

Employers Should Be Cautious When Asking About Vaccination Status

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

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Employers may want to ask workers for proof of their COVID-19 vaccination status now that many federal and state officials have relaxed COVID-19 safety rules for people who are fully vaccinated. But employers should be careful not to ask for more information than is necessary.

Fully vaccinated people no longer need to wear masks or stay 6 feet apart in many indoor and outdoor settings, unless required by federal, state or local rules, according to recent guidelines from the U.S. Centers for Disease Control and Prevention (CDC).

Some businesses still may be obligated to keep their policies in place (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/Workplace-Experts-Advise-Caution-as-CDC-Lifts-Mask-Recommendations.aspx) under industry rules or state and local orders. Other businesses may choose to continue requiring all employees and customers to wear masks and stay physically distant. But if employers want to drop their mask mandates, they will need to balance workplace safety policies and employee privacy considerations, particularly because the CDC guidelines apply only to people who are fully vaccinated.

"Fully vaccinated" means that two weeks have passed since a person received a single-shot vaccine or the second dose of a two-shot vaccine.

Here are some tips for employers that decide to ask employees for proof of their vaccination status.

Limit the Inquiry

As COVID-19-related workplace restrictions ease for those who are fully vaccinated, employers will have legitimate business reasons to ask employees about their vaccination status, said Hannah Sweiss, an attorney with Fisher Phillips in Woodland Hills, Calif.

Even in states such as California, where mask requirements still apply, government officials have loosened quarantine restrictions for employees who are fully vaccinated and asymptomatic, she noted. But she cautioned that employers should be careful not to dig too deep into any inquiry about vaccination status.

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COVID-19 Vaccination Resources

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

Feedback

Stephen Riga, an attorney with Ogletree Deakins in Indianapolis, explained that employers should avoid making medical inquiries that could run afoul of the Americans with Disabilities Act (ADA). He noted, however, that simply asking for proof of a COVID-19 vaccination is permissible under the ADA because it is not likely to prompt the employee to provide disability-related information.

"There are many reasons that may explain why an employee has not been vaccinated, which may or may not be disability-related," according to the U.S. Equal Employment Opportunity Commission (EEOC).

"So essentially, the EEOC said you can ask about vaccination status," Riga explained. But employers should refrain from asking follow-up questions about why an employee did not receive a vaccination. Such inquiries may elicit disability-related information, according to the EEOC, and would be subject to the ADA's requirement that questions be "job-related and consistent with business necessity."

If employers ask workers to provide vaccination proof from a pharmacy or health care provider, they "may want to warn the employee not to provide any medical information as part of the proof in order to avoid implicating the ADA," the EEOC said.

Jason Habinsky, an attorney with Haynes and Boone in New York City, suggested that employers ask only for the bare minimum of supporting documentation, such as a vaccination card or a survey response.

Riga noted that employers should check applicable state law, too, which may differ from federal rules and guidelines. Additionally, if employers are requiring workers to get vaccinated (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/if-workers-refuse-a-covid-19-vaccination.aspx), they will need to consider reasonable accommodations for employees with disability-related or sincerely held religious objections.

Maintain Confidentiality

If employers do require proof of vaccination, they should control access to the information and limit its use, Riga said. He suggested that employers keep the information confidential and provide the level of protection they would for employee medical information, even though the EEOC doesn't consider questions about vaccination status to be medical inquiries. "The information is sensitive, so even from an employee relations standpoint, sharing it is probably not a good practice absent a legitimate business reason."

Moreover, the data could be protected under state law. Sweiss said employers that are subject to the California Consumer Privacy Act should be aware that collecting such information likely triggers the law's notice requirements. "So employers should ensure they have issued this notice when collecting vaccine-related information."

Alexa Miller, an attorney with Faegre Drinker in Florham Park, N.J., said the best way to address employee privacy concerns is to communicate that such records will be strictly confidential and will not be used to make employment decisions.

Keep Policies Updated

"This is a rapidly changing environment," Riga said. Federal, state and local authorities are adjusting their COVID-19 requirements regularly, which can have an impact on the business reasons why an employer might need to know an employee's vaccination status.

"Be sure to keep up with the rules in your jurisdiction," he said. "Establish a process for tracking vaccination status, and train your team to make sure you're not making inquiries beyond what's necessary."

Employers will find it hard to have fixed policies and practices as the pandemic plays out, he said. So they need to "be nimble and remain nimble."

Swiss suggested that employers create consistent messaging to communicate their processes and develop some talking points in case they are faced with questions from customers or clients about employees' vaccination status.

"We're still in a state of flux," said Pierce Blue, an attorney with Morgan Lewis in Washington, D.C. "So employers should continue to pay close attention to updated rules and guidelines coming from federal, state and local agencies."

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