

First Bank's Center for Family Owned Businesses Webinar Series

COVID Vaccinations: Can Employers Require?

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Presenters:



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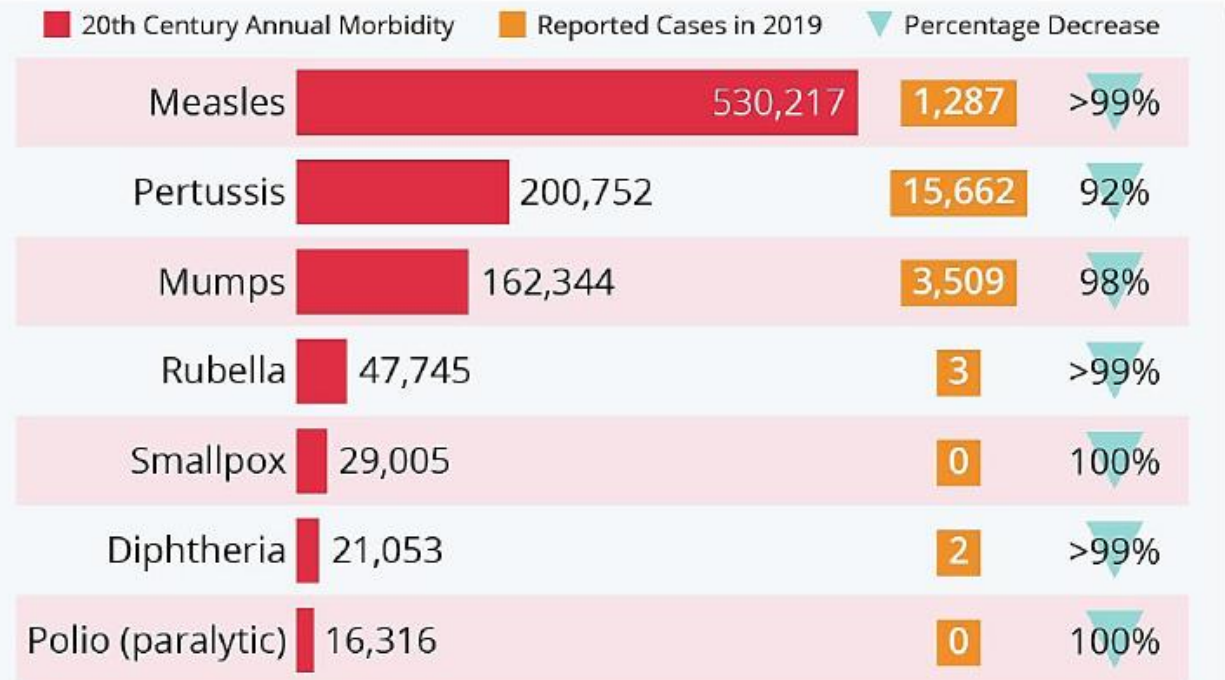
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A Look Back – How Vaccines Eradicated Common Diseases

Data from the CDC highlights how effective vaccination has been in eradicating major diseases in the United States.



