# Table of Contents

1. Introduction
2. At-A-Glance
3. Brazil
4. France
5. Germany
6. Hong Kong
7. United Kingdom
8. United States
9. Mayer Brown Contacts
The roll out of COVID-19 vaccinations is well underway in many countries. While a vaccination program has been viewed by many as the long-awaited route out of the pandemic, it continues to present challenges for employers—including whether they can require employees to be vaccinated.

This publication covers the key considerations for employers in Brazil, France, Germany, Hong Kong, the UK and the US. The at-a-glance guide below is followed by more detailed Q&As for each of these jurisdictions.

### At-A-Glance

<table>
<thead>
<tr>
<th></th>
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<th>France</th>
<th>Germany</th>
<th>Hong Kong</th>
<th>UK</th>
<th>United States</th>
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<tbody>
<tr>
<td>Employer access to COVID-19 vaccines</td>
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1. Are COVID-19 vaccines available?

Yes. According to the COVID-19 National Immunization Operation Plan, the following vaccines are approved for use in Brazil by the Health Surveillance Agency (ANVISA):

- CoronaVac developed by Sinovac in partnership with Instituto Butantan
- AstraZeneca, developed by Oxford University in partnership with Fiocruz
- Pfizer, developed by BioNTech and registered in Brazil by Wyeth Pharmaceuticals
- Janssen, developed by Johnson & Johnson

In Brazil vaccination plans were divided into groups to receive vaccines (for example, the first phase included frontline health professionals, indigenous populations and traditional communities living near rivers, individuals over 75 years old and individuals aged over 60 in nursing homes; then, several phases covering individuals by age group, according to the participatory planning of each state).

Currently, approximately 60 percent of the population in Brazil has been vaccinated with the first dose, and approximately 28 percent with the second dose or single dose. In addition, several states are already starting to vaccinate the third dose for elderly individuals who received the second dose more than six months ago.

2. Do employers have direct access to the vaccines?

Pursuant to the guidelines established by Brazil’s Ministry of Health, COVID-19 vaccines will be primarily distributed to the population through the National Public Health System (SUS).

As of the enactment of Law No. 14,125 from March 10, 2021, companies are allowed to directly purchase COVID-19 vaccines that have been temporarily authorized for urgent use by ANVISA. However, these vaccines must be entirely donated to SUS, in order to make them available for the National Immunization Program (PNI).

Companies will only be allowed to acquire, distribute and administrate vaccines after the end of the immunization of the priority groups stipulated by the National Plan of Operationalization of Vaccines against COVID-19. Nevertheless, 50% of the vaccines must be donated to SUS and the other half must be utilized without any costs.

All information regarding vaccines acquisition by companies, including purchase or donation contracts and the application of vaccines, shall be furnished to Brazil’s Ministry of Health.

3. Do employers have a legal right to require employees to be vaccinated?

Yes. Pursuant to Brazil’s Labor Code (CLT), the employer is responsible for the health and safety of the workplace and, therefore, is entitled to adopt all reasonable measures to secure that employees are healthy and safe during their activities.

Additionally, Brazil’s Federal Supreme Court (STF) has recently issued a decision through which the government can require mandatory vaccination of the population and impose penalties for those who refuse to get vaccinated, prioritizing the collective interest over the private interest of each citizen.

However, it is important to note that the Court has also protected the individual’s subjective right to freedom of conscience by not authorizing the use of coercive force by the government to make an individual receive the vaccine.
4. Can employers require employees to disclose or to produce proof of whether they have been vaccinated?
Yes. Employers that require vaccination may also require proof of vaccination. However, it is essential to remember that personal data relating to the health of an individual constitutes sensitive data (pursuant to the “General Data Protection Law” or “LGPD”). Thereby, its collection, treatment and storage must obey the parameters set forth by LGPD.

Employers should be aware that certain employees may have a reasonable justification to not take the vaccine (e.g., employees with disabilities or sincerely held religious beliefs). These employees should be allowed to provide their justifications to the employer, who should collect, treat and store the corresponding data as confidential information.

5. Can employers take action if employees do not want to be vaccinated?
Although it is not legal to physically force people to take the vaccine, employers have a right to require employees to be vaccinated or impose reasonable disciplinary measures to those who refuse.

