

**Responses to the questions posed during the IRC Network’s “Legal Aspects of COVID-19 Vaccination for Employers” webinar presented by NEPIRC and Cipriani & Werner, P.C.**

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**General Inquiries/Responses**

***Is vaccination for employees a mandatory subject for collective bargaining if your workforce is represented?***

Yes, employers subject to a collective bargaining agreement must consider the specific language of their existing agreement, as well as legal obligations under Section 8(d) of the National Labor Relations Act when developing a mandatory vaccination policy.

- a. The Act requires employers to bargain with the union representing their employees over terms and conditions of employment.
- b. Employers must determine whether the collective bargaining agreement permits (or prohibits) the employer from implementing a mandatory vaccination policy for its employees.
- c. Is the employer privileged to implement such a policy, unilaterally, pursuant to a “management rights clause”?

Absent documented authority an employer is likely required to bargain with the union over its implementation of a mandatory vaccination policy. Employers must review all applicable state and local laws and regulations that may limit their ability to implement mandatory vaccinations. They should consult qualified legal counsel particularly when a collective bargaining agreement is present.

***Can you recommend resources to use, especially in Spanish, as part of an educational campaign?***

The Department of Labor (DOL), the Center for Disease Control (CDC), the World Health Organization (WHO) and the Food and Drug Administration (FDA) are among leading resources providing multilingual narrative explanation, printable postings and educational and training material on point. We recommend you visit each website to determine which products may best suit your company’s needs.

**CDC Guidance**

***The immediate goals of the CDC are:***

- a. Decreasing death and serious disease as much as possible.
- b. Preserving the functioning of society.
- c. Reducing the extra burden COVID-19 is having on people already facing disparities.

The objective is for everyone to be able to easily get a COVID-19 vaccination as soon as possible.

- a. The first round of available vaccines is to be allocated to healthcare personnel and long-term care facility residents. (Phase 1a/December 3, 2020)
- b. Thereafter, the CDC recommends the vaccination of frontline essential workers, such as fire fighters, police officers, corrections officers, food and agricultural workers, United States Postal Service workers, manufacturing workers, grocery store workers, public transit workers and those who work in the educational sector (teachers, support staff and daycare workers). (Phase 1b/ December 22, 2020)
- c. The first phase will be completed by providing vaccination to individuals aged 65-74 years old because of their high risk of hospitalization, illness or death due to complications presented by COVID-19; people aged 16-64 years old with underlying medical conditions that increase the risk of serious, life-threatening complications from COVID-19; and other essential workers, such as people who work in transportation and logistics, food service, housing, construction, finance, information technology, communications, energy, law, media, public safety and public health. (Phase 1c/December 22, 2020)

The CDC recognizes that each state has its own plan for vaccination distribution. The best advice is to contact your local department of health to determine availability, accessibility and current guidelines.

### **CDC Guidance-Related Questions**

#### ***What is the impact of CDC guidance for vaccination?***

The CDC recommends that individuals receive the vaccine as soon as possible, understanding the current limitations of availability and distribution. Current studies suggest that the available vaccines have been successful for people ages 18 through 85 years old. Additional tests are required for people younger than 18 and pregnant women.

#### ***Has the CDC provided guidance for mandating vaccination, and does an employer face liability if it does not mandate vaccination of all employees?***

The CDC has provided the guidance listed above. The goal is to get as many medically qualified individuals vaccinated as quickly as possible. Although the CDC has added vaccination to its list of suggested protocols to stop the spread of COVID-19, it has not mandated vaccination. As a general rule, employers, outside the area of healthcare, should not presently face liability for not mandating vaccination. Currently, there are practical reasons for not mandating vaccinations, including but not limited to, the fact

that vaccines are not widely available and not all people are eligible. The law is evolving, and we will keep you apprised of significant developments.

The Occupational Safety and Health Act (OSHA) sets forth a General Duty Clause. Section 5(a)(1) of the Act requires an employer to furnish to its employees with "employment and a place of employment, which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees."

The requirements of the Act are:

- a. The employer failed to keep the workplace free of a hazard to which employees of that employer were exposed.
- b. The hazard was recognized.
- c. The hazard was causing or was likely to cause death or serious physical harm.
- d. There was a feasible and useful method to correct the hazard.

