

Can Employers Have Separate Policies Based on Vaccination Status?

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By now, many employers know that federal, state and local COVID-19 workplace safety guidelines distinguish between vaccinated and unvaccinated employees. While businesses can create policies with different mask and social-distancing rules based on inoculation status, attorneys say they should tread carefully.

Adam Kemper, an attorney with Kelley Kronenberg in Fort Lauderdale, Fla., suggested that employers conduct a confidential survey to determine how many employees have been vaccinated. Perhaps the staff is fully vaccinated and restrictions can be loosened for everyone. But if there's still a mix of vaccinated and unvaccinated workers, he said the safest route for employers is to continue requiring masks and social distancing.

"From a safety perspective, there is really no problem differentiating between vaccinated and unvaccinated," said Todd Logsdon, an attorney with Fisher Phillips in Louisville, Ky. For issues outside of the Occupational Safety and Health Administration's (OSHA's) jurisdiction, however, the biggest concern would be the need to provide reasonable accommodations (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/Takeaways-from-EEOC-Latest-Guidance-on-COVID-19-Vaccines.aspx) for disability-related or religious reasons. He noted that employers may want to consider employee morale issues, too.

"Employers need to be very cautious when they make these distinctions because they can invite unlawful discrimination," said Courtney Malveaux, an attorney with Jackson Lewis in Richmond, Va. "Managers need to be careful not to exclude unvaccinated employees from meetings or opportunities because their presence requires protective measures. That is especially true for employees who may decline to get vaccinated because of sincerely held religious beliefs or because of pregnancy or a disability."

Know Which Rules and Guidelines Apply

Before updating their policies, employers need to ensure they understand how federal, state and local rules and guidelines apply to their worksites.

FEATURED RESOURCE HUB PAGE



COVID-19 Vaccination Resources

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

Feedback

OSHA recently updated (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/what-employers-need-to-know-about-osha-covid-19-updates.aspx) its guidelines to align with recommendations (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/managing-workplace-mask-requirements-as-restrictions-are-lifted.aspx) from the U.S. Centers for Disease Control and Prevention (CDC). According to the CDC, fully vaccinated employees can safely work indoors in many situations without wearing masks, social distancing or undergoing COVID-19 screening procedures.

Outside of the health care industry, OSHA said employers "no longer need to take steps to protect their fully vaccinated workers who are not otherwise at-risk from COVID-19 exposure," except when measures are "required by federal, state, local, tribal, or territorial laws, rules, and regulations." However, employers need to continue taking steps to protect unvaccinated and otherwise at-risk workers who may have a weakened response to the vaccine.

"The guidance clearly states that it is advisory only, not a standard or rule," noted Rob Duston, an attorney with Saul Ewing Arnstein & Lehr in Washington, D.C.

OSHA's new guidelines don't address whether an employer's failure to follow them would violate the Occupational Safety and Health Act's general duty clause and subject the employer to possible sanctions.

The general duty clause requires employers to provide a work environment that is "free from recognized hazards that are causing or are likely to cause death or serious physical harm." According to Bloomberg Law (<https://news.bloomberglaw.com/safety/biden-boosts-osha-virus-enforcement-as-vaccines-herald-changes>), OSHA recently has done more inspections in workplaces where COVID-19 could be a hazard, even without receiving a related complaint.

In addition to tracking federal guidelines, employers need to watch developments in the states and cities where they operate, Duston noted. Vaccination status is not a protected category under federal or most state anti-discrimination laws. However, Montana recently became the first state to ban workplace discrimination based on immunization status (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/montana-limits-inquiries-into-immunization-status.aspx), and some other states are considering legislation that would do the same.

Some states are blocking businesses and government agencies from requiring people to produce vaccine passports (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/do-state-bans-on-vaccine-passports-impact-employer-policies.aspx)—documentation that they've been vaccinated against COVID-19. But in most states, private employers can continue to ask whether workers are vaccinated, and employers in some locations may be obligated to do so.

Many states are aligning their rules with federal guidelines. For example, the California Division of Occupational Safety and Health (which is known as Cal/OSHA) revised its COVID-19 safety rules (www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/calosha-relaxes-workplace-mask-requirements.aspx) to allow fully vaccinated employees to forgo masks in many indoor settings and most employees (regardless of vaccination status) to work outside without wearing masks. Many restrictions remain in place, however, for unvaccinated employees who work indoors, and employers must document vaccination status before lifting indoor mask policies.

Assess the Risks

Most employers can safely follow CDC and OSHA guidance and apply different rules to protect unvaccinated employees from COVID-19-related risks, Duston said.

Kemper cautioned, "Don't misunderstand what OSHA is saying and loosen restrictions for all workers."

OSHA said unvaccinated workers should:

- Identify opportunities to get vaccinated.
- Properly wear a face mask that covers the nose and mouth.
- Stay at least 6 feet away from other people.
- Be aware of whether rooms are properly ventilated.
- Practice good personal hygiene and wash hands often.

Employers can choose to still require vaccinated employees to wear masks, Duston said, but OSHA's guidelines allow them to permit vaccinated employees to not wear masks in the workplace. He noted that ambiguities remain as to whether vaccinated employees should maintain social distancing if they are around unvaccinated employees. "The way the guidance is written, the burden is on the employer to structure the workplace so that unvaccinated employees maintain distancing from each other."

Many policy risks for employers are not legal, Duston observed. Employers have to consider the impact on company culture and employee morale if they differentiate between vaccinated and unvaccinated workers.

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Malveaux noted that employees have a variety of reasons for continuing to wear masks, and they may choose to do so for a long time. They may be unvaccinated for any of a number of reasons. They may be immunocompromised. Or they might be vaccinated (www.shrm.org/ResourcesAndTools/hr-topics/employee-relations/Pages/When-Should-Vaccinated-Workers-Keep-Wearing-Masks.aspx) and just want to be careful.

"The danger is in making assumptions and treating employees differently," Malveaux said. "Smart employers and their managers are making space without making assumptions."

Kemper said employers need to be consistent and fully knowledgeable of employee vaccination status before modifying safety requirements. "At the end of day, what you want is for all employees to feel they are being treated fairly."

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