

# Chamber of Commerce of Hawai`i Presents: Getting Back to Business, Safely What Employers Need to Know Now

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# HR / LEGAL UPDATE

# **Legal Obligations of Employers: Vaccinations & EEOC Updated Guidance**

Presented By: Corianne W. Lau, Esq.

# Questions posed

- Can employers require that employees be vaccinated as a condition of returning to the workplace?
- What are some of the concerns relating to mandatory vaccine policies?
- NOTE: Guidance from regulatory bodies continues to change as the pandemic evolves. Court rulings interpret laws and executive orders, which further shape the legal landscape. Therefore, legal guidance and recommendations also change and become obsolete. Please consult the most current resources before creating employment policies and making employment decisions.

# EEOC Guidance

EEOC Guidance: Technical Assistance Questions and Answers, updated May 28, 2021  
<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

## Federal Equal Employment Opportunity Law

- Americans with Disabilities Act (ADA);
- The Rehabilitation Act of 1973;
- the Genetic Information Nondiscrimination Act (GINA); and
- Title VII of the Civil Rights Act, as amended, inter alia, by the Pregnancy Discrimination Act

Re vaccines: “The EEOC’s jurisdiction is limited to the federal EEO laws as noted above.”

# Consider CDC/Other Public Health Guidelines

EEOC: EEO laws apply during the pandemic but they do not “interfere with or prevent employers from following CDC or state and local public health guidelines”

- Centers for Disease Control (CDC)
  - Common workplace inquiries: <https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html> (Updated May 24, 2021)
  - Recommendations for fully vaccinated people: <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/fully-vaccinated-guidance.html> (Updates as of May 28, 2021)
- Hawai'i Emergency Proclamations: <https://governor.hawaii.gov/emergency-proclamations/> [State/local mandates can be more strict than federal]
- Note: EEOC updated Guidance predated CDC's May 13 Guidance for fully vaccinated individuals (EEOC is considering the impact on its tech assistance)

## EEO Laws: Mandatory Vaccine Policies OK, But ...

May an employer require all employees physically entering the workplace to be vaccinated for COVID-19?

EEOC says: Federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA and other EEO considerations.

# What About EUA Laws?

The 3 vaccines in use in the U.S.: approved under Emergency Use Authorization (EUA) only.

- The EEOC says:
  - Legal implications of EUA or the FDA approach “beyond the EEOC’s jurisdiction.” For more information . . . visit the FDA’s EUA page. “The EEOC’s jurisdiction is limited to the federal EEO laws as noted above.”
- Food and Drug Administration (FDA)
  - EUA for Vaccines Explained: <https://www.fda.gov/vaccines-blood-biologics/vaccines/emergency-use-authorization-vaccines-explained>
  - Under EUA laws a potential vaccine recipient must be given the option to accept or refuse the EUA vaccine and the consequences of such refusal. 21 USC § 360bbb-3 (e)(1)(A)(ii)(III).

# Can Employees Refuse the Vaccine Under EUA Laws?

If employer won't allow employee refusal under EUA law, can the employee claim:

- Wrongful termination for violation of public policy?
- Retaliation for exercising a federally-protected right to refuse the vaccine?
- Whistleblower protection rights if the employer failed to follow federal law allowing vaccine refusal?

**HOT OFF THE PRESS:** A Texas federal judge just dismissed a lawsuit brought by 117 employees suspended by a private hospital for refusing required vaccinations. Court said: EUA law applies to HHS's responsibilities.

- “[The law] neither expands nor restricts the responsibilities of private employers; in fact, it does not apply at all to private employers like the hospital in this case. It does not confer a private opportunity to sue the government, employer, or worker.”
- At least 4 lawsuits still pending: against public sector employers
- HI law may consider EUA law “public policy” exceptions to at-will employment

# EEO Law Requirements for a Mandatory Vaccination Program

- Employers are tasked with providing “reasonable accommodations” to allow employees vaccine exemptions/accommodations for reasons of:
  - disability under the Americans with Disabilities Act (“ADA”);
  - pregnancy or related conditions under the ADA or the Pregnancy Discrimination Act; or
  - sincerely held religious beliefs under Title VII of the Civil Rights Act of 1964.

# Required Reasonable Accommodations-Generally

- A reasonable accommodation that does not pose an undue hardship on the operation of the employer's business.
- Examples of reasonable accommodation: unvaccinated employee entering the workplace might wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, be given the opportunity to telework, or finally, accept a reassignment.
- Pregnant unvaccinated employee may be entitled to adjustments to keep working, if the employer makes modifications or exceptions for other employees.

# Excluding Unvaccinated Employee from the Workplace

An employer must show that an unvaccinated employee would pose a **direct threat** due to a “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” 29 CFR § 1630.2(r).

- Must first show mandatory vaccination is a standard that is job-related and consistent with business necessity.
- If disabled person cannot take a vaccine, employer must show
  - the person is a “direct threat” to the workplace that
  - cannot be mitigated by a reasonable accommodation that would reduce or eliminate the threat, absent undue hardship

# Direct Threat

Employer must perform an individualized assessment of the employee's present ability to safely perform the essential functions of the job.

