mandatory, or simply recommend that your employees get vaccinated when eligible to do so? Legally, you can require the vaccine, and proof of vaccination as a condition of employment.
- In that case, however, you must also allow for reasonable accommodation for employees who cannot get vaccinated because of underlying legally protected disability, and for employees who refuse to get vaccinated because of a sincerely held religious belief, practice, or observance.
- Practically speaking, both because of the ability of certain employees to opt-out and other employees who are otherwise anti-vax or pro-privacy to become offended by what they may perceive as an invasion of their medical privacy, a recommendation over a mandate is preferred in most cases.
- an “undue burden,” for example. The recently published EEOC guidance ultimately leaves the decision-making burden and legal risk on employers.



What Are Other Dilemmas

Because much of the “whether to accommodate” analysis will be employee-specific, this leaves employers open to arguments that they have provided exceptions or accommodations on an unfair basis, giving rise to discrimination claims. Employers mandating the vaccine must work with their HR and legal teams in unison to provide as uniform response as possible in similar situations.

Taking adverse action, like termination, with an employee who refuses the vaccine can likewise generate potential exposure to a wrongful termination claim.

There is also some concern, given some of the unknowns as to potential side effects, that an employee who is required to get the vaccine who then becomes ill, injured, or dies, may be eligible to bring a claim against the employer. These claims would likely be swept into workers’ compensation.

Partner with your health administration in your jurisdiction for proper vaccine protocols.

For more information or answer questions, sign up for the HR Compliance Newsletter at www.hrcompliance.net



Eva, the Compliance Diva

Summary

- Mandating Vaccines by Employers to employees are approved by the regulatory agencies
- At this time there are a limited supply of vaccines in certain communities which can impact mandatory vaccines in the workplace
- But Employers need to review many issues before they feel confident about mandating vaccines in the workplace
- There are ADA disability issues to consider as well as religious factors that can put Employers in a difficult position
- Employers can use Reasonable Accommodations as a way to mitigate some of these issues as long as they explore all requests, are consistent, and record all requests and offers
- Remember, you can offer masks, remote work, reassignment, social distancing, testing for employees who meet the exemption criteria
- Providing accommodation for employees who do not meet the exemption criteria is optional but ensure you are consistent
- Incentives can also be an issue as long as it follows the EEOC updates on incentives
- Ensure you create policies that represent the Company's procedures and communicated them promptly to employees.
- Enroll in future COVID-19 and workplace training to keep updated on new regulations for the workplace.



Resources

<http://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

<https://www.cdc.gov/>