Employees who refuse to be vaccinated without a reasonable justification (e.g., any proven allergy to the vaccine’s components or preexisting condition that endangers the employee if vaccinated) will be subject to the application of gradual disciplinary measures by the employer (written admonition, suspension and termination for cause).

Any disability that prevents the employee from receiving the vaccine is considered a reasonable justification, which is why the employer does not have carte blanche to take adverse action against employees who are in this situation, including by excluding the employee from the workplace or using disciplinary measures against the employee.

As with disability-related reasons for not being vaccinated, the fact that an employee cannot be vaccinated because of a sincerely held religious belief does not necessarily mean that an employer can terminate the employee or use any disciplinary measure against them. In such scenarios, employers should consider potential strategies, such as moving the employee to a remote work regime, instead of being subject to risks related to a discrimination-related dispute.
1. Are COVID-19 vaccines available?
The vaccination campaign against COVID-19 started on December 27, 2020. Vaccination is open to all adults without conditions, as well as to teenagers aged 12 to 17 years.

Specific vaccination campaigns are being carried out for high school and college students. The consent of only one parent is required for children below age 16.

A booster shot with a mRNA COVID-19 vaccine is recommended for:
- Residents of nursing homes (EHPAD) and long-term care units (unites de soins de longue durée);
- People over age 65, living in their own homes;
- People who are at very high risk of severe COVID-19;
- Immunocompromised individuals and people around them;
- All professionals who take care or assist these vulnerable people (caregivers, health transport and professionals from the medico-social sector).

The booster shot should be administered at least six months after the complete primary vaccination.

As of October 21, 2021, 50.97 million people, and 86.2 percent of people over age 12, are fully vaccinated.

2. Do employers have direct access to the vaccines?
The government controls the supply of vaccines to the population.

Initially limited to vaccination centers, now general practitioners, midwives, nurses and pharmacists are allowed to vaccinate to the extent that the person belongs to the above defined categories.

Employers may only organize vaccination of their employees through the company occupational medicine doctor. Employers must inform their employees about how to access the vaccination through the occupational doctors. Absences by employees to be vaccinated are considered as a working time and must not lead to any loss of pay.

However, given the relatively small number of occupational doctors, this option is quite limited.

3. Do employers have a legal right to require employees to be vaccinated?
Under French law, vaccination policy falls within the scope of Public Health and is determined by the Minister of Health. Only the legislator can make vaccinations mandatory.

Generally, employers do not have a legal right to require employees to be vaccinated. However, vaccination against COVID-19 has been made compulsory by law n° 2021-1040 of August 5, 2021, unless there is a medical contra-indication, for people working in the health and medico-social sectors. In particular, the following are concerned:

- Medical and paramedical professionals working in private practice or in hospitals, clinics, nursing homes (EHPAD) and retirement homes, as well as professionals, students or pupils working on these premises;
- Professionals in contact with vulnerable people, such as firefighters, ambulance drivers, employees in the homes of certain beneficiaries of the personalized autonomy allowance (APA) or the disability compensation benefit (PCH).

Since October 16, 2021, people subject to the compulsory vaccination are required to show one of the following documents:
- A certificate of complete vaccination status;
- A certificate of valid recovery;
- A medical contra-indication.
4. Can employers require employees to disclose or to produce proof of whether they have been vaccinated?

No, employers cannot require employees to disclose or to produce proof of whether they have been vaccinated, except under specific circumstances determined by law.

Several laws require a “health pass” for listed business activities, notably:

- Leisure and cultural venues (theaters, amusement parks, concert halls, festivals, sports venues, cinemas, etc.)
- Bars and restaurants (with the exception of company restaurants), including on terraces
- Department stores and shopping malls, by decision of the prefect of the department, in case of risk of contamination (new window), under conditions guaranteeing access to essential shops, as well as to transportation
- Seminars
- Public transport (trains, buses, planes) for long journeys
- Hospitals, homes for the elderly (EHPAD) and retirement homes for companions, visitors and patients receiving scheduled care. The pass will not be requested in case of medical emergency.

For employees working in the activities listed above, a health pass is required.

