



Does OSHA Require Employers to Record Vaccine Reactions?

By Lisa Nagele-Piazza, J.D., SHRM-SCP

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Employers that encourage or require workers to get vaccinated against the coronavirus must carefully navigate legal requirements and government recommendations—but the Occupational Safety and Health Administration (OSHA) recently gave employers a break by saying they don't have to record COVID-19 vaccine reactions.

The federal workplace safety agency requires employers to record certain work-related injuries and illnesses on the OSHA 300 log. OSHA initially said employers would have to record adverse reactions to COVID-19 vaccines if they require the shot—but not if they simply recommend that employees receive a vaccination.

The agency's directive, however, led to confusion over what is a "truly voluntary" vaccination policy. Therefore, OSHA changed its position and said it will not require employers to record worker side effects for at least the next year.

Federal agencies "are working diligently to encourage COVID-19 vaccinations," according to OSHA's COVID-19-related FAQs (<https://www.osha.gov/coronavirus/faqs#vaccine>), which were updated on May 21. "OSHA does not wish to have any appearance of discouraging workers from receiving COVID-19 vaccination and also does not wish to disincentivize employers' vaccination efforts."

Nick Hulse, an attorney with Fisher Phillips in Charlotte, N.C., said the updated guidance "is a welcome reprieve" from OSHA's recording requirements. "Whether it is through a mandatory vaccination program or simply encouraging employees to receive the vaccine, employers no longer need to worry themselves with recording reactions."

Melissa Bailey, an attorney with Ogletree Deakins in Washington D.C., said that, to her, the revision signals close coordination with the White House. "The Biden administration's messaging has consistently touted the importance of vaccines, and this is just one more way to convince employers to do whatever they can to encourage employees to get vaccinated."

Recordable Injuries and Illnesses

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Feedback

COVID-19 Vaccination Resources

(www.shrm.org/hr-today/news/hr-news/Pages/COVID-19-Vaccination-Resources.aspx)

Under the Occupational Safety and Health Act, covered employers (<https://www.fisherphillips.com/news-insights/workplace-safety-and-health-law-blog/to-keep-osha-logs-or-not-to-keep-osha-logs-that-s-the-question.html>) must maintain an annual log of all work-related injuries and illnesses on their OSHA Form 300 (which is known as the OSHA 300 log). Employers generally must record all new work-related cases if they involve:

- A death.
- Days away from work.
- Restricted work or transfer to another job.
- Medical treatment beyond first aid.
- Loss of consciousness.
- A significant injury or illness diagnosed by a physician or other licensed health care professional.

The requirement to record "days away from work" would have been most applicable to COVID-19 vaccinations. Although the U.S. Centers for Disease Control and Prevention has reported that severe allergic reactions (<https://www.cdc.gov/mmwr/volumes/70/wr/mm7002e1.htm>) to vaccines are rare, many people have reported experiencing mild "flu-like" symptoms (<https://www.aarp.org/health/conditions-treatments/info-2021/second-dose-vaccine-side-effects.html>) that may require a day or two of rest.

OSHA's initial guidance did not provide an exception for mild symptoms or days that employees may miss while out on a flexible leave policy, Hulse observed. Now that the requirement has been lifted, he said, employers can be more flexible with providing time off from work to recover from the vaccine.

OSHA may change its directive in the future but said it will practice its discretion and won't enforce the recording requirements through May 2022. "We will re-evaluate the agency's position at that time to determine the best course of action moving forward," OSHA said.

Confusion About 'Truly Voluntary' Policies

"Under the updated guidance, employers are now free to encourage employees to receive the vaccine without worrying that OSHA may interpret this encouragement as mandating the vaccine," Hulse explained.

OSHA's initial directive caused confusion about what made a vaccine recommendation "truly voluntary." The agency said employees "cannot suffer any repercussions" from their choice to accept or reject the vaccine, which led to questions about how employer incentives (<https://www.usatoday.com/story/money/columnist/2021/05/25/what-incentives-can-employers-offer-promote-covid-19-vaccinations/5154417001/>)—such as cash and gift cards—would affect the voluntary status of an employer's vaccination program.

"OSHA has a history in its guidance and enforcement of looking at incentives with skepticism," said Courtney Malveaux, an attorney with Jackson Lewis in Richmond, Va., and Melanie Paul, an attorney with Jackson Lewis in Atlanta, in a joint statement.

The amount of the incentive and whether it is part of a group health plan may impact the assessment of whether the incentive is truly voluntary, they said. Furthermore, they noted, if the incentive is provided to employees as a group, it could cause peer pressure to get the incentive for the group, even if a recordable incident occurred.

"The greater the incentive, the more likely that employees may feel compelled to receive the vaccine," Hulse noted.

Even though OSHA will no longer require employers to record vaccine reactions under voluntary or mandatory policies, businesses still need to ensure their programs comply with other federal and state laws, Malveaux and Paul cautioned.

For example, they said, while employers may ask (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/employers-should-be-cautious-when-asking-about-vaccination-status.aspx) employees whether they have been vaccinated, they should end the inquiry there. Asking why an employee is not getting vaccinated (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/if-workers-refuse-a-covid-19-vaccination.aspx) could be viewed as asking about disability, pregnancy or religious beliefs, and any actions the employer takes afterward could be viewed as discriminatory, even if that was not the employer's intent.

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