This clause pre-dated the vaccine and related guidelines. In the past year, creative attorneys have advanced lawsuits alleging that employers who failed to follow the CDC guidelines, including masking, social distancing and cleaning standards, were reckless and should be liable for consequential injury, illness and death caused by COVID-19 exposure in the workplace. It remains unclear whether these suits have any legal merit. Workers' compensation is the exclusive remedy at law for most employers in most instances in the Commonwealth of Pennsylvania. Only in the rarest of exceptions can this exclusive remedy be challenged for the imposition of additional damages.

Current standards pertaining to vaccine lean toward greater protections for employers. Again, availability and eligibility impact any duty that might be imposed on employers. Further, the vaccine is arguably an invasive procedure. Employers can provide masks and cleaning but may not be able to impose employee vaccination. Yes, the EEOC says employers may mandate vaccination policy. However, it also recognizes exceptions, the need for accommodation and potential flexibility. For now, employers should monitor the development of the law. However, simple inclusion of the vaccine in the CDC guidance should not garner additional employer liability under current standards.

### **Mandated versus Non-Mandated Policies**

***If an employee were diagnosed with COVID-19, could they still be mandated to get the vaccine?***

Having had COVID-19 may protect an employee from getting it again, but medical science remains unsure how long the employee's immunity may last. Some individuals

have had COVID-19 more than once. Current consensus suggests that employees who have had COVID-19 should still get the vaccine. Employers should proceed carefully in determining which type of program, mandatory, quasi-mandatory or voluntary, they intend to impose. Currently, the number of vaccines is limited. In most states, only certain categories of the population are eligible for vaccination. Finally, guidance and points of clarification continue to evolve. For these reasons, any vaccination program, particularly a mandatory program, may be premature. We will continue to update information as it becomes available.

***Are employers required to record the vaccination incentive as earned income for income tax reporting?***

Employers may be required to take and record appropriate payroll deductions depending on the type of incentive provided to employees upon proof of vaccination. Some current examples of proposed vaccination incentives include up to four (4) hours of pay and/or one half (1/2) to two (2) days of PTO for securing a vaccine. Obviously, if appropriate and utilized, these types of incentives would be subject to standard deductions.

However, employers should proceed cautiously as the law remains unsettled as it pertains to incentive programs for vaccination. As discussed, recently over forty (40) companies and the Society for Human Resource Management (SHRM) have joined to request further clarification from the EEOC as to what may constitute an appropriate incentive. Initial guidance suggested “de minimis” gifts would be appropriate – like a gift card of nominal value. We will update our response as further guidance is provided. For now, employers may consider but should not implement an incentive program.

In most states, including Pennsylvania, all employees are not currently eligible for vaccines. There may be potential liabilities with awarding incentives to employees who can receive the vaccine. Employees that are precluded for medical or religious reasons could entertain a suit for discrimination if they do not receive the bonus. For now, if an employer seeks to include an incentive program as part of their overarching vaccination policy and protocol, we suggest they consider but not implement without further application.

The longevity of the vaccine may create additional financial considerations. Based on tests centered on people who have received the vaccine, it has been suggested that the vaccine provides protection from COVID-19 **for at least four (4) months**. Employees may need to get vaccinated on more than one occasion a calendar year. Employers may consider this prospect in the development of their protocol.

## **Pregnancy Considerations**

### ***What about pregnant women, women who are breastfeeding and women who plan on getting pregnant?***

Women who are pregnant and part of a group that is recommended to receive the COVID-19 vaccine, such as healthcare personnel, may choose to be vaccinated. The CDC recommends eligible employees that are pregnant, contemplating pregnancy and/or breastfeeding should consult their clinicians to help them decide whether to get vaccinated. The vaccinations available have only been authorized for use under Emergency Use Authorization (EUA). Additional testing is underway to determine the effects of the vaccine on pregnancy and breastfeeding.

### **Key considerations pregnant patients can discuss with their healthcare provider include:**

- a. The likelihood of exposure to SARS-CoV-2, the virus that causes COVID-19.
- b. Risks of COVID-19 to them and potential risks to their fetuses.
- c. What is known about the vaccine – how well it works to develop protection in the body, known side effects of the vaccine and lack of data during pregnancy.

Pregnancy testing should not be a requirement prior to receiving any EUA-approved COVID-19 vaccine. Pregnant employees who decline vaccination should be supported in their decision.

