



2021

## COVID-19

Employer Vaccine  
Considerations  
and Checklist



**Gallagher**

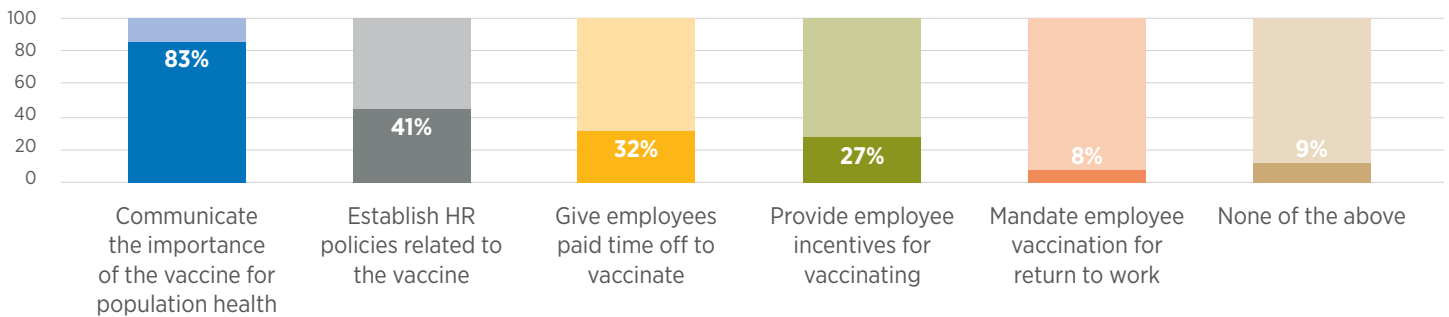
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# Executive Summary

With COVID-19 vaccine production and administration expanding, employers are increasingly focused on developing a strategy that keeps their workforce safe and healthy, protects their business while being compliant, and is sensitive to varying employee beliefs regarding vaccines.

As we enter 2021, people around the world are receiving the COVID-19 vaccinations. What will these vaccinations mean for employers, and how are organizations responding? Our recent *The Vaccination and Your Organization Town Hall* webinar brought visibility to how almost 2,000 employers are approaching their vaccine strategy.

## HOW ARE ORGANIZATIONS APPROACHING THE VACCINE?



Results: Based on 1,969 unique, external attendees who responded to a live poll during the 2.3.2021 Gallagher *The Vaccination and Your Organization Town Hall* webinar.

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

The vaccine roll out process will continue to evolve. The below 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 Health Insurance Portability and Accountability Act (HIPAA)?</li></ul>

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?

**The EEOC has indicated that employers may require that employees get inoculated, if certain conditions are met.**

However, employers must consider Title VII and Americans with Disabilities Act (ADA) requirements when determining whether to adopt mandatory vaccination requirements.

Whether an employer can implement a mandatory vaccine policy likely will depend on the type of business. Although vaccinations are not considered to be “medical examinations” under the ADA, pre-screening vaccination questions may elicit information about a disability. If an employer administers the vaccine, it must show that any pre-screening questions it asks employees are “job-related and consistent with business necessity.”

To meet this standard, “an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others.” Thus, a hospital may be able to clearly show that a mandatory vaccination program is job-related and necessary to avert a direct threat, but a law firm may have more difficulty meeting those requirements.

Employers must also be aware of the potential need to provide a reasonable accommodation for employees with certain medical conditions or with objections based upon religious beliefs. In December 2020, the EEOC updated its [COVID-19-related FAQs](#) to address reasonable accommodations.

**In summary, as you evaluate whether or not to mandate, consider:**

- **Federal, State and Local Laws** at the regional, state, county and local levels. Consider 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 ([LINK](#)).
- **Reasonable Accommodations** for employees who are unable to receive a vaccination 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.

If an organization can mandate a vaccine, should they?

**Many, but not all Americans, have eagerly awaited the arrival of the vaccines.**

Because many have misgivings, employers should consider the following when determining whether or not to mandate employee vaccination:

- Will a vaccine mandate alter how the employer is perceived?
- What communications will help employees understand the benefits of the vaccine, where to get vaccinated, and any cost involved?
- Will the organization offer time off for employees to get the vaccine, and recover from any potentially mild side effects?
- Employers should understand that they can still help the vaccination effort by encouraging their 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. Employees who refuse the vaccine due to a disability or religious beliefs are protected under the ADA and Title VII.**

The EEOC has indicated that employers may be able to require that employees get inoculated if certain conditions are met. As a threshold matter, whether an employer can implement a mandatory vaccine policy likely will depend in large part on the type of business the employer operates. Although vaccinations are not considered to be “medical examinations” under the Americans with Disabilities Act (ADA), pre-screening vaccination questions may implicate the ADA’s provision on disability-related inquiries, which are inquiries likely to elicit information about a disability.

After meeting the threshold requirement under the ADA, employers must also be aware of the potential need to provide a reasonable accommodation for employees with certain medical conditions or with objections based upon religious beliefs. In December 2020, the EEOC updated its COVID-19-related FAQs to address [reasonable accommodations](#).

Whether or not these laws apply to the situation, consult your employment attorney before taking action.

For a deeper dive on the specific considerations in this situation, read the article from [Gallagher Employee Benefits and COVID-19 FAQ](#).

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?

**If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then it would be lawful for the employer to exclude the employee from the workplace.**

This does not mean the employer may automatically terminate the worker. Employers will need to determine whether any other rights apply under the EEO laws or other federal, state, and local authorities.

