

# COVID-19 BULLETIN

## Employer Guidance on COVID-19 Vaccine Coverage Requirements

As COVID-19 vaccines begin to roll out to Americans, Gibson would like to provide some information as we know it today.

### CAN EMPLOYERS MANDATE EMPLOYEES GET THE VACCINE?

Employers can mandate employees get the COVID-19 vaccine; however, it is recommended they first encourage, and possibly consider incentivizing, employees receive it. With mandating, employers will have to navigate the inherent legal risks and logistics of employees receiving the vaccine. To do so, employers should discuss which course of action is best for their organization with the obligation to provide accommodations to those with disabilities under the ADA and those with sincerely held religious beliefs under Title VII of the Civil Rights Act (more on this). Noting how influenza vaccines are currently handled, several states require them for healthcare workers, while other states – including Indiana – only encourage vaccinations and do not require them. Employers should strongly consider making the vaccinations voluntary by linking any wellness benefits to receiving the vaccine and possibly incentivizing. U.S. Surgeon General Jerome Adams doesn't recommend mandating it. "Right now, we are not recommending that anyone mandate a vaccine."

### ARE EMPLOYERS REQUIRED TO PAY FOR THE COVID-19 VACCINES AND ADMINISTERED COSTS?

Yes. Under the CARES act, the requirement is that plans and employer-sponsored health plans (as well as Medicare and Medicaid) cover all costs associated with qualifying preventive COVID-19 immunizations at no cost to employees for the duration of the public health emergency. These preventive services must be provided at both in-network and out-of-network providers. Costs are not set to be substantial with the current Medicare payment rate at \$45.33 for a two-dose vaccine. These costs will likely not increase substantially as the majority of development costs have been funded through government grants already.

### WHAT ARE THE IMPLICATIONS FOR PROVIDING THE COVID-19 VACCINE?

While no formal guidance has yet been issued by either EEOC or OSHA, we expect guidance to be set in-line with prior direction regarding vaccines.

**OSHA** – In 2009 under the context of the H1NI outbreak, OSHA issued an interpretation that they do expect healthcare facilities to perform a risk assessment of their workplace and encouraged those employers to offer vaccinations. While OSHA does not require vaccines be mandated, they stated the employer may due so.

### HIGHLIGHTS

Employers can mandate employees get the COVID-19 vaccine for employees, however, should first consider encouraging and possibly incentivizing employees receive it.

Because the vaccine is currently under EUA (Emergency Use Authorization), legal grounds from an employer mandate become more volatile as there is no precedent for it thus far.

Qualifications under Title VII Civil Rights Act as well as the ADA (Americans with Disabilities Act), and Rehabilitation Act would provide employees exemptions if mandating the vaccine.

During the COVID-19 public health emergency, this coverage must be provided (paid) by employer-sponsored health plans at 100% (no cost-sharing) and be provided at both in-network and out-of-network providers.

Employers should focus on their organization's overall values, direction, and wellness programs to clearly develop and communicate guidance on providing COVID-19 vaccinations for their workforce.

#### FREQUENTLY USED SITES:

[IN Chamber: Indiana's Road to Recovery](#)

[EEOC: What you should know about COVID-19](#)

[OSHA: COVID-19](#)

[FDA Authorizations](#)

This Update is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.

However, “an employee who refuses vaccination because of a reasonable belief that he or she has a medical condition that creates a real danger of serious illness or death...” may be protected under Section 11(c) pertaining to whistle blower rights.

**EEOC (Equal Employment Opportunity Commission)** - Past EEOC guidance permits employers to enforce a vaccination requirement, as long as accommodations under Title VII of the Civil Rights Act, the Americans with Disabilities Act, and Rehabilitation Act are made. This means that employees who have a qualified disability under ADA that prevents them from getting a vaccine must be exempt. Also, employees with sincerely held religious beliefs against vaccinations must also be exempt from the requirement. [So, unless they are job-related, consistent with business necessity, and no more intrusive than necessary, vaccines can be mandated.](#) This is ordinarily a difficult standard to meet unless the employer is part of the healthcare field. However, due to the current circumstances of the COVID-19 pandemic and the fact that an individual with COVID-19 is considered to pose a direct threat to the health of others, the EEOC may allow mandatory COVID-19 vaccines in workplaces beyond the healthcare field. This conclusion is supported by the fact that the EEOC has already allowed employers to screen employees (i.e. temperature checks, etc.) for COVID-19 on this same basis.

**Workers' Compensation** – Employers that mandate employees receive the vaccination as a condition of employment may open themselves to a workers' compensation claim in the event the employee suffers a severe, adverse reaction.

## IS THE COVID-19 VACCINE CONSIDERED A “MEDICAL EXAMINATION?”

No. The vaccination itself is not a medical examination. A medical examination is “a procedure or test usually given by a health care professional or in a medical setting that seeks information about an individual's physical or mental impairments or health.” Examples include “vision tests; blood, urine, and breath analyses; blood pressure screening and cholesterol testing; and diagnostic procedures, such as x-rays, CAT scans, and MRIs.” If a vaccine is administered to an employee by an employer for protection against contracting COVID-19, the employer is not seeking information about an individual's impairments or current health status and, therefore, it is not a medical examination.