There is no guidance qualification specifically associated with women who wish to get pregnant in the next ten (10) years. Both physicians and attorneys have examined the precedent provided by the influenza vaccine. The medical community performed a 10-year look back and did not find any direct correlation between the vaccination and deleterious side effects for women who had the vaccine and subsequently became pregnant. This precedent is persuasive, not dispositive. Again, further tests must be conducted to determine the impact of the COVID-19 vaccine on women who are pregnant, may become pregnant or are breastfeeding.

## **Federal Protections**

### ***Many of the federal employment rules apply to companies with a minimum size. Do you know if there is a minimum of employees for GINA to apply?***

The **Genetic Information Nondiscrimination Act (GINA)** protects individuals against employment discrimination based on genetic information. GINA covers **employers with 15 or more employees**, including state and local governments. It also applies to

employment agencies, labor organizations, joint labor-management training, apprenticeship programs and the federal government.

Genetic information includes:

- a. Information about an individual's genetic tests
- b. Information about the genetic test of a family member
- c. Family medical history
- d. Requests for and receipt of genetic services by an individual or a family member
- e. Genetic information about a fetus carried by an individual or family member or of an embryo legally held by an individual or family member using assisted reproductive technology

GINA prohibits the use of genetic information in making employment decisions, such as hiring, firing, advancement, compensation, and other terms, conditions and privileges of employment. There are no exceptions to the prohibition on using genetic information to make employment decisions.

The **Americans with Disabilities Act (ADA)** prohibits discrimination against individuals with disabilities in all areas of public life, including jobs, schools, transportation and all public and private places that are open to the general public. The purpose of the law is to make sure that people with disabilities have the same rights and opportunities as everyone else.

The ADA applies to employment practices of private employers with **15 or more employees**, state and local governments, employment agencies, labor unions, agents of the employer and joint management labor committees); and Title II (programs and activities of state and local government entities. Employers should be aware that many states have enacted similar statutes that provide similar protections to employees of smaller employers. The Pennsylvania Human Relations Act prohibits discrimination based on disability and applies to employers with four (4) or more employees.

**Covid-19 Mitigation Practices and Procedures**

***If remote work and social distancing is not possible, like on a manufacturing floor, what do you do with the one person who is not getting the vaccine?***

First, employers must determine the type, time and method for vaccination protocol. Employers may select from a purely voluntary policy, a strictly mandatory policy or a hybrid that utilizes mandatory testing for certain categories of employees utilizing a business necessity basis for vaccination.

Second, employers should work with counsel (and local health authorities as suggested by the CDC) in determining and implementing an effective vaccination policy.

Third, employers need to familiarize themselves and provide training to supervisors and management for processing protected exceptions to the vaccination protocol. As outlined in the presentation there are two (2) primary exceptions; a protected health condition/disability under the Americans with

Disabilities Act (ADA) or religious accommodation under Title VII. If, and when, an employer is confronted with one of the two exceptions, they must participate in the interactive process to determine if the condition may be reasonably accommodated without undue hardship. The interactive process requires dialogue and evaluation of potential alternatives to preserve the employment relationship. The employee should be an active participant. The employer should seek the employee's suggestions for accommodation although that specific accommodation does not need to be employed. Employers should seek the advice of counsel to address the case-by-case analysis and list of potential accommodations before any decision is made and certainly before any adverse employment action is taken.

Finally, leave of absence and remote employment may be options for accommodation. We recognize that many positions in the manufacturing industry do not lend themselves to these accommodations based on business necessity and job responsibilities. Employers can separate employment if accommodation cannot be met. **HOWEVER**, employers must tread lightly. Consider how employees have been working/accommodated to this point in the pandemic. Review all ancillary statutes and regulations for compliance, such as FMLA. Consult counsel before taking any action.

***Can you incorporate risk mitigation practices, such as daily testing to be included in the accommodation discussion?***

The CDC does NOT recommend that employers use antibody tests to determine which employees can work. Antibody tests check a blood sample for **past infection** with SARS-CoV-2, the virus that causes COVID-19. **The CDC does not yet know if people who recover from COVID-19 can get infected again.** All employers should conduct risk and hazard assessments for all types of workers, and then create plans to address identified hazards. Employers can use OSHA's tools for hazard identification and assessment. There are essentially two broad categories of testing:

1. **Antigen test** (Rapid Test): This test detects protein fragments specific to the coronavirus. It can be done in a clinic, doctor's office or hospital. Results can be reported within 15 minutes.
2. **PCR test**: PCR testing is considered the "gold standard" in SARS-CoV-2 detection. This test actually detects RNA (or genetic material) that is specific to

the virus and can detect the virus within days of infection, even those who have no symptoms. The turnaround time is longer – two to three days.

