



COVID-19: Situation Summary And Trends Regarding Vaccination and Masking



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COVID-19: Situation Summary

- April 26, 2021 – 28.9% of eligible Americans are fully vaccinated and 42.6% have received at least one dose
- May 13, 2021 – The CDC updated its guidance for fully vaccinated people, advising that they no longer need to wear a mask or physically distance except if otherwise required by law or policy
 - In response, many employers roll back masking requirements
- May 18, 2021 – 37.6% of eligible Americans are fully vaccinated and 59% have received at least one dose



COVID-19: Situation Summary

- June 10, 2021 – OSHA issues a COVID-19 ETS for healthcare employers and guidance for all other employers
 - ETS - requires implementation of numerous measures to minimize the spread – e.g., provision of PPE, patient and employee screening, cleaning and disinfecting, development of a COVID plan, and recordkeeping
 - Even here, exemptions for fully-vaccinated workers in numerous situations
 - Guidance - "Most employers no longer need to take steps to protect their fully vaccinated workers;" focus, instead, is on protections for unvaccinated or otherwise at-risk workers
- July 27, 2021 – In response to the rapid spread of the Delta variant, the CDC revises its recommendations for fully vaccinated people
 - Suggests that fully vaccinated individuals mask in "public indoor settings" if they are in an area of "substantial" or "high" transmission
 - As a result, employers must grapple with whether to reverse course on masking

COVID-19: Situation Summary

- July 27, 2021, cont.
 - The DOJ issued a memorandum opinion concluding that employers **can** legally mandate the vaccine so long as:
 - No state or local law prohibits; and
 - Consider reasonable accommodations for those unable to receive the vaccine for medical or religious reasons
 - The Biden Administration announced all civilian federal employees and federal contractors must either be vaccinated or be subjected to alternative safety measures
- August 13 – OSHA Revises Its Employer Guidance
 - Suggests that employers require employees to get vaccinated or undergo regular testing
 - Suggests that all employees mask and physically distance in areas of high community transmission



COVID-19: Anticipated Trends

- All of these developments suggest that employers will now more strongly consider mandating the vaccine in some form
- We are seeing this play out already:
 - Healthcare institutions;
 - Schools;
 - Large employers in both factory and office settings
 - Tyson
 - Northwestern Mutual
 - Manpower

Key Considerations for Mandatory Vaccination

- Before implementing a mandatory vaccination program, employers should:
 1. Conduct a Risk Assessment
 - Determine percentage vaccinated
 - State and local law – prohibitions; liability immunity
 - Rates of community transmission
 - Industry standards
 - Key aspects of business operations
 2. Develop an Exemption Process
 - Exemptions must be considered for medical conditions and sincerely-held religious beliefs that conflict with vaccination requirement
 - Require completion of request forms
 - Provide HR training re: processing requests on a case-by-case basis

Key Considerations for Mandatory Vaccination

- Before implementing a mandatory vaccination program, employers should:
 3. Develop a Policy
 - What form will mandatory vaccination take and what are consequences for non-compliance?
 - E.g., condition of employment (for all or for some/for new or existing); condition of return to office; condition of exemption from other safety measures
 - What should employees do if they wish to request an exemption
 - Particulars re: scheduling (including role of manager and quick links to find available appointments)
 - How will time off be handled (to receive vaccine and to recover from side effects)
 - How should employees provide proof of compliance
 - Impact on exposure/workplace modification policies and procedures
 4. Ensure Advanced Communication
 - How/when will you inform employees of the requirement?
 - Articulate the reason for the policy change
 - Be clear about the consequences
 - Ensure sufficient time for compliance (i.e. make your deadline at least 4-5 weeks out)

Benefits Considerations

- More modest than the employment law concerns – those employment law concerns drive the analysis, usually
- We have had some benefits-related questions
- Can an employer design its health plan to exclude COVID-19 claims for plan enrollees who refuse to get vaccinated (without a religious / medical reason)?
 - Probably not. Likely a HIPAA nondiscrimination violation

Benefits Considerations

- Can an employer provide a health-plan-related incentive (e.g., 10% premium discount) for enrollees who become vaccinated?
- Probably. It looks like a wellness program. But it looks like a "health-contingent" wellness program, not a "participation-only" wellness program
 - So, it would be subject to additional restrictions, but may be possible
 - And, EEOC ADA wellness program rules still not published, so some risk from that angle

Questions?

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