Source: Centers for Disease Control and Prevention

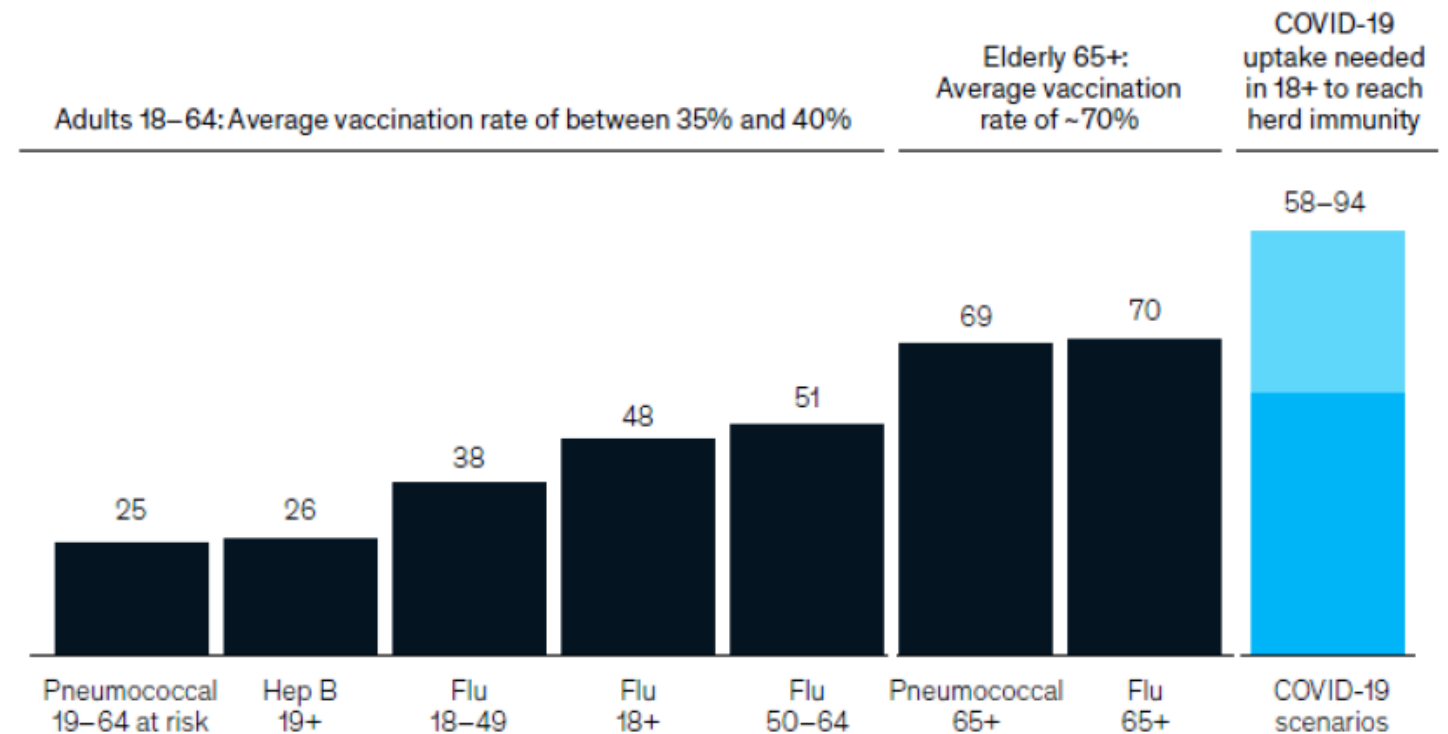


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Percent of U.S. Population Vaccinated by Disease and Age Group

Ending the pandemic could require COVID-19 vaccine uptake in the range of between 58% and 94%, higher than most adult vaccine benchmarks.

Overall COVID-19 vaccine rates may be lower than flu or pneumococcal rates for seniors