Whenever an employee is legally required to show a health pass or to be vaccinated, the employer must check that the employee has complied with their obligation.

The “health pass” consists of the digital (via the TousAntiCovid application) or paper presentation of one of the following three health proofs:

1. Vaccination, provided that people have a complete vaccination schedule and the necessary time after the final injection.
2. Proof of a negative RT-PCR or antigen test within 72 hours.
3. A positive RT-PCR or antigen test result showing recovery of COVID-19, at least 11 days old and less than six months old.

5. Can employers take action if employees do not want to be vaccinated?

In the health sector, failure to be vaccinated in time may lead to suspension of employees and public servants without pay. The possibility of dismissal in case of failure to be vaccinated, initially planned by the government, has been removed by Parliament.

For staff working in the sectors concerned by the extension of the health pass, the health pass is required from August 30, 2021. If employees fail to present the pass, their employment contract may be suspended, without pay. At the end of the third day following the beginning of the suspension, the employer must organize a meeting with the employee to consider ways to regularize the situation. They may be offered an assignment to another position, without contact with the public. The possibility of dismissal for failure to present the health pass, initially envisaged by the government, has been removed by the senators. However, employers will be able to terminate fixed-term employment contracts (CDD).

Also, as a matter of principle, an employer cannot impose remote work to its employees. However, during the health emergency period, the employer may require an employee to work remotely a certain number of days per week if the employee’s activities are eligible for this work organization.

It should be noted that the health emergency period initially planned until November 15, 2021 is in the course of being extended to July 21, 2022 by a bill currently under discussion at Parliament.
1. Are COVID-19 vaccines available?
So far, the vaccines from Biontech/Pfizer, Moderna, Astrazeneca, and Johnson & Johnson are available in Germany. Vaccines from other manufacturers continue to be in the development or approval process and should also be available in the next few months. More than 57.6 million people have been vaccinated in Germany at least once so far (as of October 27, 2021), including almost 55.2 million people who are already fully vaccinated. The access to vaccination in Germany used to be staggered according to prioritization, starting with high-risk groups such as elderly citizens and medical personnel. However, since June 7, 2021, there is no longer a prioritization and everyone can make an appointment to get vaccinated. The vaccination is carried out in vaccination centers as well as by mobile vaccination teams, general practitioners and since June 7, 2021, also company doctors. In August 2021, Germany started to offer booster shots primarily to older citizens and members of other high risk groups.

2. Do employers have direct access to the vaccines?
As of October 27, 2021, employers in Germany do not have any direct access to the vaccines. However, company doctors have been able to secure a certain number of vaccine units per company for which they provide medical services. While employers are not obliged to facilitate a vaccination campaign at their premises, many use this opportunity to engage with their company doctor and offer vaccination appointments for employees and their family members on a voluntary basis. Apart from that, the government procures and finances all vaccines used in Germany and organizes distribution to each federal state. The federal states then ensure safe storage and distribution on site. They also organize and operate the vaccination centers and the mobile vaccination teams that vaccinate residents of nursing homes and their staff.

3. Do employers have a legal right to require employees to be vaccinated?
At present, a COVID-19 vaccination is not mandatory for employees. There is no indication that a legal obligation to vaccinate is planned by the government. It is more likely that vaccination will remain voluntary, as is the case with other infectious diseases.
Likewise, there is no contractual obligation for employees to vaccinate. The employer’s right of direction is not sufficient for a vaccination order. A vaccination obligation agreed in the employment agreement is highly unlikely to be effective and thus not enforceable.

4. Can employers require employees to disclose or to produce proof of whether they have been vaccinated?
Only very few employers (e.g., hospitals and medical practices) can require their employees to disclose or to produce proof of whether they have been vaccinated. The vaccination status constitutes a special category of personal data (health data) in the sense of Art. 9 para. 1 GDPR, and thus, the disclosure of the vaccination status would require the explicit and free consent of the respective employee.

