

# COVID-19 Protocol for Employers

How to Navigate the Workplace and  
Establish a Compliant Framework for  
Vaccines & Testing

January 26, 2021

By: Carla Hartley, Elyssa Kulas, Thomas  
Paschos, & Scott Toothacre

# PFIZER VS. MODERNA

(AS OF 1/24/2021)



The Moderna logo, featuring the word "moderna" in a red, lowercase sans-serif font with a blue dashed underline.

- 2 doses, 21 days apart
- \$19.50 per dose
- 95% effective
- Approved for individuals 16 years old and older
- Severe adverse reactions: 0-4.6% of participants
- Common side effects:
  - Injection site reaction
  - Fatigue
  - Headache
  - Muscle Pain
  - Chills
  - Joint pain
  - Fever

- 2 doses, 28 days apart
- \$32-37 per dose
- 94.1% effective
- Approved for individuals 18 years old and older
- Severe adverse reactions: 0.2-9.7% of participants
- Common side effects:
  - Injection site pain
  - Fatigue
  - Headache
  - Muscle Pain
  - Chills
  - Joint Pain

# BACKGROUND INFORMATION

- Emergency Use Authorization (EUA) by the FDA
- Important Considerations
  - mRNA Vaccines
  - Potential allergic reactions
  - Clinical trial limitations
  - Effectiveness of vaccine
  - Availability of vaccine
- Vaccinated workforce does not mean you can eliminate safety & sanitation protocols

## ACCESSIBILITY AND PRIORITIZATION



- CDC Recommendation for Allocation of COVID-19 Vaccine
- States Differing Opinions on Prioritization
- New Administration's Vaccination Campaign

## WHAT ARE EMPLOYERS' OPTIONS?

- A. Follow typical influenza vaccination approach, i.e. offer free of charge on volunteer basis
- B. Hybrid approach – dependent on job duties and workplace
- C. Mandate for all employees

# EEOC ENFORCEMENT

## 2009 EEOC TECHNICAL ASSISTANCE DOCUMENT

- EEOC's conclusion in 2009 was that ADA and Title VII-covered employers should simply consider "encouraging" employees to get the influenza vaccine rather than requiring them to take it.
- This document was re-issued on March 19, 2020, to incorporate updates regarding the COVID-19 pandemic.

**EEOC DECEMBER 16, 2020  
GUIDANCE**

## IS THE COVID-19 VACCINE A MEDICAL EXAMINATION?

**NO!**

- Under the ADA, vaccines are not medical examinations. The employer does not need to demonstrate it is job related or consistent with business necessity
- The employer can request proof of vaccination – This is not a disability-related inquiry under the ADA
- The employer is allowed to mandate vaccination, subject to reasonable accommodations for a sincerely held religious belief or for disability



## DOES THAT MEAN EMPLOYERS CAN MANDATE COVID-19 VACCINATIONS WITHOUT RESTRICTION?

**NO!**

### A. Direct Threat Standard

- According to the EEOC, an employer that wants to require vaccinations must show that an unvaccinated employee would pose a direct threat 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.”

### B. Accommodation Requests

### C. Ongoing business operations may undermine “direct threat” analysis

# EEOC ENFORCEMENT

THESE TWO STATUTES ARE IMPLICATED BY VACCINATIONS IN THE WORKPLACE:

## THE AMERICANS WITH DISABILITIES ACT (ADA)

42 USC § 121010, ET SEQ.

- Under the ADA, an employee may be entitled to an exemption from having to take the vaccination if the employee has a **disability** that prevents him/her from taking the vaccine.
- **Reasonable Accommodation** – A reasonable accommodation under the ADA is a modification or an adjustment in a job, employment practice, or work environment that allows an individual with a disability to have an equal employment opportunity. (See 29 C.F.R. Pt. 1630, App. (see discussion under “Section 1630.2(o) Reasonable Accommodation”).)
- **Undue Hardship to Employer’s Business** – action requiring **significant difficulty or expense** when considered in light of a number of factors (ie., nature and cost of the accommodation in relation to the size, resources, nature, and structure of the employer’s operation).
  - If an accommodation would be an undue hardship, the employer must try to identify another accommodation. If the cost of an accommodation would impose an undue hardship on employer, then the individual with a disability should be given the option of paying that portion of the cost which would constitute an undue hardship or providing the accommodation.

## TITLE VII

42 USC § 2000E

- Under Title VII of the Civil Rights Act of 1964 (“Title VII”), employees with **sincerely held religious beliefs**, practices or observances, can likely be exempt from any COVID-19 vaccine employment requirement.
- Title VII & ADA apply to employers with 15 or more employees.
- Employers are required to reasonably accommodate to employees’ qualifying religious objections under Title VII at least absent “undue hardship.” Undue hardship is defined less stringently under Title VII than under ADA and only requires a showing of more than a *de minimis* cost to the operation of the employer’s business.
- Employers should be aware of any state-specific anti-discrimination laws that may mirror the general accommodation obligations of Title VII but have different standards for “undue hardship.”

