

1. A) Can businesses and organizations mandate their employees be vaccinated before returning to work? B) Does it make a difference whether an employee is exempt or nonexempt?

Yes, employers can mandate their employees receive the vaccine before returning to work (subject to disability and religious accommodations, and ensuring no other issues such as the ones flagged in our [FAQ](#) - that a mandate does not impede on protected concerted activity, does not violate a particular state statute, and is implemented consistent with recognized workplace safety guidance).

No, it does not make a difference whether the employee is exempt or nonexempt from the FLSA/state law minimum wage/overtime requirements. But job function does matter - this goes to the essentiality/risk analysis. Some non-exempt employees might be at higher risk than others (e.g., cashiers, baristas, grocery workers compared to call center employees working remotely) and the same could be said for exempt employees, so the analysis should take into account specific job function, not exemption.

2. Does each state create its own vaccination system? Seems like some states have local drugstores that do vaccinations while others have big but limited vaccination sites. Is there a federal plan coming?

The CDC creates recommendations for who should receive the vaccine and when, consistent with ACIP guidance. Then each state makes its own plan. The CDC also provides recommendations as to how to set up clinics/points of distribution of various sizes and by various entities – local departments of public health, businesses, pharmacies. The CDC's guidance is voluntary. It has been left up to states to make final determinations as to how to distribute vaccines in practice, and many states have passed on that responsibility to local departments of public health. Unfortunately, we do not anticipate this changing anytime soon – like most employment issues and almost all things COVID, this will continue to be a state-by-state patchwork analysis.

3. What should companies doing business in multiple states consider when it comes to employee vaccinations?

This is a question with a lot of potential answers! In general, because states (and even cities/counties, in some instances) all vary in terms of availability of vaccines and vaccine appointments and which employees are eligible and when, employers should be sensitive to the fact that a one-size-fits-all policy likely will not work because the logistics will vary by location. Local conditions should be monitored and accounted for – we recommend a vaccine task force charged with responsibility to stay on top of such updates in each jurisdiction, to ensure the employer does not, for instance, institute a mandatory policy in a jurisdiction only

providing vaccines to limited groups (that wouldn't include all of your employees in that jurisdiction).

As noted, the employer should also consider the job roles at each location – per the essentiality/risk analysis noted above.

4. What can you do about employees who refuse to wear masks because their state has done away with mask mandates?

OSHA and the CDC have both continued to recommend wearing masks, and the CDC has specifically confirmed that mask-wearing and social distancing are recommended even after vaccination in most instances. So, employers can still require mask wearing at work.

5. What can you do about an employee who refuses to wear masks generally?

Having signage in place, a declared policy on mask wearing while on the business premises, making masks available in the workplace are all measures to have in practice...which provide support to warning an employee that another failure to use the mask will result in unpaid leave for a non-exempt employee and result in potential discipline for the exempt employee by giving an express written direction to wear a mask which will lead to termination if not followed going forward.

6. Is there a medical or religious exception for masks?

Employers do need to allow accommodations for disabilities or sincerely held religious objections. But if the employer concludes that 1) there is no reasonable accommodation that can be afforded the employee for not donning a mask because their job requires them to work in close proximity to other mask-wearers and 2) working without a mask represents an undue hardship (such as a significant cost in redesigning the work area) or the refusing employee represents a direct threat to mask wearers in the workplace from being unvaccinated, you can exclude that employee from the workplace. Terminating the employee is not recommended. The CDC has offered guidance to wear more than a face shield while state OSHA agencies have asserted that wearing a face shield alone without a covering to control droplet spread is a violation of the general duty clause.

7. Experts predict that the US could have far more doses of vaccine than it needs in just 2 months. The challenge then could be combatting vaccine hesitancy. Vaccine hesitancy is a problem because the longer the virus is allowed to spread, the more likely it is to mutate and create new and potentially dangerous strains, complicating the path to herd immunity. Beyond offering incentives to employees to get vaccinated, what recommendations do you have for employers to combat vaccine hesitancy?

This goes to the "advisory" piece about informing employees of the vaccine's value and potential side effects - the EUAs require knowing and voluntary, informed consent. Employers can't be too aggressive - but it is only in the employees' best interest that they are informed, and employers can and should encourage employees to read about the vaccine (from reputable sources - CDC, relevant DPH, etc.) The CDC has model forms in its vaccine toolkit that it recommends employers use to encourage employees to learn about the vaccine and how receiving it helps not just them, but everyone else.

Of course, that won't prevent some employees from seeking vaccine education elsewhere [hopefully not Facebook however] - their doctors (always a good source of info, but could lead to the situation where one receives conflicting advice on whether someone pregnant or desiring pregnancy should receive the vaccine), family members and those who have already received the vaccine. But if the employer is at least offering accurate information (maybe on a semi-regular basis - emails or posters) that should help as a counterpoint.