In the context of the COVID-19 pandemic, the opening clause of Art. 9 para. 2(i) GDPR, according to which processing is permitted if it is necessary for reasons of public interest in the area of public health, was used as the legal basis for data processing under the German Infection Protection Act. Pursuant to section 23a of the German Infection Protection Act, employers of certain sectors (e.g., hospitals and medical practices) are permitted to process the vaccination status of their employees. Other employers are not permitted to request employees to disclose their vaccination status. However, if employees voluntarily disclose their vaccination status, employers are permitted to use that information when planning and implementing infection protection measures.
5. Can employers take action if employees do not want to be vaccinated?
There is currently no obligation for employees to be vaccinated against COVID-19. Employers can only recommend the vaccination and incentivize it by offering vaccination premiums. However, if an employee refuses the (voluntary) vaccination, this refusal cannot be used as a basis for any disciplinary measures (such as formal warning or dismissal). Likewise, in general, the respective employee must not be treated differently than their vaccinated colleagues. Whether the employer can deny access to the office premises if an employee refuses to be vaccinated will depend on the circumstances of the individual case. In particular, it must be assessed whether the employer’s duty to protect its staff can be achieved through less restrictive means (obligation to wear masks, distancing, etc.).
1. Are COVID-19 vaccines available?

Yes. Two COVID-19 vaccines are currently available in Hong Kong, the Sinovac vaccine (CoronaVac) and the BioNTech vaccine (Comirnaty).

Hong Kong residents aged 12 or above are eligible to receive free vaccination. The minimum age for receiving Comirnaty is 12 and for CoronaVac the minimum age is 18.

Holders of Exit-entry Permits for traveling to and from Hong Kong and Macao that are allowed to stay in Hong Kong as visitors, and can complete two doses of vaccination within their limit of stay without extension, are also eligible to receive the free vaccination. Other lawful visitors can make appointments for vaccination if their stays are long enough for them to complete both doses.

Non-refoulement claimants and refugees recognized by the United Nations High Commissioner for Refugees can indicate their intention of receiving a vaccination through the International Social Service Hong Kong Branch. They can receive the vaccine at designated community vaccination centers where interpretation service is available.

Vaccination is available to eligible persons in community vaccination centers (which will operate until the end of December 2021), designated general out-patient clinics of the Hospital Authority (note that these clinics will stop providing vaccination services for the first dose of the CoronaVac after September 28, 2021, while services for the second dose will stop after October 26, 2021), designated clinics of the Department of Health and designated private clinics. Outreach vaccination service is provided to residential care homes and nursing homes by visiting medical officers under the Residential Care Home Vaccination Programme. Such service is available also to enterprises and organizations if enough employees want to be vaccinated and there is a suitable venue with enough space.

Details of the vaccination programme can be found here: https://www.covidvaccine.gov.hk/en/programme

2. Do employers have direct access to the vaccines?

Not at this time. The Hong Kong Government is controlling the sourcing and administering of the vaccines to the general public. Employers can apply for outreach vaccination service if enough employees want to be vaccinated and a suitable venue is available.

3. Do employers have a legal right to require employees to be vaccinated?

Vaccines are not currently mandatory and employers do not have a statutory right to require employees to have the vaccine.

Employers have an obligation under the Occupational Safety and Health Ordinance (OSHO) and common law to take all reasonably practicable steps to ensure the safety and health at work of all of their employees. The vaccine should be considered as part of COVID-19 risk assessments, as a potential additional measure to control the risks associated with contracting the virus at work. Employers may decide, following such a risk assessment, that having a vaccinated workforce would be necessary and reasonable in reducing the risk.

An instruction to have the vaccine must also be a lawful and reasonable direction on the part of the employer. While it is not unlawful to require employees to be vaccinated for COVID-19, the question becomes whether a direction to be vaccinated is reasonable, which will depend on the circumstances.

As far as practice goes, the Government now requires all its employees to either have received the first dose of a COVID-19 vaccine or be tested every two weeks at their own time and expense (the “vaccination in lieu of regular testing” arrangement) unless they are certified as medically unfit for the COVID-19 vaccine.
Increasing numbers of private employers have followed the Government in adopting similar policies.

4. Can employers require employees to disclose or to produce proof of whether they have been vaccinated?

Depending on the circumstances, the requirement for employees to disclose or to submit proof that they have been vaccinated may be considered a lawful and reasonable direction of the employer.