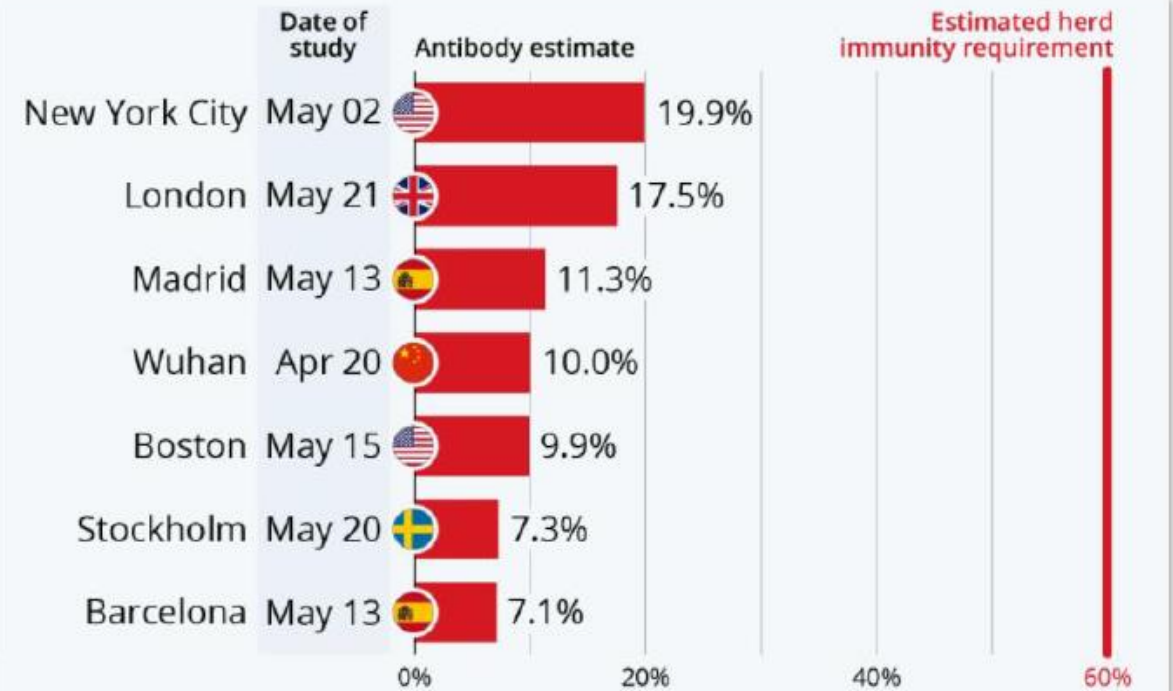


Source: CDC

How Far Away are we from Herd Immunity?

Sources indicated we still have a long way to go to reach herd immunity.

The following chart shows the estimated share of the population with COVID-19 antibodies.

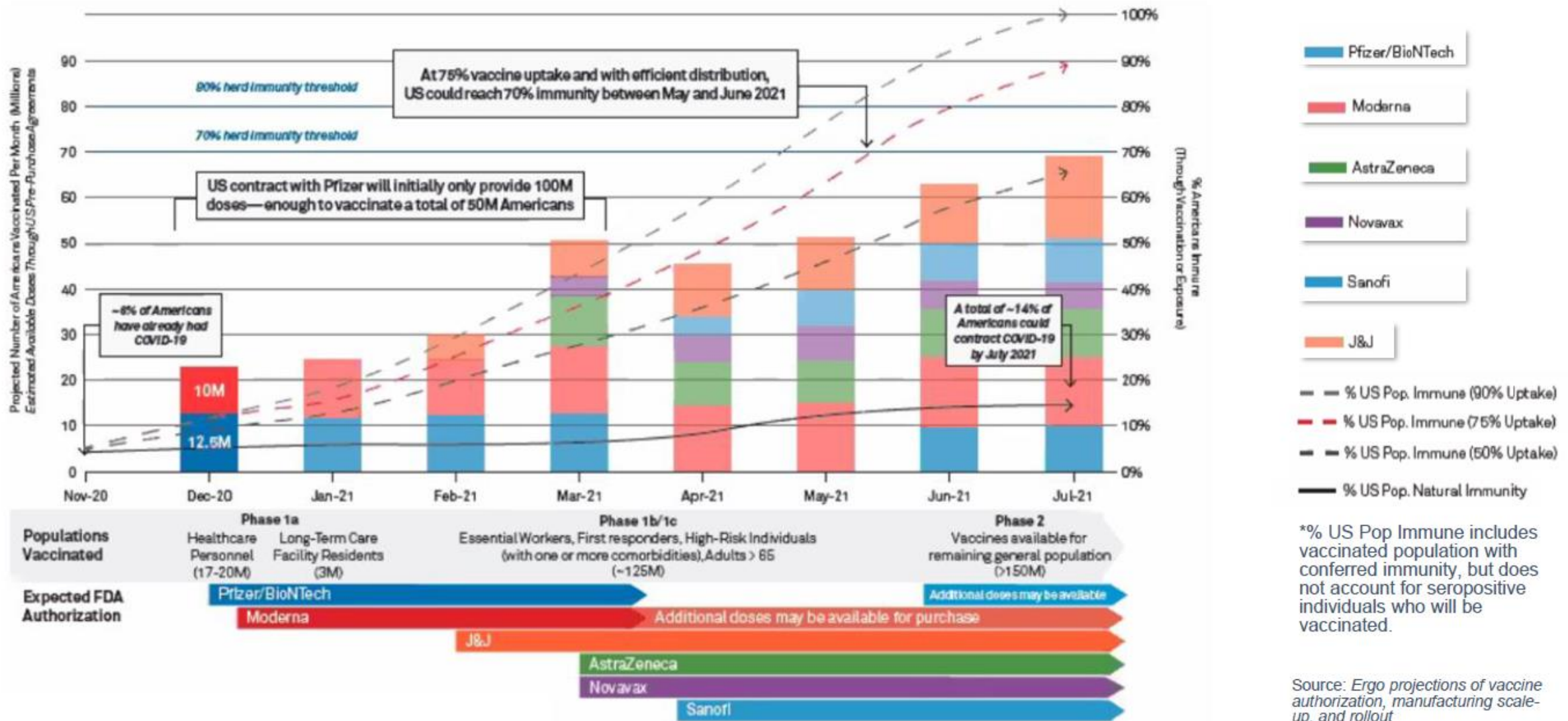


Sources: Multiple studies via The New York Times



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Projection: Americans Vaccinated Per Month & Progress Towards COVID-19 Herd Immunity



*% US Pop Immune includes vaccinated population with conferred immunity, but does not account for seropositive individuals who will be vaccinated.

