

March 18, 2021

## **COVID-19 Update: CDC Issues Guidance on Workplace COVID-19 Vaccination Programs and New York State Grants Employees Paid Leave for COVID-19 Vaccination**

The Centers for Disease Control and Prevention (the “CDC”) recently issued guidance on workplace COVID-19 vaccination programs (the “CDC Guidance”). In New York, new legislation requires employers to provide up to four hours of paid time off to employees per COVID-19 vaccine injection (the “NY COVID-19 Vaccination Paid Leave Law”). As many states, including New York, are taking steps to expand access to COVID-19 vaccines to a broader population and employers are contemplating their return to work plans, we discuss the legal requirements and practical considerations relevant to employers who wish to incorporate a COVID-19 vaccination policy into their return to work plan.

### **Key Takeaways**

- The CDC Guidance advises employers to (1) provide up-to-date information about COVID-19 vaccines; (2) consider COVID-19 vaccination options for employees, including whether to offer COVID-19 vaccinations to employees on-site or off-site; (3) offer flexible, non-punitive sick leave options (e.g., paid sick leave) for employees with signs and symptoms after vaccination; (4) consider staggering employee vaccine schedules to avoid worker shortages due to potential vaccine side effects; (5) consider providing vaccination to all workers, regardless of their status as a contract or temporary worker; (6) provide exemptions to employees who cannot take the vaccine due to a medical condition or religious belief; and (7) conduct a risk assessment of the workplace that considers the extent to which employees have been vaccinated.
- From March 12, 2021 through December 31, 2022, employers in New York are required to provide employees with up to four hours of paid leave of absence at the employee’s regular rate of pay per COVID-19 vaccine injection. Employers may not require employees to use other available leave before taking this leave. Additionally, employers may not discriminate or retaliate against an employee for exercising their rights under the NY COVID-19 Vaccination Paid Leave Law.

### **I. CDC Guidance on Workplace Vaccination Programs**

#### *Information About COVID-19 Vaccines*

Employers may incorporate basic information about COVID-19 vaccination in their return to work policy, including whether workers will be required to get vaccinated for work, how workers can report side effects,

safety and effectiveness of COVID-19 vaccines, and a continued requirement to take preventative measures, such as maintaining social distancing and wearing a face mask after vaccination. Both the CDC and Occupational Safety and Health Administration (“OSHA”) recommend that vaccinated individuals continue to wear face coverings and maintain physical distancing until there is further guidance on how vaccination affects the transmissibility of COVID-19.<sup>1</sup>

### *Offering COVID-19 Vaccination On-Site*

The planning process for hosting an on-site COVID-19 vaccination clinic may include input from management, human resources, employees, and labor representatives, as appropriate. Important preliminary steps include obtaining senior management support, identifying a vaccine coordinator, and enlisting expertise from local public health authorities, occupational health providers, and pharmacies. Employers are encouraged to offer the vaccination at no charge to employees and during work hours.

Pursuant to the Americans with Disabilities Act (the “ADA”), employers are required to keep all medical information about a particular employee, including information related to COVID-19, confidential and separate from the employee’s personnel file.<sup>2</sup> As such, any documentation on employees’ COVID-19 vaccination or any record of the employer’s offer to vaccinate and the employee’s decision to accept or decline vaccination should be kept confidential and in existing medical files.

Employers who wish to offer vaccination at the workplace should contact the health department in their jurisdiction for planning and guidance.<sup>3</sup>

### *Offering COVID-19 Vaccination Off-Site*

Employers who are not offering COVID-19 vaccinations on-site may want to encourage employees to seek COVID-19 vaccination in their community by taking the following steps.

- Provide information about where employees can get the vaccine in their community.

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<sup>1</sup> See CDC, When You’ve Been Fully Vaccinated, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated.html> (last updated Mar. 9, 2021); OSHA, Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace (Jan. 29, 2021), <https://www.osha.gov/coronavirus/safework>.

<sup>2</sup> EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, B.1. (Dec. 16, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

<sup>3</sup> Health Department directories can be found [here](#).

- Establish and implement flexible policies that allow employees to take paid leave to seek COVID-19 vaccination. Consider providing transportation to off-site vaccination clinics.
- Post promotional posters and flyers about COVID-19 vaccination in break rooms, cafeterias, and other high traffic areas.<sup>4</sup>
- Post articles in company communications (e.g., newsletters, intranet, emails, portals) about the importance of COVID-19 vaccination and where to get the vaccine in the community.

### *Providing Sick Leave Options*

Employers may wish to offer flexible paid sick leave for employees with symptoms after vaccination. Employees who experience a fever after vaccination may need to stay home pending further evaluation, including possible COVID-19 testing.

### *Vaccine Scheduling*

While the CDC expects that “most employees who experience symptoms following vaccination will not need to miss work,” the CDC Guidance states that workplaces may consider staggering schedules for employees who receive vaccination to avoid worker shortages due to vaccine side effects, particularly for employees receiving a two-dose vaccine.<sup>5</sup> Employers may take into consideration the specific circumstances of their workplace, and may consider, for example, staggering vaccination for employees in the same job category or who work in the same area of a facility.