If an employer requires its employees to make such a disclosure, then they will need to comply with the Personal Data (Privacy) Ordinance (PDPO) as the requirement will inevitably involve the collection and processing of employees’ personal data.

The PDPO requires, among other things, that the collection of the data is necessary for the purpose for which it is collected and is adequate but not excessive. The PDPO requires data users to take all practicable steps to ensure the personal data collected is accurate and not retained for a period longer than is necessary for the fulfilment of the purpose for which the data is used. There is also certain information that should be provided to an employee before seeking vaccination data from the employee. Under the PDPO, an employer will need to inform the employee on or before collecting the data whether it is obligatory or voluntary for them to supply the data and when it is obligatory, the consequences for the employee if they fail to supply the data.

5. Can employers take action if employees do not want to be vaccinated?

The actions that an employer may take will depend on, among other things, whether the employer has a lawful right to require the employee to be vaccinated. This will depend on, among other things, whether the requirement to be vaccinated is reasonably necessary and practicable to ensure the safety and health at work of its employees and protect public health as well as whether the employer has a right under the contract of employment to require the employee to be vaccinated. If these things are not established, then the employer may not be able to do much. If they are, then the employer may be able to take certain actions in respect of the employee. What steps may be taken will of course depend on the circumstances, but may include disciplinary action.

Employers should also have regard to any conditions of its employees which may explain why they may refuse to get vaccinated and be careful about treating employees who refuse to get vaccinated less favorably, as there is a risk that this may fall foul of anti-discrimination laws. For instance, there may be individuals with medical conditions or who are pregnant or breastfeeding where medical advice is that they should not take the vaccine (e.g., CoronaVac is not recommended for pregnant or breastfeeding women). Employers should be careful of potential disability, pregnancy or breastfeeding discrimination where there is less favorable treatment of employees who have not been vaccinated, for example, by not allowing them to go into the office.

The obligations that the employer must comply with include the contract of employment, the OSHO, Disability Discrimination Ordinance and Sex Discrimination Ordinance. They may also have to consider employee relations issues as well, for example, if the employee disagrees with or is opposed to vaccination as a matter of principle.
Each of the UK nations has plans to scale up vaccine delivery, however, the information in this section of the guide relates to COVID-19 vaccinations provided by the National Health Service (NHS) in England only.

1. Are COVID-19 vaccines available?
Yes. The UK government’s strategy has been to develop a diverse portfolio of vaccines and figures released in mid-October 2021 showed that more than 49 million people had received the first dose of the vaccine and more than 45 million people had received the second dose. Booster vaccine doses are also now available for those who have had a second dose of a vaccine at least six months ago.

2. Do employers have direct access to the vaccines?
No. Currently, vaccines are not commercially available and are distributed through the NHS.

3. Do employers have a legal right to require employees to be vaccinated?
Vaccines are not currently mandatory and employers do not have a legal right to require employees to have the vaccine. According to government guidance, employers should support staff in having the COVID-19 vaccine, but they cannot force staff to be vaccinated.

Employers may find it useful to talk with their staff about the vaccine and share the benefits of being vaccinated. If an employee does not want to be vaccinated, the employer should listen to their concerns. Employers should be sensitive towards individual situations and must keep any concerns confidential, in particular as some people may be resistant to taking the vaccine on health grounds or on grounds that are protected from discrimination under the Equality Act 2010.

UK employers have obligations under health and safety law to reduce health risks to employees and others to a level which is as low as reasonably practicable. The vaccine should be considered as part of COVID-19 risk assessments, as a potential additional measure to control the risks associated with contracting the virus at work. Employers may decide, following such a risk assessment, that having a vaccinated workforce would be necessary and reasonable in reducing the risk. Therefore, an instruction to have the vaccine could be regarded as a “reasonable instruction” on the part of the employer, but that will depend on the circumstances.

Recent press coverage has suggested we may see such decisions implemented across the UK in the near future. For example, a report published in September 2021 commissioned by Indeed Flex, a recruitment company, revealed that of 400 company HR directors surveyed, 70 percent were planning to implement vaccine mandates. September 2021 also saw some of the first UK employers to mandate vaccination against COVID-19. With the London offices of two US law firms introducing such policies ahead of their employees returning to the office.

