



COVID-19 Vaccine: Distributing and Mandating

With the U.S. Food and Drug Administration's emergency use authorization of the first COVID-19 vaccination, many organizations are wondering when their employees will be able to receive it and if it can be mandated as a requirement to work.

When Will the Vaccine Be Available?

Each state will determine its distribution strategy. Most state strategies are utilizing the *COVID-19 Vaccination Program Interim Playbook for Jurisdiction Operations* issued by the Centers for Disease Control and Prevention (CDC). This strategy includes priority population identification, vaccine distribution and supply-chain limitations.

Because of limited availability, the distribution strategies include broad categories of priority populations using a phased approach:

- **Phase 1** – Healthcare workers, essential workers and those at high risk
 - **Phase 1-A:** Paid and unpaid persons serving in healthcare settings who have the potential for direct or indirect exposure to patients or infectious materials
 - **Phase 1-B:** People who play a crucial role in keeping essential functions of society running and cannot socially distance in the workplace (e.g., emergency and law enforcement personnel not included in Phase 1-A, food packaging and distribution workers, teachers/school staff, childcare providers), adults with high-risk medical conditions who possess risk factors for severe COVID-19 illness, and people 65 years of age or older (including those living in LTCFs)
- **Phase 2** – Increase supply and access expanded to include a broader set of the population, with more providers involved, and;
- **Phase 3** – Sufficient supply to meet demand; distribution integrated into routine vaccination programs.

The Biden campaign and transition team have communicated plans for a more prominent role in the COVID-19 response in the U.S. This will likely include increased federal guidance and more substantial oversight of the vaccine delivery strategy. State and local jurisdictions will continue to remain responsible for much of the vaccine delivery effort. CDC guidance and federal oversight could evolve over the next several months as vaccines become available and distribution begins.

Can the Vaccine Be Mandated?

States have the constitutional authority to mandate population-wide vaccinations based on a Supreme Court ruling in 1905 regarding the smallpox vaccine. The Court said, "states have the authority to enact reasonable regulations as necessary to protect the public health, public safety, and the common good." In response to the argument of individual freedoms, the Court said, "the rights of the individual may at times, under the pressure of great dangers, be subjected to such restraint to be enforced by reasonable regulations as the safety of the general public may demand."

Private employers can mandate the vaccine for employees. As with any vaccine mandate, either on a statewide or employer basis, there are federally-regulated exemptions.

Should My Organization Mandate Employee COVID-19 Vaccination?

While it is legal for employers to mandate the COVID-19 vaccine, employers should anticipate pushback from employees and be aware of the large undertaking of processing exemption requests.

The Americans with Disabilities Act (ADA) requires employers to provide accommodation to employees who cannot receive the vaccine due to medical reasons. The employee is responsible for providing information about the nature of the limitation or disability and the difficulty or issue that the vaccination would cause. An employer may require an employee to provide documentation from the worker's medical provider to confirm the employee's specific limitation or disability and the need for an exemption.

Under Title VII of the Civil Rights Act of 1964, employers must provide an exemption to individuals who have sincerely held religious beliefs. Supporting documentation requests by employers of employees is acceptable. However, take caution and do not request unnecessary evidence as that risks liability for denying an exemption.

Some companies will have strong justifications for mandating the vaccine. Organizations whose employees are at risk or present risk to others will have a more substantial business case to mandate the vaccine than businesses that rely on remote employees. Depending on the type of business, making a policy that encourages but does not require vaccination may be the easiest way to administer for many employers.

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