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Vaccination Q&As for Construction Employers

This guidance is provided by AGC of America (AGC) and the law firm Fisher Phillips to inform AGC members about their rights and obligations under federal law so that they can make well-informed decisions when adopting employment policies and practices related to COVID-19 and other vaccinations. It is in no way intended to signify that AGC recommends employer vaccination mandates. AGC opposes government mandates requiring construction firms to require employee vaccination and supports construction firms' freedom to choose the best approach for their individual businesses and workforces.

AGC and Fisher Phillips provide this document in hopes that it will be helpful to you but without any promises that the information is accurate, complete, or up-to-date. Nothing in this document should be considered legal advice. Readers are encouraged to consult legal counsel for advice in making the best choices based on their particular circumstances, including consideration of any relevant contractual obligations and state and local laws.

1. Can we require employees to be vaccinated?

The Equal Employment Opportunity Commission (EEOC) issued [updated guidance](#) on this issue on December 16, 2020. The Agency's updated FAQs do not unequivocally state that "employers can require the vaccine." However, it repeatedly answers questions discussing what actions employers can take in response to various circumstances *after* an employer has mandated the vaccine. This language plainly suggests there are circumstances where employers may require vaccine immunization of their workers without violating the Americans with Disabilities Act (ADA), Title VII, and other federal anti-discrimination laws. Employers have the most latitude in enforcing a vaccine requirement as to employees who do not have a medical condition or sincerely held religious conviction that would prevent them from being vaccinated. According to the EEOC, this is true even though the COVID-19 vaccine is only authorized under the FDA's Emergency Use Authorization (EUA), rather than approved under the full and comprehensive FDA vaccine licensure process, known as a Biologics License Application or "BLA."

The only scenario explicitly described by the EEOC as a permissible basis to mandate vaccination under the ADA is when a worker poses a "direct threat" to themselves or others by their physical presence in the workplace without being immunized. This means mandating vaccines and excluding an unvaccinated employee [who cannot take the vaccine] from the workplace is only permitted if workers would pose "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." Therefore, if an employee is capable of fully performing their current job duties remotely without the potential spread of the virus to co-workers or work-related third parties, it does not appear that you can require that they get vaccinated.

Employers should carefully consider their specific circumstances before deciding whether to require vaccinations and whether to apply the requirement to some or all employees.



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The law does not permit employers to unilaterally ban employees whose underlying condition may make them especially vulnerable to COVID-19 unless the employee's condition poses a "direct threat" to their health that cannot be eliminated or reduced by reasonable accommodation. On the other hand, employers must consider **requests** for accommodation from employees with particular underlying vulnerability to COVID-19.

The Americans with Disabilities Act and provisions of Title VII of the Civil Rights Act of 1964, as amended, provide most of federal legal framework that requires employers to consider requests for accommodation based upon an employee's medical condition or sincerely held religious beliefs or practices. General philosophical objections to vaccinations do not implicate these federal laws. State or local law may also limit an employer's right to require vaccinations. These circumstances can change rapidly.

2. **Should we require our employees to get a vaccine?**

AGC of America takes no position as to whether employers should require vaccination. This is a decision that employers should make based on their particular legal obligations (federal, state, and local) and business needs.

One factor to consider is the "general duty" clause of the OSH Act, which requires employers to "shall furnish to each of his employees 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 his employees." While we [anticipate](#) that OSHA will issue standards specific to COVID-19 vaccination in 2021, in the absence of such standards, OSHA theoretically could rely on the general duty clause to cite employers who do not offer employees vaccines or keep employees safe from co-workers who refuse to get vaccinated. At the same time, workers with medical conditions who refuse to be vaccinated may be protected by the OSH Act's whistleblower provisions if they have a reasonable belief that vaccination could lead to serious illness or death.