4. Can employers require employees to disclose or to produce proof of whether they have been vaccinated?
Requiring evidence of vaccination gives rise to significant data protection issues. Details about an employee’s vaccination status is likely to be considered special category health data, which means employers will have to identify a particular GDPR exemption for processing it. Potential grounds may include where it is necessary for performance of rights and obligations in connection with employment, such as maintaining a safe place of work. A policy would also be required, covering the collection of such data and its retention (i.e., only retaining the information for as long as it is needed).
Even if permitted by privacy law, an employer cannot require an employee to disclose such information against their will. Whether any adverse action could be taken against an employee who refuses is likely to depend on the grounds of their objection (see question 5 below), but it would seem reasonable for an employer to be permitted to ask the question as part of a wider policy of encouraging staff to be vaccinated.

Can employers take action if employees do not want to be vaccinated?
Whether an employer can take action will depend on a number of factors, including whether there is a vaccination policy in place and whether being vaccinated is necessary for the employee to do their job. It is arguable that a requirement for vaccination is a reasonable management instruction in order for an employer to provide a safe place of work. Any such policy, however, is likely to have to make room for exceptions based on employees’ reasons for refusal.

For example, the reason for refusal to have the vaccine could be protected from discrimination by the Equality Act 2010. Indeed, the COVID-19 Secure Guidelines suggest that employers should be mindful of the particular needs of those with protected characteristics.

Employers could be at risk of indirectly discriminating against individuals with certain protected characteristics if they plan to treat vaccinated staff differently from unvaccinated staff. Examples of different treatment could include requiring vaccinated staff to return to work whilst preventing unvaccinated staff from entering the workplace or not allowing them to travel abroad for work.

Individuals with the following protected characteristics could potentially be indirectly discriminated against in these circumstances:

**AGE**
As stated in question 1, the vaccine roll out was initially prioritized largely based on age, with older (and therefore higher risk) individuals being offered the vaccine first. This means that middle-aged and younger members of the workforce will not generally have received both doses until around September 2021.

Any differences in treatment between vaccinated and unvaccinated staff could, therefore, be indirectly age discriminatory unless the treatment can be objectively justified.

**DISABILITY**
Individuals with certain medical conditions are being advised not to have the vaccine. These employees may be disabled for the purposes of the Equality Act 2010 and their decision not to get vaccinated could be “something arising from” that disability. Differential treatment could, therefore, lead to successful indirect disability discrimination claims unless the employer could show an objective justification for the treatment. If employers press employees for reasons why they will not have the vaccine, employers could be put on notice of a disability they did not know about and must then be prepared to make necessary reasonable adjustments for the employee.
PREGNANCY AND MATERNITY
Expectant mothers have also been advised not to have the vaccine. Employers therefore need to ensure that any vaccination instructions or policies cover pregnant women in order to avoid indirect discrimination. It would also be prudent to take into consideration the fact that many women choose not to tell their employer of their pregnancy until three months’ gestation and also the fact that women who are trying to get pregnant may also refuse a vaccine.

RELIGION OR BELIEF
An anti-vaccination stance could amount to a protected philosophical belief and therefore attract protection under the Equality Act 2010.

A successful claim using this protected characteristic would need to establish that the belief was genuinely held, cogent, serious and worthy of respect in a democratic society.

If an employee refuses to be vaccinated because of a protected characteristic, and this results in detrimental or disciplinary action from their employer, they may be able to issue a direct or indirect discrimination claim and claim constructive unfair dismissal if they resign in protest. It is important to remember that discrimination claims have no financial cap, so a successful claim could potentially come with severe costs consequences in damages for the employer.