Source: Ergo projections of vaccine authorization, manufacturing scale-up, and rollout

THE COVID-19 VACCINE

INFORMATION YOU NEED TO KNOW



ADMINISTERED IN **TWO DOSES** 21 DAYS APART

95%
EFFECTIVE



APPROXIMATELY
38,000
INDIVIDUALS PARTICIPATED
IN THE CLINICAL TRIALS &
WERE MONITORED FOR
TWO MONTHS AFTER THE
SECOND DOSE



THE VACCINE WILL BE
APPROVED FOR USE IN
PEOPLE OVER THE AGE
OF 16

MOST COMMONLY REPORTED

**SIDE
EFFECTS**



84.1%

INJECTION SITE
REACTION



55.1%

HEADACHE



31.9%

CHILLS



14.2%

FEVER



62.9%

FATIGUE



38.3%

MUSCLE PAIN



23.6%

JOINT PAIN

*SEVERE REACTIONS WERE
REPORTED IN UP TO 4.6%
OF INDIVIDUALS & WERE
MORE LIKELY AFTER THE
SECOND DOSE*

Vaccine Mandate – Distribution

Initial Distribution

- The CDC directed states and U.S. territories to draft and submit vaccine distribution plans
- The CDC recommended prioritizing health care workers, first responders, and high risk populations (e.g. the elderly)

Essential Workers ≠ Employees of Essential Businesses

- The vaccine distribution plans use the term “essential worker” to refer to health care workers, first responders, and any other workers (if any) assigned high priority for distribution
- Essential worker does not mean all employees of an employer deemed an essential business
- We are not aware of any state assigning priority merely based on essential business status

Vaccine Mandate – Labor & Employment Issues

State and Local Governments

- State and local governments will likely require vaccination for certain employers (e.g. health care providers, nursing homes/assisted living facilities)

An Employer Generally can Require its Employees to be Vaccinated

- Employers will need to allow accommodations for employees in protected classes
 - Religious exception for employees with sincerely held religious beliefs that do not permit traditional medicine or vaccination (e.g. Christian Scientist)
 - Health/disability exception for employees for whom it is medically inadvisable to be vaccinated
 - Accommodations may include permitting masks, remote employment, or other solutions
- An employment contract may prevent requiring vaccination without permission or agreement

Note: An employer does not have to accommodate or excuse employees merely because they are opposed to vaccination.

Vaccine Mandate – Labor & Employment Issues

We recommend speaking with your labor & employment counsel before requiring vaccination or taking disciplinary action against employees who do not vaccinate.

Considerations Before Requiring Vaccination

- Available vaccine supply in your area
- Do you require other vaccinations?
- Employee relations
 - Many are concerned about the vaccine development process
 - Requiring vaccination may be viewed as invasive
 - What are you prepared to do if key or a significant number of employees refuse?
- Who pays for employees not covered by your medical plan?
- Require vaccination or provide wellness incentives...you can have one or the other

Vaccine Employer Fact Sheet

New Resource

COVID-19 Vaccine Employer Fact Sheet

- What we know today
- Vaccine details
- Employer considerations



VACCINE DETAILS

Here's what we know about the most

- Both the Pfizer and Moderna vaccines require two doses of the same vaccine to be effective, and which vaccine they received, when they received it.
- Pfizer's vaccine must be given 21 days apart.
- Both vaccines must be stored at ultra-cold temperatures, more similar to that of a freezer than a refrigerator.
- Because of challenges surrounding the logistics of distribution, it is not clear at this time which vaccine they receive. The Pfizer vaccine is being distributed to centers whereas the Moderna vaccine is being distributed to an ultra-cold freezer facility.

In addition to Pfizer and Moderna, Johnson & Johnson is developing a single-dose vaccine in an effort to simplify distribution. In an effort to simplify distribution, everyone is encouraged to get vaccinated. Per the CDC, it is possible to become reinfected with COVID-19, but the best protection against reinfection is to get vaccinated. The virus will not mutate and require an annual flu shot. The vaccine could take longer than others. We should know more.