Thus far, studies indicate that many employers have chosen to *encourage* rather than *require* flu shots, even though the CDC has said it is more important than ever to receive the flu vaccine this year. Under such a policy, employees who do not get the flu shot may be required to wear face masks at all times while on premises or near coworkers, customers or patients. Studies also indicate most employers will likely encourage, but not require, the COVID-19 vaccine when it is available to their workforce. According to the EEOC, mandating vaccines is only permitted if workers would pose "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by [some] reasonable accommodation." This is why the question of mandating vaccines is job-specific.

Additionally, a vaccine mandate would also represent a potentially enormous employee relations issue, which may vary be largely, based upon on the nature of your business. A substantial segment of the workforce may still be skeptical or resist receiving the COVID-19 vaccine for various.



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Depending on the circumstances, resistance could be protected under Section 7 of the National Labor Relations Act. If nothing else, employee pushback can create substantial disruptions and unhappiness. This underscores the importance of thinking through the impact of requiring vaccinations in each setting, including analysis of job-relatedness, business necessity, and being prepared to present that information to employees.

Employers should review and update their inoculation policies now, considering the CDC guidance regarding both the importance of flu shots and the increasing availability of the COVID-19 vaccine.

3. If we decide not to require employees to be vaccinated, how could we best encourage employees to get vaccinated?

Employers can and should educate employees regarding the benefits and safety of the vaccine, especially compared to the risks of not being vaccinated. They should also explore ways to make it easier for employees to access the vaccines, such as providing information about local vaccination providers, arranging for mobile units or clinics at or near jobsites, paying for any vaccination costs, and allowing employees to get vaccinated during paid work hours. Local health departments and hospitals may be helpful in arranging access, as may any labor union partners. Some employers are considering incentives to encourage employees to get vaccinated, but these efforts appear to be subject to HIPAA and EEOC rules regarding wellness programs, which can be complicated. Employers should confer with counsel before implementing incentives.

4. What should employers consider before requiring employees to be vaccinated?

Referring to the explanation above, before adopting any vaccination requirement, employers should ensure that they can articulate the reason for the mandate, specifically how the vaccination is job-related and consistent with business *necessity*. Employers should also ensure that policies fully inform employees of applicable requirement and explain how employees may seek an exemption as an accommodation, based on a medical condition or a sincerely held religious belief. If an employee seeks an exemption on either or both bases, employers must engage in, and document, an **interactive exchange** with the employee to determine whether a reasonable accommodation would enable them to perform their essential job functions without compromising workplace safety. Particularly in the case of the COVID-19, this may be detailed and challenging.

Accommodations are fact-specific, but could include, for example, moving the employee's workstation, temporarily reassigning the employee, approving a teleworking arrangement if feasible, or offering a leave of absence. Employers are not required to provide an accommodation that poses an undue hardship on the company. However, the "undue hardship" standard varies depending on the reason for the request. State and local laws must also be considered. Finally, employers must implement safeguards to ensure the privacy of all employee medical information obtained through this process.



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5. Are there state and local laws that should be considered?

Yes. For more information, please refer to Fisher Phillips' [50-STATE CHART ON VACCINES, EXEMPTIONS, AND RELATED ISSUES](#).

6. How can we ensure the confidentiality of employee medical information with regard to a vaccine?

The ADA requires employers to keep all employee medical information separate from employee personnel files. You may store COVID-19 and/or vaccine-related medical information in existing medical files, which should be accessible only on a strict need-to-know basis. As a rule, employees' direct supervisors should not have access to their medical information.

Regarding the vaccination process, the entity that administers the vaccine must ask medical prescreening questions. Employers can minimize their exposure regarding these medical inquiries by either: a) making vaccinations voluntary; or b) by obtaining proof of vaccination through a third party (such as a clinic or pharmacy) who is not contracted with the employer.

7. If we require our employees to get a vaccine, what proof of vaccination can we require?

Employers can require employees to provide proof of vaccination from the administering healthcare provider or pharmacy. If an employee has chosen not to be vaccinated, employers may not inquire into the employee's **reasons** without being prepared to establish the job-related business necessity for doing so, based upon a reasonable, objective belief that the unvaccinated worker's presence in the workplace would constitute a significant risk of substantial harm that cannot be eliminated by a reasonable accommodation. Best practice would also be to advise employees to avoid providing any genetic information, such as family health history.

