



COVID-19 Considerations for Employers

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Legal Considerations

- ▶ OSHA: “shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees.”
- ▶ State and Local Laws: Mask mandate, remote work mandates
- ▶ CDC: provides guidance and sets a basis for reasonable requirements
- ▶ EEOC/ADA: implicated in vaccine requirements and health data
- ▶ Others: wage and hour law, paid leave law, National Labor Relations Act, whistleblower laws

2020 Review

Many of these issues and decisions are now being re-visited and potentially changed due to the Delta variant.

- ▶ **COVID-19 Preparedness Plan:** A written COVID-19 Preparedness Plan is no longer mandated by executive order. However, under federal and Minnesota OSHA laws, employers are responsible for providing a safe and healthy workplace free from recognized hazards likely to cause death or serious physical harm. To meet these obligations under OSHA laws, employers should continue to implement COVID-19 prevention programs in the workplace. The most effective programs contain a number of key elements, including conducting a hazard assessment, identifying and implementing measures that limit the spread of COVID-19 in the workplace and adopting measures that ensure that workers who are infected or potentially infected are separated and sent home from the workplace. Prevention programs should take into consideration mandatory safety and health protocols established by OSHA standards, as well as Centers for Disease Control and Prevention (CDC), the Minnesota Department of Health (MDH) and OSHA recommendations that reflect developments in science and best practices.
 - ▶ Education and Health Screening
 - ▶ Masks, Social Distancing, Hygiene Standards, Remote Work
 - ▶ What to do with a Positive Test
 - ▶ Paid Leave, PTO considerations

CDC Mask Guidance (7/27/2022)

Updated previous guidance to recommend fully vaccinated individuals wear a mask in public indoor settings in areas of substantial or high transmission.

Assessing Mask Requirements

No Mask Requirement

- Avoids inquiries into vaccination status
- Treats all employees equally
- Avoids divulging views on vaccinations
- May leave employees feeling unprotected
- Mask “recommendation” still an option and should be utilized

Masks Required for Some

- May involve employer inquiry into vaccination status
- Can select requirement based on job position/social distancing or vaccination status
- Employees may be sensitive to divulging vaccination views and feel alienated

Mask Requirement for All

- May be seen as a step backwards by some
- Treats all employees equally
- Eliminates inquiries into vaccination status

COVID-19 Vaccine Requirement

EEOC Guidance

Rev. May 28, 2021

- ▶ Can an employer require all employees physically entering the workplace to be vaccinated for COVID-19?
 - ▶ Yes, subject to reasonable accommodations for disability or sincerely held religious beliefs. If a disability prevents vaccination, the employer must conduct a direct threat assessment (significant risk of substantial harm that cannot be reduced by reasonable accommodation). Reasonable Accommodations may be wearing a mask or other PPE, social distancing, modified shifts, periodic testing, telework or reassignment, among others.
- ▶ Vaccination requirements must be applied equally and not based on sex, race, color, national origin, genetic information or any other protected class.

COVID-19 Vaccine Incentives

EEOC Guidance

Rev. 6/28/21

- ▶ Employers may provide employees and their family members with information to educate them about COVID-19 vaccines, raise awareness about the benefits of vaccination, and address common questions and concerns.
- ▶ Under certain circumstances employers may offer incentives to employees who receive COVID-19 vaccines (gift cards, gifts, PTO days). The employer must not acquire genetic information in order to offer incentives. If the vaccine is provided by the employer, the incentive cannot be so substantial as to be coercive.

COVID-19 Vaccine Inquiries

EEOC Guidance

Rev. 5/28/21

- ▶ An employer may inquire as to an employee's vaccination status. This should only be done by an authorized member of HR trained in how to guide the discussion.
 - ▶ Seek only vaccination status, no other medical information
 - ▶ Determine whether to seek verification or documentation
- ▶ Information about an employee's vaccination status is confidential medical information, it must be kept confidential and stored separately from the employee's personnel file.

Employer Vaccine Considerations

- Employee Privacy
- Workplace Safety/Social Distancing/Other Protections
- Vaccines not widely accepted by all groups
- Workplace culture
- Employee Retention
- Accommodation requirements/disability information
- Legal exposure: workers' compensation, liability for side effects, other
- Union workforce – need to bargain

Can an Owner/GC mandate vaccinated workers onsite?

PROBABLY, YES.

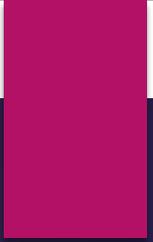
The answer depends in part on the contact between the parties, but generally, an owner can require only vaccinated workers on its site. This does not relieve the employer of its legal responsibilities when it comes to vaccinations/medical inquiries/accommodations.

Contract terms may incorporate Owner's "regulations" or "safety rules".

AIA language requires subcontractor to comply with "safety measures initiated by the Contractor".

Additional Resources

- ▶ <https://www.osha.gov/coronavirus/control-prevention/construction>
- ▶ <https://www.cdc.gov/coronavirus/2019-ncov/downloads/community/organizations/Construction-COVID-19-Checklist-for-Employers.pdf>
- ▶ <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>



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