9. Assuming you cannot make the vaccine mandatory, how are companies educating employees about the COVID vaccine and its safety?

See this [link](#) from the CDC for one set of recommended guidance and education that employers may send to employees. It should be included in any announced or published vaccination policy.

10. Even if you get vaccinated, there is still a small percentage that you can get COVID. How will companies protect employees that received the vaccine from those that choose not to get vaccinated?

Employers may (and should) simply continue to engage in all of the COVID-19 safety protocols that they have been since before the vaccine, until herd immunity is achieved. See response to reasonable accommodation question above – employers may require mask wearing, social distancing, or even implement more formal measures, such as alternate or rotating schedules, installing plexiglass barriers, etc. Note also that more states have considered or implemented COVID-19 immunity legislation in 2021. See our [latest article on that point](#) here.

11. Are companies liable for employees who choose not to receive the vaccine if they get COVID while traveling on business? What about employees that did get vaccinated that get COVID while on the job, are they liable?

Whether an employer could be liable for COVID-19 infection in the workplace or on the job would depend heavily on the circumstances, and litigation involving these types of claims is only just now beginning – so there are lots of unknowns. It is equally unknown whether (and to what extent) failure to receive the vaccine

would cut against a plaintiff's claim of infection (could an assumption of the risk defense be asserted by an employer in that event?) States also vary in how they treat COVID-19 for purposes of workers' compensation coverage (and thus allowing workers' comp to preempt civil remedies). Some states have gone so far as to enact presumptions in the workers' comp context that COVID-19 **was contracted in the workplace** if the infection occurs during the pandemic—thus implicating work comp coverage; others have been less clear or still handle claims on a case-by-case basis.

Note too that employer liability can extend beyond a civil claim – certain work-related COVID cases may require recording or reporting per OSHA.

Finally, as noted above, more states are passing laws providing businesses (including employers) with immunity from COVID-19 related suits, which would create a defense to any claims (though not immunity from litigation) in most instances in those states.

12. Once the vaccine is widely available, how are companies handling employees who are still concerned with business travel?

Some employers have chosen to assess the breadth of its workforce that is resistant to take the vaccine and travel or takes the vaccine but still unwilling to travel. If the group of reluctant travelers is small, you could issue a temporary policy that reads as follows:

For any travel that you propose to undertake, please note that the Company does not presently require or request that you travel as a part of your job duties. In the event that you choose to travel, we will require that you follow all health precautions recommended for any travel destination. More information on travel recommendations and requirements including quarantine detailed for the arrival or return destination are listed in the link embedded below.

<https://www.cdc.gov/coronavirus/2019-ncov/travelers/index.html>

You are guarding against the employee claiming to have become infected while traveling (which is difficult to prove for that employee).

Note that as more data regarding the effectiveness of vaccines and the risks of air travel are collected, we expect the CDC will issue further guidance regarding public travel (and how to do so safely).

13. Can/should I require my employees to get vaccinated?

See above – yes, you may require your employees to get vaccinated subject to exceptions for reasonable accommodations for disabilities. As to whether you should, that is a fact-specific determination that will depend on your workplace (and

where it is located), your workforce (and their job roles), your organizational culture, your goals as an employer and even what your employees are saying on the subject. This is a conversation to engage in with the advice of counsel and key stakeholders within your company to ensure the decision you make is thoughtful and appropriate for your organization (not a knee-jerk reaction that does not suit your company's goals). As an example of other considerations to evaluate, the UK does not allow employers to mandate employees to be vaccinated. For those nations, the challenge is thus even more difficult for employers to manage workforce staffing. You should be prepared to confidently demonstrate the wisdom of whichever path to vaccination that you choose between a) Mandated, b) Incentivized, c) Encouraged or a combination of those methods.

14. Will vaccinated employees be allowed to go without masks or social distancing?

No, see above – for now, the CDC has continued to recommend that vaccinated individuals continue to wear a mask and social distance, except in limited circumstances. Other states such as California with COVID-19 specific standards have also not relaxed their recommendations in this regard.

15. Can I require employees to return to the office full time once they have been vaccinated?

Yes – unless offered as a reasonable accommodation, an employer does not have any obligation to allow telework.

16. What if someone refuses to get the vaccine and wants to come back to the office?

The EEOC has indicated that if “an individualized analysis” by the employer indicates that an unvaccinated individual would present a direct threat (a high bar to reach for an employer) then he or she may be excluded from the workplace (but not terminated, at least without specific guidance from counsel). But consider whether the individual is refusing to get the vaccine because of fear or opinion, versus due to a legitimate disability or sincerely held religious belief, in which case you must determine whether there is a reasonable accommodation. Alternatives for employees who simply do not want the vaccine include the same protocols you have likely been familiar with throughout the pandemic – alternate scheduling, plexiglass barriers, distanced workspaces, among others.