Rapid tests are considered the most accurate for a patient who is having symptoms of COVID-19. While the rapid test can get you results very quickly, the results may not always be accurate, particularly when individuals do not present active symptoms. Best practices for mitigating the spread of COVID-19 include:

- a. Wearing a face mask
- b. Social distancing – maintaining a distance of six feet
- c. Washing your hands often with soap and water for at least 20 seconds
- d. Using an alcohol-based hand sanitizer with at least 60% alcohol
- e. Not touching your eyes, nose and mouth with unwashed hands
- f. Avoiding close contact with people who are sick
- g. Staying home when you are sick
- h. Covering your cough or sneeze with a tissue
- i. Cleaning and disinfecting frequently touched objects and surfaces

***If an employer chooses not to mandate the vaccine, is a vaccine policy still necessary?***

Employers considering implementing a workplace COVID-19 vaccination program should contact the health department in their jurisdiction for guidance. The planning process for hosting a workplace COVID-19 vaccination program should include input from management, human resources, employees and labor representatives, as appropriate. Important preliminary steps include obtaining senior management support, identifying a vaccine coordinator, and enlisting expertise from local public health authorities, occupational health providers and pharmacies.

Consider hosting a vaccination clinic at your workplace and contact the health department in your jurisdiction for guidance. Offer the vaccination at no charge and during work hours. If hosting a vaccination clinic at your workplace is not possible, consider other steps to encourage vaccination, which are listed below:

- a. Be flexible in your human resources policies. Establish policies that allow employees to take paid leave to seek COVID-19 vaccination in the community. Support transportation to off-site vaccination clinics.
- b. Use promotional posters/flyers to advertise locations offering COVID-19 vaccination in the community. Display posters about COVID-19 vaccination in break rooms, cafeterias and other high traffic areas.
- c. Post articles in company communications (e.g., newsletters, intranet, emails, portals) about the importance of COVID-19 vaccination and where to get the vaccine in the community.



(Above bullets taken from CDC Website: Workplace vaccination; January 27, 2021)

There are many reasons an employer may not wish to mandate a policy. However, all current guidance suggests that employers should consider an educational campaign to arm their employees with scientific facts about the benefits and potential concerns surrounding vaccination, along with encouraging employees to pursue the option most appropriate for their personal circumstance.

***How do we determine a medical disability without violating HIPAA?***

Employers can include provisions that protect the confidentiality of any COVID-19 test results in accordance with the Health Insurance Portability and Accountability Act (HIPAA) and the Americans with Disabilities Act (ADA), including any state equivalent law, if applicable.

Under HIPAA, employers generally cannot receive employee-protected health information unless authorized by the employee or otherwise authorized under applicable federal and state privacy laws. If an employer would like to access an employee's COVID-19 test results, the employer can ask that employees to sign consent forms authorizing the release of such records as a condition of testing, provided that an employee nonetheless may revoke such authorization under HIPAA prior to disclosure of the results.

Under the ADA, once an employer receives an employee's test results, the employer would be well advised to maintain the result as a confidential medical record – separate from the personnel file.

***To put our customers at ease, can (or should) an employer outwardly promote that 100% of their employees have been vaccinated, if that is indeed the case?***

To put customers at ease, employers should promote that they have implemented all available safety guidelines. In addition to those listed above, employers should post and promote cleaning and disinfecting practices. Employers should also take steps to demonstrate the active practice of posted action steps. If you are promoting that employees and customers wear masks and social distance, then enforce the same. If, and when, an employer adopts a mandatory vaccination program, and if they have full compliance with that mandate, they may post and promote that policy implementation. However, based on the exceptions noted, few, if any, programs will ever be 100% compliant. If you are to promote a mandatory vaccination program, you should consult counsel and include an appropriate disclaimer.

***Can we ask our visiting vendors (HVAC, etc.) if they have been vaccinated? Is it within our right to insist that our vendors require that their representatives be vaccinated before they visit us?***

Your policy and protocol should be consistent. It is difficult to demand customers and vendors to be vaccinated if your workforce is not 100% vaccinated. Currently, that is simply impractical based on the vaccine distribution status. As vaccine distribution becomes more readily available, and more of the population can secure vaccines, your individual policy can evolve.