# EXAMPLES OF ACCOMMODATION REQUESTS IF YOU HAVE CONCLUDED THAT UNVACCINATED EMPLOYEE PRESENTS A DIRECT THREAT

## ADA ACCOMMODATIONS

- Modifying a workplace tardiness standard to allow employee with disability flexibility in reporting time
- Use of plexiglass or other barriers to minimize employee exposure
- Designating one way aisles in retail to maintain distancing
- Staggering shifts to minimize employee exposure
- Moving work location to another area within the company
- Working remotely

## RELIGIOUS ACCOMMODATIONS

- Overlaps with ADA Accommodation
- Change in work location within a facility
- Allow employee to work remotely to minimize infecting others
- Altering shifts to minimize exposure

## EXCLUDING UNVACCINATED EMPLOYEES FROM THE WORKPLACE

- “If an employer determines that an individual who cannot be vaccinated due to disability poses a direct threat at the worksite, the employer cannot exclude the employee from the workplace—or take any other action—unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.”
- Individualized assessment
- Other leave entitlements under FMLA, FFCRA (if continuing to offer benefits), state or local law, employer policies
- Implications of placing employees on unpaid leave of absence or terminating employee

# PROOF OF VACCINATION: ADA IMPLICATIONS

- Requesting proof of receipt of a COVID-19 vaccination is likely not to elicit information about a disability and is not a generally prohibited disability-related inquiry.
- Examples of Employer Requests that may be subject to ADA scrutiny:
  - Asking why an individual DID NOT receive a vaccination
  - Disability-specific questions
  - Requesting an individual's information for pre-vaccination screenings
    - AVOID questions about individual family medical or genetic history that implicates Genetic Information Non-discrimination Act (*protects individuals against employment discrimination base on genetic information*)
    - When an employer is administering the vaccine or contracting with a third party to administer the vaccine, these pre-vaccine medical screening questions may illicit information about a disability and thus must be job-related and consistent with the business activity
  - STANDARD: Employer would need “to have a reasonable belief, based on objective evidence, that an employee who does not answer the screening questions, and therefore, does not receive a vaccine, will pose a direct threat to health or safety of others in the workplace.”

## PROOF OF VACCINATION: 3<sup>RD</sup> PARTIES IN THE WORKPLACE

- New technology/applications for proof of vaccination
- Generally, federal discrimination statutes protect employees and applicants for employment, not independent contractors
- If mandating vaccines for your own employees and excluding unvaccinated individuals from the workplace based on “direct threat” standard, should consider similarly excluded unvaccinated independent contractors
- If not mandating vaccines for own employees, then consider practicality of mandating independent contractors be vaccinated

# OTHER EMPLOYMENT CONSIDERATIONS

## POTENTIAL LIABILITY: WAGE & HOUR

### IF MANDATORY

- Reimbursement of expenses → cost of vaccine, cost of commute to vaccination
- Compensatory time → consider portal to portal analysis under federal and state laws

### IF VOLUNTARY

- Likely non-compensatory time

\*\*\*Scrutinize employee incentives for obtaining vaccination



## POTENTIAL LIABILITY: OPPOSITION TO COVID-19 VACCINATIONS

- Section 7 of National Labor Relations Act
  - Discussing terms and conditions of employment
  - Applies to union and non-union employees
- Free Speech and Political Activity
- Social Media and Off-Duty Conduct
- Harassment, Discrimination, or Retaliation

POTENTIAL LIABILITY:  
OTHER CONSIDERATIONS

- Adverse Reactions
- OSHA
- Workers' Compensation
- Privacy/Constitutional Issues
- Collective Bargaining
- Immunity of Drug Companies

# GLOBAL IMPLICATIONS

- Availability of certain vaccines
- Safety/effectiveness of different vaccines
- Government mandates and guidance

## Chinese Vaccines

- CoronaVac (50-90%) inactivated vaccine
- Wuhan/Sinopharm -inactivated vaccine
- BBIBP-CorV (86%) inactivated vaccine

- Russian Vaccines
  - Sputnik V (91%) non-replicating viral vector
  - EpiVacCorona - peptide vaccine