A recent publication by ACAS encourages employers to consider hybrid working arrangements to increase productivity and job satisfaction, attract and retain a more diverse workforce and improve trust and working relationships. The publication covers considering hybrid working, consulting and preparing, creating a policy, treating staff fairly and supporting and managing staff.
1. Are COVID-19 vaccines available?
In mid-December of 2020, the U.S. Food and Drug Administration granted approval for emergency use of the Moderna and Pfizer COVID-19 vaccines. Distribution of the vaccines to the U.S. population began shortly thereafter. The Advisory Committee on Immunization Practices (ACIP), a committee within the U.S. Centers for Disease Control and Prevention (the “CDC”), has issued interim recommendations to federal, state and local jurisdictions for allocation of the COVID-19 vaccine to provide guidance while vaccine supply is limited during the initial phase of vaccine distribution. The ACIP has recommended a phased allocation of the vaccine. The first phase is comprised of three groups of people:

- Phase 1a: Healthcare personnel in hospitals, outpatient care centers, home care settings, and pharmacies, as well as emergency medical services workers, public health officials, and residents and staff of long-term care facilities.
- Phase 1b: Essential workers, such as police, grocery store employees, public transportation workers, and school staff, including teachers.
- Phase 1c: Seniors over 65 and people with high-risk health conditions, such as diabetes, chronic kidney disease, cancer, and sickle cell disease.

The second phase includes all other people over the age of 16.

Vaccination distribution is being handled on the state level and each state is implementing the distribution process differently. Generally, consistent with ACIP’s guidance, most states are still in the first phase of the distribution—i.e., vaccination is available only to essential healthcare workers, residents of long-term care facilities and older adults.

2. Do employers have direct access to the vaccines?
No. Not at this stage.

3. Do employers have a legal right to require employees to be vaccinated?
There is currently no law or regulation that directly addresses whether employers may mandate employee COVID-19 vaccinations. However, on December 16, 2020, the Equal Employment Opportunity Commission (EEOC) updated its technical assistance document titled “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws” (the “Guidance”) to provide guidance to employers regarding COVID-19 vaccinations in the workplace.

The EEOC’s Guidance does not directly address whether an employer is permitted to adopt a mandatory vaccination policy with respect to its employees. However, the EEOC’s responses to the vaccination-related questions posed in the Guidance strongly suggest that an employer may implement a mandatory vaccination policy as a condition of continued employment or, at the very least, as a condition of physically returning to the workplace, subject to certain exceptions, described below.

In particular, the EEOC opined that administering a COVID-19 vaccine to an employee does not itself constitute a “medical examination” under the Americans with Disabilities Act (“ADA”). Specifically, “[i]f a vaccine is administered to an employee by an employer for protection against contracting COVID-19, the employer is not seeking information about an individual’s impairments or current health status and, therefore, it is not a medical examination.” Accordingly, an employer does not need to establish that a vaccine is “job-related and consistent with business necessity” in order to require the employee to receive the vaccine.
However, pre-vaccination medical screenings, which are required in order to determine whether an individual may be vaccinated, do trigger the ADA’s protections regarding disability-related inquiries because they are likely to elicit information about a disability. Accordingly, if an employer itself administers the vaccine to its employees or hires a third party to do so on its behalf, the employer must demonstrate that the screening questions are “job-related and consistent with business necessity.” To meet this standard, an employer must have “a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others.”

Importantly, the ADA’s disability-related inquiry standard is not triggered if (1) the employee receives the employer-required vaccination “from a third party that does not have a contract with the employer, such as a pharmacy or other health care provider” rather than from the employer itself or a third party with which the employer has contracted; or (2) the employer offers employees the vaccine on a voluntary basis.

Due to the nature of the vaccination’s phased distribution, certain sectors of the population are eligible to receive the vaccination in the first phase, including frontline healthcare workers and long-term care facility residents. To ensure a safe workplace, an employer should consider whether to implement different vaccination policies with respect to employees in different roles and/or work locations. For example, an employer may wish to mandate vaccinations for employees who have more direct interaction with other workers or with the public as compared to employees who do not.

Prior to instituting a mandatory vaccination policy, an employer should consider whether there are any state laws or regulations that may be implicated. Similarly, an employer should assess whether other statutes, such as the Occupational Safety and Health Act or the National Labor Relations Act, are implicated. For example, collective bargaining agreements may limit an employer’s ability to implement or enforce a mandatory vaccination program as to certain unionized employees.

An employer that implements a mandatory vaccination policy should also consider how it will handle situations where an employee subject to the mandatory vaccination policy suffers side effects from the vaccine. For example, an employer may wish to consider providing such an employee with a paid leave of absence during the period in which they are recovering from the side effects. An employer should also discuss any mandatory vaccination policy with applicable insurance carriers, including the employer’s workers’ compensation insurer, to address coverage in the event an employee becomes ill from side effects.