**ADA (Americans with Disabilities Act)** – *prohibits discrimination on the basis of disability.* Under that law, employers must reasonably accommodate disabled employees unless doing so would be prohibitively difficult or expensive. Persons with certain health-related conditions, such as life-threatening allergies to ingredients in the vaccine or disorders such as Guillain-Barré Syndrome, should not be vaccinated. Further, the EEOC advises that employers should accommodate a pregnant employee's request to not be vaccinated, and other impairments resulting from pregnancy could qualify as disabilities under the ADA warranting accommodation.

**Title VII (Civil Rights Act)** – *prohibits employment discrimination based on race, color, religion, sex and national origin.* This means that employees with sincerely held religious beliefs against vaccinations must be exempt from the vaccine requirement. Employers are obligated to provide accommodations for employees refusing mandated vaccines.

Some COVID-19 vaccines may only be available to the public for the foreseeable future under EUA (Emergency Use Authorization) granted by the FDA, which is different than approval under FDA vaccine licensure. [The FDA has an obligation to:](#)

Ensure that recipients of the vaccine under an EUA are informed, to the extent practicable under the applicable circumstances, that FDA has authorized the emergency use of the vaccine, of the known and potential benefits and risks, the extent to which such benefits and risks are unknown, **that they have the option to accept or refuse the vaccine**, and of any available alternatives to the product.

## WHAT SHOULD EMPLOYERS BE FOCUSED ON?

Even if your organization is not ready to create and implement a vaccination plan, there are a few items to consider.

**Communicate and educate.** The first step for employers is to communicate unbiased, reliable information - [for example, content from public health announcements and websites.](#) A clear communication strategy about your policies will be important in effectively communicating to your employees the direction of your company will go based on your values, mission, and wellness path.



An empathetic communication approach that advises employees of plan coverage provisions, options for where to get the vaccine, and rationale for requiring or recommending the vaccine will be critical. Above all, the message should be that the health and safety of employees and their families is top priority for your organization.

When it becomes available, provide a listing of nearby locations that are providing administration of the COVID vaccine.

As of now, the government is purchasing all supplies of the vaccine. Employers may be able to purchase vaccines and host onsite COVID-19 vaccine clinics as the vaccine supply improves, this could be as early as late 2021 or 2022. If you're considering hosting an onsite clinic, keep in mind that the vaccines require two-doses. A second injection is required three to four weeks after the first. Someone in your organization will need to be responsible for tracking and timing to make sure the doses are administered correctly. We recommend a vendor partner to best manage this for your organization.

After the vaccines, COVID-19 booster shots may be covered by employer-sponsored insurance plans allowing for the shots to be covered under preventive care or they will be available at an established market price, similar to current flu shot vaccinations.

**Offer time off.** Provide a flexible work schedule or additional time off to allow employees to receive both the first & second doses at the prescribed intervals. Encourage employees to get the vaccine when it becomes available by providing time off to go and receive the vaccine. For most people the side effects of the vaccine are expected to be similar to other vaccines. Employers should consider whether to provide time off or require employees to take sick leave if they need to recover from any side effects.

**Lead by example.** Senior managers and other "influencers" in the organization can share their vaccination experiences and explain why they chose to be vaccinated. Communicate with employees that that your organization needs them to get the COVID-19 vaccine in order to get through this pandemic together.

**Incentives.** If your organization already has a wellness program in place that offers incentives for seasonal flu shots the infrastructure may already be in place to add a COVID-19 vaccine incentive, but until further guidance is available, supply chains are established, and full FDA approval is given, it may be best suited if employers first strongly recommend vaccines before moving forward with a plan to incent.

## VACCINE ROLLOUT PHASES:

PHASE 1	PHASE 2	PHASE 3	PHASE 4
<p><b>Phase 1a "Jumpstart Phase":</b></p> <ul style="list-style-type: none"><li>High-risk workers in health care facilities</li><li>First responders</li></ul> <p><b>Phase 1b:</b></p> <ul style="list-style-type: none"><li>People of all ages with comorbid and underlying conditions that put them at significantly higher risk</li><li>Older adults living in congregate or overcrowded settings</li></ul>	<ul style="list-style-type: none"><li>Critical risk workers - workers who are both in industries essential to the functioning of society and at substantially high risk of exposure</li><li>Teacher and school staff</li><li>People of all ages with comorbid and underlying conditions that put them at moderately higher risk</li><li>All older adults not included in phase 1</li><li>People in homeless shelters or group homes for individuals with physical or mental disabilities or in recovery</li><li>People in prisons, jails, detention centers, and similar facilities, and staff who work in such settings</li></ul>	<ul style="list-style-type: none"><li>Young adults</li><li>Children</li><li>Workers in industries essential to the functioning of society and at increased risk of exposure not included in phase 1 or 2</li></ul>	<ul style="list-style-type: none"><li>Everyone residing in the United States who did not receive the vaccine in previous phases</li></ul>