8. Can we disclose which employees have or have not been vaccinated?

You should not disclose a particular employee's vaccination status. Doing so would likely violate employee privacy laws, including but not limited to the ADA. Best practice would be, if applicable, to assure another party with a legitimate need to know that you will not send them employees who have not been vaccinated.

9. Can we mandate that our subcontractors require their employees to be vaccinated? And if so, how?

This is partially a contract issue, but if you issue such a mandate, you are far more likely to be included in any litigation that may arise from the requirement. Please see the discussion above regarding when vaccines may be mandated.



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10. What if a project/property owner requires all workers on the site/project be vaccinated?

Please see the preceding response. Also, please note that even if a project/property owner requires all workers on site to be vaccinated, that does not relieve you company of its legal obligations to comply with the law as the employer. By way of example, consider what you would do if a project/property owner instructed you not to hire women – this would be illegal and your company would be responsible for following such a request or requirement.

11. We are a union contractor. Is there anything else we need to consider with respect to our vaccine policy?

If you operate your worksite under a collective bargaining agreement (including any project labor agreement), you may be required to bargain with the union over adoption of a vaccination mandate or over the effects of any vaccination policy. You should consult the management rights, health and safety, and any other applicable provisions within such agreements that may permit or restrict your authority to unilaterally adopt or implement a vaccination policy, along with any analogous past practices in effect. Before implementing any changes in that regard, you should also furnish advance notice to the incumbent union(s) and be prepared to bargain over the effects of such changes upon request. Check with your labor counsel for specific guidance.

12. Once our workers prove they have been vaccinated for COVID-19, can we relax our social distancing and facemask requirements?

For several reasons, we recommend that you not relax your social distancing and facemask requirements, even after workers are vaccinated. First, in most cases, not every worker at the jobsite will be vaccinated. Moreover, the CDC has said that experts need to understand more about the protection that COVID-19 vaccines provide before it will make the decision to stop recommending that people wear masks and avoid close contact with others to help prevent the spread of the virus that causes COVID-19. Other factors, including how many people get vaccinated and how the virus is spreading in communities, will also affect the [CDC's recommendations](#).

Next, the first COVID-19 vaccines require two doses, extending the time it may take for workers to be protected from COVID-19. While people are expected to get some level of protection within a couple of weeks after the first shot, full protection may not happen until a couple of weeks after the second shot. Also, it is still unclear whether the vaccines will protect people from the COVID-19 infection entirely, or simply from the symptoms. That means vaccinated workers might be able to get infected and transmit the virus in the workplace, even without developing symptoms.

Until additional CDC guidance to the contrary emerges, it would be best to continue following current COVID-19 guidelines for workers — including requiring facemasks and social distancing.



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13. If we require our employees to be vaccinated, are we liable for any adverse reaction an employee might have from taking the vaccine?

Individuals who experience adverse side-effects may assert claims against the manufacturer, the pharmacy or provider who administers it and possibly the employer, depending on the facts. This does not mean the claims would be successful. In most states, workers' compensation is the exclusive remedy for illness or injury *acquired at work*, in the absence of an intentional action or gross negligence.

14. Do we have to pay for our employees to get a vaccine?

If the employer requires the vaccine, the employer must ensure that the employee pays no cost. Further, the most conservative approach would be for the employee to be paid for the time spent getting the vaccine in that scenario.

15. Should we make these new policies permanent going forward?

We recommend adopting a policy regarding the COVID-19 vaccine and continuing to monitor developments going forward. Circumstances will affect whether these policies should be continued, discontinued or revised.

16. Where can we find more up-to-date information on our options and rights as an employer?

Please refer to the [Fisher Phillips Vaccine Resource Center](#) and the [AGC Coronavirus Resource Center](#).

For further assistance, please contact:

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