Employers not only have the right but the responsibility to protect their employees. All businesses need to keep everyone onsite as safe as possible. Employers should be using COVID-19 questionnaires that ask if visitors or vendors are experiencing any symptoms of COVID-19.

***Generally, what is our current legal exposure if we require vaccinations and, three years later, side-effects are discovered with the vaccine our employees received?***

In most states, including the Commonwealth of Pennsylvania, workers' compensation will be the exclusive remedy for injuries and or illnesses suffered by an employee at or through work in the course and scope of their regular duties. If an employer sanctions a mandatory program, resulting in injuries or illnesses now or in the future, they will be covered by workers' compensation.

Employers considering a program or employers with a unique workforce (for example one that utilizes staffing services or independent contractors) should review potential exposure with qualified counsel and/or their insurance broker. There may be additional insurance coverage available or required to protect the employer's interest. Similarly, there may be specific contract language indemnity clause required to insulate the employer from potential liability.

***What about federal employees?***

Generally, the information provided in the presentation does apply to federal employees. There are no statutory exceptions to federal employers. However, each program for vaccination may be unique. Additional guidelines may be adopted for federal/government employees. We will keep you abreast of developments.

***If vaccines do not reduce the transmission of the virus, aren't any complaints or concerns by employees that they do not want to work with non-vaccinated co-workers a moot point? Either way, their risk of contagion from a co-worker is the same, is it not?***

Several different types of potential vaccines for COVID-19 are in development, including:

- a. *Inactivated or weakened virus vaccines*, which use a form of the virus that has been inactivated or weakened, so it doesn't cause disease but still generates an immune response.
- b. *Protein-based vaccines*, which use harmless fragments of proteins or protein shells that mimic the COVID-19 virus to safely generate an immune response.
- c. *Viral vector vaccines*, which use a safe virus that cannot cause disease but serves as a platform to produce coronavirus proteins to generate an immune response.
- d. *RNA and DNA vaccines*, a cutting-edge approach that uses genetically engineered RNA or DNA to generate a protein that itself safely prompts an immune response.

Current studies indicate that COVID-19 vaccines will prevent people from getting and spreading the virus. For example, the Moderna vaccine showed the vaccine prevented COVID-19 in about 95 out of 100 people and severe COVID-19 in 100 out of 100 people.

***Must you retain proof of vaccination for 30 years?***

The general rule under OSHA is employee medical records must be preserved and maintained for at least the duration of employment plus 30 years unless a specific occupational safety and health standard provides a different period of time. Currently, there is no specific rule or exception for the proof of COVID-19 vaccination. Given the uncertainty surrounding the vaccines and potential short-term/long-term side effects, the OSHA standard should be followed.

***Is there an accepted revision timeframe for job descriptions, even if nothing has changed, i.e. do they have to be reissued every year? Every 2 years, etc.?***

There is no statute or regulation mandating periodic reviews and updates of job descriptions. Best practices suggest every year to 18 months or as needed should a job specifically change based on product, automation or market. As discussed in the presentation, sound job descriptions that accurately define and delineate duties, qualifications and physical requirements are the cornerstone of an effective employment practice and protocol. Job descriptions can be utilized in every aspect of the employment relationship, from hiring through review of performance and/or leave and accommodation to termination. Employers must endeavor to be certain the written narrative matches the actual position.

***Should job descriptions be updated to include the CDC rules like wearing a mask, washing hands, the six feet rule and not coming to work sick?***

All employers should have published and posted the safety requirements for maintenance of a safe work environment pursuant to the guidelines proffered by the CDC, as well as state and local officials. This includes all recognized protocols,

including but not limited to, handwashing, mask wearing and social distancing. Each job description does not need to have these functions added. If employers wish to emphasize this heightened requirement while the pandemic persists, they may be attached as an addendum to job descriptions. However, they should be independently posted and consistently reinforced for every position.

***Disclaimer: This FAQ document is designed to provide learned interpretation of general guidance for the specific topic of COVID-19 vaccinations. It is not to be considered legal advice. Undoubtedly, employers will have questions specific to their business and their workforce. Appropriate legal analysis will require the application of then current law to variables attributable to that employer and their particular circumstance. Employers are encouraged to contact either Jim Devine (JFDevine@c-wlaw.com), Caitlin Donahue (CADonahue@c-wlaw.com) or their own trusted counsel for specific legal review.***