

COVID-19 Vaccinations Arriving For the Holidays: What Employers Need to Know and Can Do

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In the last two weeks, two drug manufacturers announced the results of late-stage trials for COVID-19 vaccines that show effective rates of 95 percent and 94.5 percent respectively. Another manufacturer also announced successful phase-two trials for a vaccine that shows robust immune results among older adults. Some manufacturers say they are poised to launch widespread distribution of their vaccines upon approval by the U.S. Food and Drug Administration, but current estimates indicate that the earliest a vaccine will be available for most non-prioritized Americans is April 2021.

As we discussed in a previous post, employers have already been [planning for the arrival of a vaccine](#)—and for good reason given the array of issues to consider when implementing vaccination-related policies. Although mandatory vaccination policies are legal (possibly subject to two limited categories of exemptions and variations in state laws), implementing such policies may prove challenging, at least in the near term.

For instance, one version of the vaccine requires two doses, and its manufacturer says it could have 50 million doses available by the end of the year. But only half of the initial doses will be available in the United States—which means there will only be enough for about 12.5 million people nationally. [Initial prioritization plans](#) target workers in healthcare and essential industries, as well as racial and ethnic minority groups that have been disproportionately impacted by the virus. Storage of the vaccine may also present challenges: some versions must be stored at negative 94 degrees Fahrenheit and even in special low-temperature freezers may only last up to 15 days.

Relevant Factors When Implementing Vaccination Policies

As medical professionals and policymakers tackle distribution and other logistical issues, employers have plenty to think about. Understandably, many employers will have the initial impulse to pursue a mandatory vaccination policy that promises to inoculate their workplaces against the coronavirus. Employers may want to weigh this potential benefit against significant challenges related to

administration and enforcement, including the following.

Employee Morale

Asking employees to choose between a vaccine and their job could drive wedges, breed resentment, and risk legal action. According to a recent poll, only 58 percent of those in the United States say they would get vaccinated when a vaccine becomes available, and only 48 percent of nonwhite adults would be willing to get the vaccine. Given these statistics, employers may want to consider the potential that certain employees may claim that a vaccine policy disparately impacts them. Those who would decline a vaccine cite the following reasons: rushed timeline for development, safety concerns, a general distrust of vaccines, and doubts about the effectiveness of a vaccine.

Discipline and Enforcement

Is your company willing to discharge employees who refuse to vaccinate? More importantly, can an employer replace discharged employees quickly enough to operate seamlessly and effectively? If the answer to either of these questions is no, then employers may want to consider a policy that strongly encourages vaccination, rather than mandating it. Such a policy could include incentives for opting into a vaccination program rather than punishment for those who opt-out.

Accommodation Requests

Employees may request an accommodation for a sincerely held religious belief or disability that prevents vaccination. Potential accommodations include granting exemptions from the vaccination requirement, providing alternative vaccine agents (e.g., a vaccine that does not consist of ingredients at issue with an employee's disability or religious objection), or requiring additional mitigation measures, such as increased social distancing, continued use of face coverings, or reassignment to a different position or area of the workplace. Reviewing accommodation requests and engaging in the interactive process is a fact intensive process for which employers will want to be prepared. Additionally, the process may result in the filing of disability and religious discrimination claims, even if done correctly.

Cost and Distribution

It is unclear at this stage when a vaccine will be readily available, how much of the vaccine will be available, and how distribution will be prioritized. Any policy that mandates or strongly encourages vaccination would be more effective if the employer provides onsite vaccination services for free. However, it is too soon to estimate such costs with any precision.

Administrative Burden

Other administrative challenges include scheduling vaccination events at the workplace, verifying and documenting employee vaccinations, establishing recordkeeping protocols for employees' medical information, and, as discussed above, documenting and administering accommodation requests, as well as implementing appropriate discipline policies. Additionally, employers must keep employees' vaccination status and underlying conditions confidential in accordance with the Americans with Disabilities Act (ADA) and, if applicable, the Health Insurance Portability and Accessibility Act (HIPAA).

Side Effects

Early indications suggest that some people may experience mild symptoms following vaccination. Employers may want to consider whether they will allow employees to take paid time off to recover from these vaccine-related symptoms. Serious adverse effects to vaccination, though rare, may also potentially result in workers' compensation and/or tort claims against companies that mandate vaccinations. Employers may want to check their insurance policies to ensure coverage.

Legislative and Regulatory Uncertainty

While the prospect of a COVID-19 vaccine in the near future is encouraging, it is not without controversy, particularly in the context of mandating vaccinations for employees. Employers will need to stay abreast of forthcoming legal developments, which may include new recommendations from public health authorities and/or worker protections from federal or state agencies.

Next Steps for Employers

So, with all that in mind, what can employers do to prepare? Here are some factors employers can consider before implementing a vaccine policy.

Documenting Business Justifications

Employers can determine and document their business justifications for a mandatory policy and the extent to which it could be limited to high-risk positions or departments, or substituted with a policy that *encourages* vaccination rather than compels it. In many cases, a properly incentivized voluntary policy can yield comparable participation rates compared to mandatory policies once all required accommodations and exemptions are provided.

Implement New Policies

Employers may want to take this opportunity to develop policies for administration and enforcement, including a process for ensuring confidentiality, reviewing accommodation requests, and administering discipline to employees who refuse to comply. In the alternative, employers may consider incentives to vaccinate, such as monetary bonuses, gift cards, extra paid time off, or other rewards.

Communications and Messaging

Employers may want to consider developing positive employee communications, internal and external messaging, and education plans designed to assuage employee concerns and explain the company's decision in terms of ensuring the health and safety of its employees. In this regard, employers can take the following actions:

- Provide timely information regarding vaccine agents and public health authority recommendations.
- Make sure that all supervisors and company spokespersons are properly trained to address questions regarding the company's chosen vaccination policy. To that end, employers may want to organize a COVID-19 team or contact who is tasked with staying abreast of developments and handling communications within the company and to which all questions may be directed.
- Determine how to communicate the company's vaccination policy to the public, including

customers, guests, clients, vendors, patients, etc.

Distribution and Tracking

It may be helpful to stay abreast of options for distribution and tracking, such as information regarding availability, distribution, costs, and onsite vaccination services.

Labor Contracts

Unionized employers may need to address collective bargaining obligations in advance of a vaccination becoming available and before the company decides or communicates its company-wide vaccination policy.

Insurance

Employers should review their insurance policies to confirm workers' compensation coverage in the event of an adverse reaction to the vaccine.

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