In all events, employers should be mindful that guidance regarding COVID-19 in the workplace continues to evolve at the federal, state and local levels. Employers should carefully monitor applicable updates and consult with their counsel to ensure that their policies comply with the most current guidelines and requirements.
4. Can employers require employees to disclose or to produce proof of whether they have been vaccinated?

The EEOC has stated that simply requiring an employee to provide proof that they have received a COVID-19 vaccination is not a disability-related inquiry because it is not likely to elicit information about a disability. There are many reasons—not all of which are disability-related—why an employee may not be vaccinated. However, to the extent an employer asks an unvaccinated employee questions about why the employee did not receive a vaccination, such questions may elicit information about a disability and would therefore be subject to the disability-related inquiry standard. If an employer requires its employees to provide proof of vaccination from their own health care provider or a pharmacy, an employer should warn employees, in order to avoid implicating the ADA, not to provide any medical information as part of the proof. In addition, because proof of vaccination constitutes personal data relating to an employee, the information should be collected, treated and stored as confidential medical information.

Under Title II of the Genetic Information Nondiscrimination Act (“GINA”), employers are generally not permitted to use, acquire or disclose an employee’s genetic information. Accordingly, while administering the COVID-19 vaccine generally does not implicate GINA, employers who engage (or hire a third party to engage) in pre-vaccine medical screenings or who require proof that employees have received the vaccine should specifically advise employees not to provide any genetic information, either in responding to screening questions or providing proof of receipt of the vaccine.

5. Can employers take action if employees do not want to be vaccinated?

Yes. Subject to the exceptions described below relating to disabilities and sincerely-held religious beliefs, employers may take action if they implement a mandatory vaccination policy and employees refuse to be vaccinated.

In the event an employee is unable to receive the vaccination due to a disability, the employer does not have carte blanche to take adverse action against the employee, including by excluding the employee from the workplace. Rather, the EEOC instructs that employers must determine whether the individual’s presence “would pose a direct threat [to the workplace] due to a ‘significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.’” In doing so, the employer must conduct “an individualized assessment of four factors”: (1) the duration of the risk posed by the employee; (2) the nature and severity of the potential harm caused by an employee’s physical presence at the worksite; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.

If the employer concludes that the employee poses a direct threat—which the EEOC has stated “would include a determination that an unvaccinated individual will expose others to the virus at the worksite”—the employer must assess whether it can implement any “reasonable accommodation” to mitigate the risk while still allowing the employee to come to the worksite. If no such accommodation is possible or practical because it would impose an undue hardship on the employer, the employer can exclude the individual from the worksite. However, the employer is not automatically permitted to terminate the employee’s employment under such circumstances. Rather, the employer must assess whether other reasonable accommodations are available that would enable the employee to keep their job — such as, for example, permitting the employee to work remotely or to take legally mandated leave. Employers should keep in mind that the reasonable accommodation analysis is quite fact-specific. For example, the EEOC advises that “[t]he prevalence in the workplace of employees who already have received a COVID-19 vaccination and the amount of contact with others, whose vaccination status could be unknown, may impact the undue hardship consideration.”
RELIGIOUS BELIEF, PRACTICE, OR OBSERVANCE

Pursuant to Title VII of the federal Civil Rights Act, if an employee’s sincerely held religious belief, practice, or observance prevents the employee from receiving a COVID-19 vaccination, the employer must provide the employee with a reasonable accommodation unless the accommodation poses an undue hardship. “Undue hardship” under Title VII is defined as an accommodation that has “more than a de minimis cost or burden on the employer.” The EEOC’s Guidance further provides that “because the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar, the employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief.” If the employer has an objective basis for questioning the employee’s religious nature or the sincerity of a religious belief, the employer “would be justified in requesting additional supporting information.” As with disability-related reasons for not being vaccinated, the mere fact that an employee cannot be vaccinated because of a sincerely held religious belief does not necessarily mean that an employer can terminate the employee. Other options, such as remote work, may need to be considered as potential accommodations if they do not impose undue hardship on the employer.
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