EMPLOYER CONSIDERATIONS

With news of the vaccine front and center in their strategies moving forward, employers should consider industry, state, and local requirements for employees long-term.

Top of mind is the question of whether to mandate the vaccine for employees. In general, the accommodations for employees with disabilities and employees who are unable to get vaccinated is not available. Employers should also consider the availability of vaccines, and the cost of the vaccine given to those who return to the workplace.

Regardless of stance on the vaccine, employers should provide updates to employees regarding vaccine updates and the CDC for guidance on the ramifications that an employer should have in effect.

At this time, the federal government is not mandating the vaccine, and there is no option for employees to pay for the vaccine.



COVID-19 Vaccine Employer Fact Sheet

With news of the impending vaccine, many employers and individuals alike are wondering when the vaccine will become widely available, if organizations will be permitted to require employees to get vaccinated, how and what to communicate to employees about the vaccine, and much more. In an effort to keep our clients informed, we have compiled the most relevant information into the following fact sheet. As details evolve over the coming weeks and months, Marsh & McLennan Agency will provide updated guidance as more information becomes available.

WHAT WE KNOW TODAY

While there are many different COVID-19 vaccines currently in development, two companies – Pfizer and Moderna – have already applied for emergency use authorization from the Food and Drug Administration (FDA) to begin administering their vaccine. More companies are expected to apply for authorization in the coming months. The FDA has approved the Pfizer vaccine, and it is expected to become available for vaccinations across the nation the week of December 14th. By the end of the year, the U.S. is expected to have 40 million doses of the vaccine to deliver across the states.

According to a U.S. advisory panel, the first round of individuals to receive the vaccine are healthcare workers, long-term care residents, and first responders. It is ultimately up to each state to determine who is deemed a healthcare worker and first responder, so these groups may vary by state.

Vaccine doses purchased with U.S. taxpayer dollars will be given to Americans free of charge, according to the CDC. However, vaccine providers will be able to charge administrative fees for administering shots to individuals.

*Updated December 15, 2020

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Coronavirus Resource Page

Coronavirus (COVID-19) Pandemic Risk Hub

LEGISLATIVE ALERT FOR EMPLOYERS FOR EMPLOYEES FOR FAMILIES
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The Coronavirus pandemic is affecting all companies and their employees. Throughout this Resource Center you will find thought leadership, expert views, links to government sites, and solutions and strategies that you can apply as you navigate the challenges posed by COVID-19.

Legislative Alerts

[CARES Act Signed Into Law](#) | April 10, 2020 NEW
While most of the CARES Act provisions involve economic relief for employers and employees that are beyond the scope of this Alert, there were several changes affecting group health plans. Some of these changes are permanent while others are of limited duration to address the COVID-19 pandemic period.

[Families First Coronavirus Response Act](#) | April 7, 2020 NEW

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mma.marshmma.com/coronavirus-outbreak-resourcepage



WORKPLACE VACCINATION PROGRAMS

Considerations for U.S. Employers

Charles B. Jellinek

Agenda

- ▶ Legal Landscape
 - State and Federal Laws
 - EEOC Guidance
- ▶ Employer Considerations
 - Alternative Approaches
 - Mandatory v. Voluntary Programs
 - Employer v. Independent Distribution of Vaccines
 - Timing of Vaccine Program

Legal Landscape: State and Federal Laws

- ▶ Americans with Disabilities Act
- ▶ Title VII of the Civil Rights Act
- ▶ Genetic Information Nondiscrimination Act
- ▶ National Labor Relations Act
- ▶ State and Local Anti-Discrimination Laws

Legal Landscape: EEOC Guidance

- ▶ Historical Guidance: Employers are encouraged to adopt voluntary vaccine programs (especially in relation to pandemic flus) as a result of concerns with the ADA and Title VII.
- ▶ Dec. 2020 Guidance for COVID-19 Vaccine:
 - Does not include a recommendation as to whether employers should adopt vaccine programs (mandatory, voluntary, or otherwise).
 - Rejects notion that a vaccine is per se a “medical examination” under the ADA.
 - Rejects notion that a vaccine, even one that uses RNA technology, is per se “genetic information” under GINA.