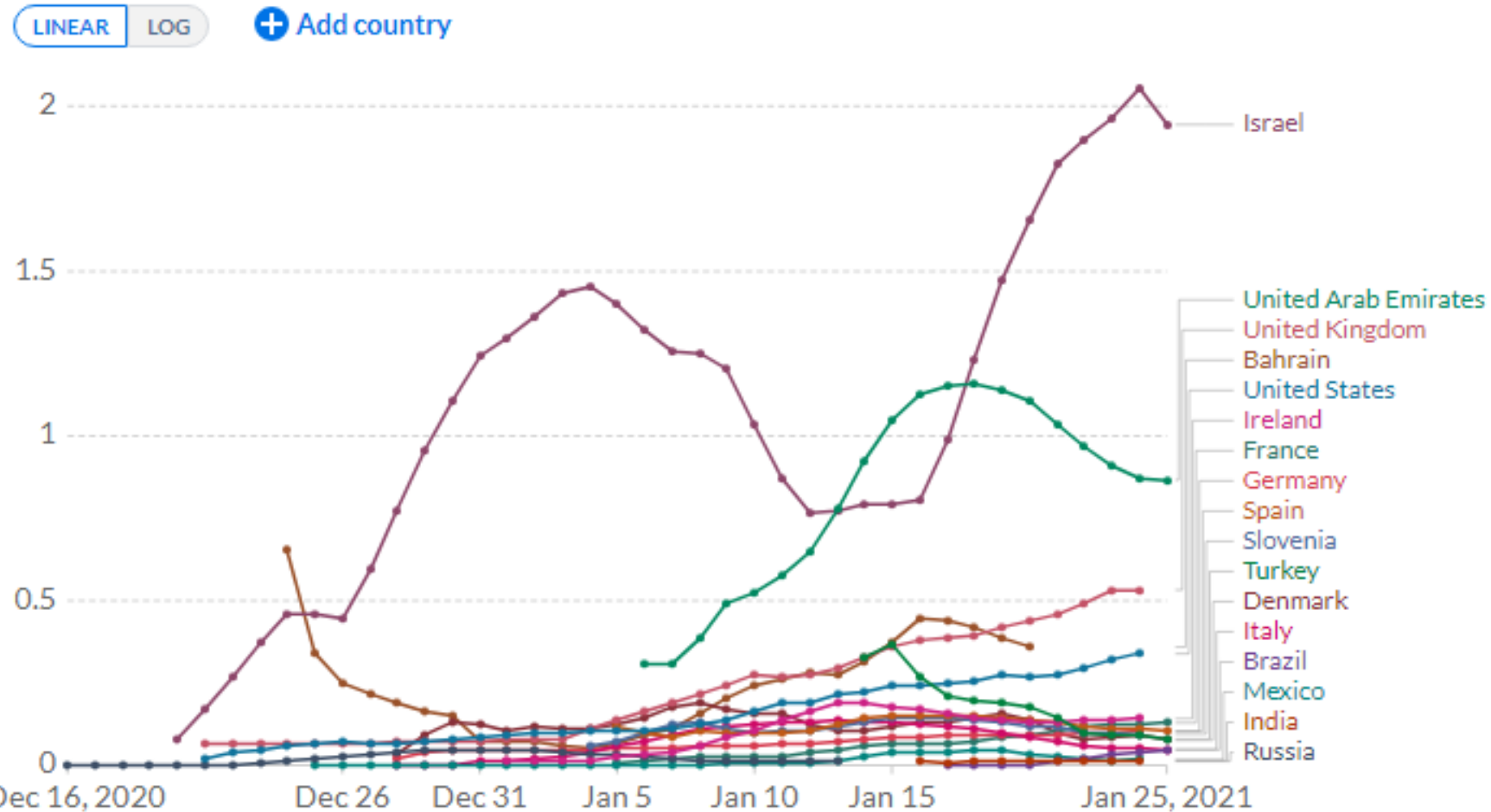
Oxford-AstraZeneca – UK (70%)  
adenovirus vaccine

Covaxin – Indian inactivated vaccine

# Daily COVID-19 vaccine doses administered per 100 people

Our World  
in Data

Shown is the rolling 7-day average per 100 people in the total population. This is counted as a single dose, and may not equal the total number of people vaccinated, depending on the specific dose regime (e.g. people receive multiple doses).



Source: Official data collated by Our World in Data - Last updated 25 January, 19:20 (London time)

CC BY

▶ Dec 16, 2020 ○ Jan 25, 2021

Source: <https://ourworldindata.org/covid-vaccinations> (last updated 1/25/2021)

## RECAP: WHAT ARE EMPLOYERS' OPTIONS?

- A. Follow typical influenza vaccination approach, i.e. offer free of charge on volunteer basis
- B. Hybrid approach – dependent on job duties and workplace
- C. Mandate for all employees

# CONCLUSION

- Consider availability, experimental stages of vaccine, and potential exposure in mandating vaccinations
- EEOC guidelines and views may change or be revised over time
- Employers should consider *encouraging* and *highly recommending* the vaccine rather than mandating vaccination
- Employers must still maintain safety and sanitation protocols, even if vaccine is mandated
- Stay on top of current and evolving guidelines from the CDC, OSHA, the U.S. Department of Labor and state and local governments.