To assert a need for an accommodation or an exemption from a mandatory vaccination program, the request or objection must be based upon a sincerely held religious belief, practice, or observance. In this context, a sincerely held but non-religious opposition to a vaccination is not sufficient. Thus, a general unease about taking the vaccine is not sufficient in this framework.

Whether or not these laws apply to the situation, employers should consult their employment attorneys before taking action. For a deeper dive on the specific considerations of this situation, read the [Gallagher Employee Benefits and COVID-19 FAQ](#).

In addition to the ADA and Title VII, are there Occupational Health & 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.**

As of December 15, 2020, OSHA has not mandated employee vaccinations; however, 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. Therefore, employees may claim that employers who do not require vaccinations are putting their workforce at risk in violation of Section 5(a)(1). Employers should note that OSHA may also protect an employee who refuses vaccination because of a reasonable belief that the employee has a medical condition that creates a real danger of serious illness or death (such as serious reaction to the vaccine).

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

**More specifically, OSHA has provided to employees the following FAQ:**

- [What can I do if I believe my employer is not protecting me from exposure to SARS-CoV-2, the virus that causes COVID-19, on the job?](#)
- Under federal law, you are entitled to a safe workplace. Your employer must provide a workplace free of known health and safety hazards. If you have concerns, you have the right to speak up about them without fear of retaliation.
- If you believe you are being exposed to SARS-CoV-2, the virus that causes COVID-19, or that your employer is not taking appropriate steps to protect you from exposure to the virus at work, talk to your supervisor or employer about your concerns. OSHA provides [recommended measures for workers and employers to take to prevent exposures and infections](#).
- You have the right to [file a complaint](#) if you feel you are being exposed to a serious health or safety hazard. If you have suffered retaliation because you voiced concerns about a health or safety hazard, you have the right to file a [whistleblower protection complaint](#).
- If you believe you have contracted COVID-19 on the job, [OSHA recommends several steps you should take](#), including notifying your supervisor. Your employer can take actions that will keep others in your workplace healthy and may be able to offer you leave flexibilities while you are away from work.

Thus, employers should carefully weigh OSHA considerations when determining whether to mandate a COVID-19 vaccine for their workforce.

If an employer mandates vaccinations, would it need to re-visit collective bargaining agreements?

**Potentially. In addition to EEOC and OSHA requirements, employers should be aware of potential collective bargaining agreement implications.**

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.

What privacy issues related to the vaccine should an employer be concerned about?

**Under HIPAA's 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.**

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.

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. Potentially under the ADA, the documentation will be treated as a confidential employment record; however, it is not PHI in the employer's hands because it is not related to an employer-sponsored health plan.

Under ADA guidance, an employer may store all medical information related to COVID-19 in existing medical files.

Employers also should take care to ensure that any vaccination program would comply with applicable state law, including state privacy law.

When should an employer stop mandating testing, masks, contact tracing and other measures?

**Employers should continue to follow the guidelines put in place by organizations like the Centers for Disease Control and Prevention ([CDC](#)), the World Health Organization (WHO), as well as local health guidelines.**

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>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 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 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, group health plans must cover COVID-19-related preventive services without cost sharing.</b></p> <p>This means that plans must cover without cost-sharing a COVID-19 vaccination and its administration, 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>
<p>Can employers incent vaccine participation?</p>	<p><b>Unless a policy decision is made to treat the vaccine for the coronavirus differently—either by Congress or one or more of the agencies with jurisdiction over areas related to COVID-19 immunizations, or group health plans—the compliance implications of an employer offering an incentive for its employees (and possibly their family members) to receive the vaccine would fall under the rules that govern wellness programs.</b></p> <p>Under the various wellness program rules, the considerations would largely mirror those that must be made when a wellness program pays an incentive for receiving a flu vaccine. If the only thing an employee would be required to do to be eligible for a financial incentive reward is receive the vaccine, the program would be subject to both the EEOC’s rules under the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act, as well as the Health Insurance Portability and Accountability Act (HIPAA) and Patient Protection and Affordable Care Act wellness rules for participatory programs.</p> <p>For additional information on wellness program rules, see the <a href="#">Gallagher Employee Benefits and COVID-19 FAQ</a>.</p>

# □ Assess Employee Sentiment, 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 on social distancing, masks, good ventilation, and hygiene.</li><li>• Vaccine availability and administration is different from state to state.</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></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 level in returning to the workplace with a vaccination, and employees' 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 and evolve into a question-and-answer format where employees can ask leaders questions.</p> <p>Understanding employee sentiment will ensure the tone of communications is appropriate for the workforce and balances empathy with business realities.</p>

# □ Organizations Should Ensure their Liabilities Are Covered Should They Provide Vaccine 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.

**• Casualty coverage considerations:**

The liability risk arising out of vaccine distribution is largely unknown. Vaccine research has followed a shortened timeframe 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 the specific activities and consult with their insurance broker 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, Ensure Business Continuity

The vaccination 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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The intent of this analysis is to provide general information regarding the provisions of current federal laws and regulation. It does not necessarily fully address all an organization’s specific issues. It should not be construed as, nor is it intended to provide, legal advice. An organization’s general counsel or an attorney who specializes in this practice area should address questions regarding specific issues.

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### HELPFUL RESOURCES

- [Gallagher Employee Benefits and COVID-19 FAQ](#)
- [CDC COVID Data Tracker](#)
- [National Academy for State Health Policy: State specific vaccination plans](#)