### *Vaccination for Contractors and Temporary Workers*

For workers employed by contract firms or temporary help agencies, the CDC Guidance provides that both “staffing agency and the host employer . . . are responsible for providing and maintaining a safe work environment” as joint employers.<sup>6</sup> Accordingly, employers that hire contractors or temporary workers may wish to consider providing vaccination to all people working at the workplace, regardless of their worker status.

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<sup>4</sup> The CDC promotional posters and flyers on COVID-19 vaccinations can be found [here](#).

<sup>5</sup> CDC, Workplace Vaccination Program - Vaccinations for Contractors and Temporary Employees, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html> (last updated Mar. 16, 2021).

<sup>6</sup> *Id.*

### *Mandatory COVID-19 Vaccination Policy and Exemptions*

As we discussed in the [February 4, 2021 memorandum](#), the Equal Employment Opportunity Commission (the “EEOC”) issued guidance on COVID-19 vaccinations clarifying that employers may require employees to get vaccinated for COVID-19 as long as they provide reasonable accommodations to employees who are unable to receive a COVID-19 vaccine due to a disability or sincerely held religious practice or belief.<sup>7</sup> Consistent with the EEOC guidance, the CDC Guidance provides that employers may provide the following two types of exemptions to employees: (1) medical exemptions for those who may be at risk for adverse reaction due to an allergy to one of the vaccine components or a medical condition; and (2) religious exemptions for those who may decline vaccination due to a religious belief.

Employers offering vaccination to workers may want to keep a record of the offer to vaccinate and the employee’s decision to accept or decline vaccination due to an exemption.<sup>8</sup>

### *COVID-19 Risk Assessment*

The CDC provides that it is important to conduct a thorough assessment of the workplace to identify potential workplace hazards related to COVID-19. Widespread vaccination of employees may be a consideration for restarting operations and returning employees to the workplace. Other considerations may include: (1) the necessity for employees to physically return to work and whether telework options can be continued; (2) the rate of transmission of the virus that causes COVID-19 in the community; (3) the ability of employees to practice preventative measures, such as social distancing and wearing masks, in the workplace; and (4) local or state mandates for business closure restrictions.

## **II. New York COVID-19 Vaccination Paid Leave Law**

From March 12, 2021 through December 31, 2022, employers in New York are required to provide employees with up to four hours of paid time off per COVID-19 vaccine injection.

All New York employees—regardless of employer size, employer status as a private or public entity, or industry—are entitled to up to four hours of paid leave of absence, unless such employees shall receive a greater number of hours pursuant to a collective bargaining agreement or as otherwise authorized by the

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<sup>7</sup> EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, Section K (Dec. 16, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

<sup>8</sup> CDC, Workplace Vaccination Program, Employee Medical Conditions or Religious Beliefs Exemptions, <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html> (last updated Mar. 16, 2021).

employer. Accordingly, employees may take up to eight hours of paid time off if receiving a two-injection COVID-19 vaccine such as the Pfizer-BioNTech or Moderna vaccines.

Employers must pay employees their “regular rate of pay” for the time off.<sup>9</sup> Employers may not deduct the period of the leave granted under the law from any other leave that an employee is otherwise entitled to.<sup>10</sup>

Employers may not discriminate or retaliate against an employee for exercising their rights to take paid COVID-19 vaccination leave.

Notably, the NY COVID-19 Vaccination Paid Leave Law is silent as to whether employers may require proof of vaccination from employees. If employers require documentation of vaccination, they may wish to discourage employees from providing medical information beyond simple proof of receipt of the COVID-19 vaccine so as not to trigger the ADA’s requirements concerning disability-related and medical inquiries.<sup>11</sup>

The law does not state whether its requirements apply retroactively to employees who have already been vaccinated.

### **III. Implications for Employers**

- Employers may wish to update their COVID-19 return to work plans or other workplace policies to reflect the CDC Guidance and the requirements of the NY COVID-19 Vaccination Paid Leave Law.
- Under the NY COVID-19 Vaccination Paid Leave Law, from March 12, 2021 through December 31, 2022, employers in New York are required to provide employees with up to four hours of paid leave of absence at the employee’s regular rate of pay per COVID-19 vaccine injection.
- Employers may want to develop and implement flexible and creative strategies to encourage employees to get vaccinated. The CDC Guidance provides that COVID-19 vaccination may provide potential benefits to employers including reduction of absences due to illness and improvement in workplace productivity and morale.

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<sup>9</sup> *Id.* § 196-c, 2.

<sup>10</sup> *Id.* §§ 159-c, 2; 196-c, 2.

<sup>11</sup> See EEOC, What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, K.3, <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (last updated Dec. 16, 2020).

- Employers may wish to reaffirm that all workers—including those who have been fully vaccinated—should continue to maintain social distancing and adhere to other measures aimed at preventing the spread of COVID-19.
- Employers may not discriminate or retaliate against an employee for exercising their rights under the NY COVID-19 Vaccination Paid Leave Law.

The CDC Guidance can be found [here](#).

The New York legislation providing paid leave to workers can be found [here](#).

For additional resources and real-time updates regarding new legal developments in connection with COVID-19, please visit Paul, Weiss's [Coronavirus Resource Center](#).

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This memorandum is not intended to provide legal advice, and no legal or business decision should be based on its content. Questions concerning issues addressed in this memorandum should be directed to:

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