

What Should Be in a Vaccination Policy?

By Allen Smith, J.D.

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Vaccination policies vary depending on whether an employer requires vaccines or makes them voluntary. Here is an overview of what to include in the policies.

"Policies relating to COVID-19 vaccines in the workplace can elicit strong opinions and have a significant impact on employee morale," said Lindsay Ryan, an attorney with Polsinelli in Los Angeles.

Some employees feel strongly that their employers should mandate vaccines (www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/vaccination-policy-mandatory-covid19-coronavirus.aspx) before returning employees to the workplace to protect everyone's health and safety, she said. Other employees think that a mandatory policy, or even requests to determine vaccination status, are an invasion of their privacy, she noted.

"As with all employment-related issues during the pandemic, employers should exercise compassion and flexibility when creating a COVID-19-related policy and clearly communicate the basis for their decisions and the expectations of employees," she said.

Communicate any expectation regarding vaccination status well in advance of an anticipated return-to-work date, said Mary Leigh Pirtle, an attorney with Bass, Berry & Sims in Nashville, Tenn.

Mandatory Policy

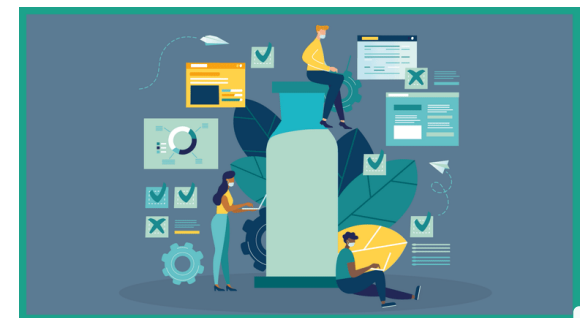
When an employer intends to mandate COVID-19 vaccination, the policy should first clearly identify the scope of the policy and which employees it applies to, Ryan said. For example, most mandatory vaccine policies don't need to extend to remote employees if the employer has no intention of returning them to the workplace.

Similarly, employers may want to mandate COVID-19 vaccination only for certain job categories but not others, depending on the level of interaction those positions have with other individuals.

If vaccines will be required, include the rationale for making the policy mandatory (e.g., protecting employees' health and safety), said Carole Spink, an attorney with McDermott Will & Emery in Chicago.

Any policy mandating vaccination should clearly identify the deadline by which employees must receive all doses, Ryan said. Keep in mind the impact that the vaccination deadline will have on staffing due to vaccine appointments and adverse reactions, as well as the availability of the vaccine.

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COVID-19 Vaccination Resources

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

Feedback

If the employer will make the vaccine available to employees, the policy should set forth details regarding the dates when vaccines will be made available and at which locations.

If employees are expected to receive vaccines through third parties in the community, the policy should provide information about where employees may receive the vaccination and indicate that the employer will pay for the cost of the vaccination if there is a charge, Ryan said.

For mandatory policies, communicate that the time spent becoming vaccinated is compensable, said Kristen Gallagher, an attorney with McDonald Carano in Las Vegas. According to federal regulations, the time an employee spends waiting for and receiving medical attention during the employee's normal work hours is compensable.

The policy also should clearly identify how employees will be required to demonstrate proof of their immunization. The employer should ensure that all such information and documentation will be maintained confidentially—separate from personnel files.

Employers will also need to consider employees who choose not to get vaccinated for medical or religious reasons. "Any mandatory policy should also clearly set forth the process by which employees can request an exemption or other accommodation if the employee declines the vaccination on account of a qualifying medical condition or a sincerely held religious belief," Ryan said.

At a minimum, the policy should identify who employees should notify about receiving an accommodation and how to request one. The policy should also assure workers that they will not be subject to retaliation for exercising this right, she noted.

Ideally, employees wouldn't notify immediate supervisors of the need for accommodation but instead HR or someone outside of employees' direct reporting line, said Emily Mack, an attorney with Burr & Forman in Nashville, Tenn.

"The employer should advise employees that they may be required to substantiate any request for an exemption by providing appropriate documentation," she said.

A best practice is to supply accommodation request forms that will help employees and HR professionals identify the relevant information—and not more—for purposes of determining if the employer may grant an exemption from the vaccine mandate as a reasonable accommodation, Ryan said.

The policy also should communicate the potential consequences for anyone who fails to receive the vaccine and does not obtain an approved exemption by the stated deadline, she noted. Consequences might include increased safety measures, unpaid leave or termination.

"Some employers have been requiring or encouraging flu vaccinations for years," said Brian Pezza, an attorney with Lewis Rice in St. Louis and Edwardsville, Ill. "If an employer had such a policy before, I see no reason to back away from it now."

[SHRM members-only sample policy: Vaccination Policy: Mandatory (www.shrm.org/resourcesandtools/tools-and-samples/policies/pages/vaccination-policy-mandatory-covid19-coronavirus.aspx)]

Permissive Policies

If an employer is not mandating the COVID-19 vaccine, it may still want to issue a written policy strongly encouraging COVID-19 vaccination and identifying sites where employees may receive the vaccination, Ryan said.

To the extent that the employer offers any incentives (www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-vaccination-incentives.aspx) in lieu of requiring the vaccine, the policy should identify the criteria for earning the incentive, she added. "If the employer will offer incentives to employees for voluntarily receiving a vaccine administered by the employer or its agent, the incentive must not be so substantial as to be coercive."

An employer may also consider issuing a written policy requiring employees to disclose their vaccination status, without requiring vaccination.

Such a policy should clearly identify if employees must self-attest to vaccination status or show a copy of proof of immunization.

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