Consideration #1: Alternative Approaches

- ▶ Vaccine programs are relatively novel and carry some inherent risks given the number of laws they implicate.
- ▶ As such, before implementing a vaccine program, employers should consider whether an alternative, less-risky approach may be similarly beneficial.
- ▶ Examples of alternatives:
 - Teleworking arraignments
 - Mandatory diagnostic testing programs
 - Implementation of additional social distancing measures
 - Furloughs

Consideration #2: Mandatory v. Voluntary Programs

Mandatory Programs	Voluntary Programs
<ul style="list-style-type: none">• Blanket mandatory vaccination programs are illegal. To be lawful, the program must provide:<ul style="list-style-type: none">• Exceptions for employees who object based on a disability,• Exceptions for employees who object based on sincerely-held religious beliefs, and• Exceptions for employees who object based on certain other state-recognized protected characteristics.• Exceptions must be individualized and include an analysis of appropriate reasonable accommodations. As a result, In practice, there are a number of other risks for employers to consider when actually implementing a mandatory program.*• If the workforce is unionized, advanced negotiations with applicable union(s) may be required depending on the terms of the program and relevant CBA.	<ul style="list-style-type: none">• Voluntary vaccination programs are legal.• Employers are permitted to incentivize employees' participation in such programs provided that:<ul style="list-style-type: none">• The incentives do not have a coercive effect in practice.**• An equivalent incentive is provided to employees who cannot participate in the program due to a disability, religious belief, or other protected characteristic.

Consideration #3: Employer v. Independent Distribution of Vaccines

Employer	Independent
<ul style="list-style-type: none">Occurs when an employer distributes (or contracts with a third-party to distribute) vaccines directly to employees.Does not implicate the ADA or GINA with respect to the physical administration of the vaccine, but likely does with respect to pre-vaccination screenings that the employer (or third-party) undertakes.<ul style="list-style-type: none">Pre-vaccination screenings include questions likely to reveal information about a disability and may include disclosure of genetic information.To be permissible under the ADA, the employer must show that these disability-related screening inquiries are “job-related and consistent with business necessity.”It is unclear whether the recommended screening questions will implicate GINA once the vaccine is readily available. If they do, genetic information may only be voluntarily disclosed.	<ul style="list-style-type: none">Occurs when an employer does not dictate how an employee receives the vaccine, but instead only requires proof that the employee received the vaccine.Does not implicate the ADA or GINA with respect to administration or pre-vaccination screenings, provided that:<ul style="list-style-type: none">Proof of vaccination materials are kept confidential; andThe employer does not ask subsequent or follow up questions about why an employee did or did not receive the vaccine, the employee’s family history, etc.

Consideration #4: Timing of Vaccine Program

- ▶ Before a vaccine program goes “live,” employers should:
 - Confirm that the vaccine is readily available to employees in their communities.
 - Train managers and HR personnel on the program, including confidentiality obligations, how to identify an employee’s potential need for accommodation, and anti-retaliation obligations.
 - Provide employees with advanced notice of the program’s requirements and an opportunity to ask questions/raise concerns.
 - Continue to monitor guidance from federal, state, and local agencies and public health authorities (i.e., EEOC, OSHA, CDC, etc.).

Appendix 1:

Additional Risks Associated with Implementing Mandatory Vaccine Programs

- ▶ **Scope of Exceptions** – The definition of employees entitled to medical and/or religious exemptions is broad under federal and state laws, so the program may have limited application in practice.
- ▶ **Potential Scrutiny of Exception Determinations** – In recent years, the EEOC has given particular attention to employee claims regarding religious objections to mandatory vaccine programs. As such, if challenged, an employer's exception determinations are likely to be subject to scrutiny by the agency and courts.
- ▶ **Administrative Burden** - Determining whether an employee is qualified for an exception is a highly individualized and time-consuming process that will require significant involvement from HR and potentially Legal. Exception determination should be clearly documented and maintained in accordance with applicable federal and state privacy laws.
- ▶ **Response to Employee Refusal** – Because COVID-19 vaccines are novel, more employees may object to receiving the vaccine, especially early on. Additional protocols for reviewing exception determinations and responding to employees who do not qualify for an exception but still refuse the vaccine may be necessary. As with all HR policies, any protocols that are developed will need to be consistently applied.
- ▶ **Employee Morale** – Implementing a mandatory program may be viewed as draconian, especially if employees have an adverse reaction to the vaccine (although such illness/injury is likely covered by workers' compensation law).*
- ▶ **Impact on Other Healthy Hygiene Habits** – Given that most employees will be vaccinated, employees may lower their guard and fail to take other reasonable precautions, such as washing hands, covering coughs and sneezes, and staying home when sick.



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Document Number

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Thank you!