Considerations:

- (1) the duration of the risk;
- (2) the nature and severity of the potential harm;
- (3) the likelihood that the potential harm will occur; and
- (4) the imminence of the potential harm.

# Direct Threat (Cont.)

Assessment must be based on a reasonable medical judgment that relies on the most current medical knowledge about COVID-19, such as

- the level of community spread at the time of the assessment.
- statements from the CDC and the employee's health care provider.

Assessment should take account of the type of work environment, such as:

- whether the employee works alone or with others or works inside or outside;
- the available ventilation;
- the frequency and duration of direct interaction the employee typically will have with other employees and/or non-employees;
- the number of partially or fully vaccinated individuals already in the workplace;
- whether other employees are wearing masks or undergoing routine screening testing; and
- the space available for social distancing.

# Reasonable Accommodations

If an unvaccinated person is found to be a “direct threat” the employer must consider, absent undue hardship, whether reasonable accommodations would reduce or eliminate the threat. Examples:

- requiring the employee to wear a mask,
- work a staggered shift,
- making changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees ),
- permitting telework if feasible, or
- reassigning the employee to a vacant position in a different workspace.

# Accommodation Due to a Sincere Religious Belief, Practice or Observance

- The employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance.
- Examples of reasonable accommodations are similar to those for disabled individuals.
- An employer can show “undue hardship” if the accommodation has more than minimal cost or burden on the employer. This is an easier standard for employers to meet than the ADA's undue hardship standard applicable to requests for accommodations due to a disability.

# Confidentiality Issues

Asking whether an employee is vaccinated is not prohibited under the ADA because no disability information is elicited.

If the employee gets the vaccine from the employer (or an agent of the employer) rather than in the community, the ADA is implicated:

- Because the employer who administers the vaccine to the employee must necessarily ask pre-vaccination questions that can elicit protected medical information about a disability
- Therefore asking the screening questions require that they be “job related and consistent with business necessity.”

# Incentives

The May 28 EEOC Guidance clarified that employers may offer incentives to employees to take the vaccine. However it stated:

- If the employer wants to offer an incentive for the employee to get the vaccine administered by the employer or its agent, the incentive cannot be “not so substantial as to be coercive.”
  - That is, because vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information to the employer or its agent.
- If the employee is offered an incentive to show proof of vaccine obtained in the community administered by a third party, there is no limitation on the amount of the incentive.

## **Employee Rights: Workplace Safety & Return To Work Requirements**

Presented By: Louise K.Y. Ing, Esq.

# What are OSHA's latest COVID-19 Workplace Safety Announcements?

June 10, 2021

## What OSHA did

- Issued an Emergency Temporary Standard (“ETS”) for healthcare settings\*
- Posted new guidance (not binding) for other workplaces

*\*Check the definition carefully to determine what workplaces are covered*

## What OSHA did NOT do

- Issue an ETS for other industries
- Limit state\* or local mandates that go beyond and are not inconsistent with the ETS
- Issue industry-specific guidance updates

\*States with OSHA-approved State Plans must either adopt the ETS or show that an existing standard is “at least as effective” as the ETS (notify w/in 15 days; adopt w/in 30)

## What workplaces does OSHA's new ETS cover?

- Aimed at protecting workers facing the highest COVID-19 hazards—those working in healthcare and healthcare support services settings where suspected or confirmed COVID-19 patients are treated.
- Includes employees in hospitals, nursing homes, and assisted living facilities; emergency responders; home healthcare workers; and employees in ambulatory care facilities where suspected or confirmed COVID-19 patients are treated.
- See OSHA Fact Sheet, Subpart U—COVID-19 Healthcare ETS,  
<https://www.osha.gov/sites/default/files/publications/OSHA4122.pdf>

# Does the ETS apply to my workplace?

## EMERGENCY TEMPORARY STANDARD

### Is your workplace covered by the COVID-19 Healthcare ETS?



Employers may use the flow chart and footnote 1, below, to determine whether and how your workplace is covered by the ETS.<sup>1</sup> For the full text of the ETS, refer to **29 CFR 1910.502** at [www.osha.gov/coronavirus/ets](http://www.osha.gov/coronavirus/ets).

<https://www.osha.gov/sites/default/files/publications/OSHA4125.pdf>

## Does the ETS apply to my workplace? (continued)

- Administrative support and medical billing services for the healthcare industry: “It depends.”
  - Not to employees who are not in a healthcare setting (e.g., off-site laundry)
  - Not if exceptions apply (“For example, the ETS does not apply to non-hospital ambulatory care settings where all non-employees are screened prior to entry and people with suspected or confirmed COVID-19 are not permitted to enter those settings.”)
- Healthcare professionals who perform healthcare services in a manufacturing facility: “It depends.”
  - Generally yes, if embedded (e.g., medical clinic in a manufacturing facility), but only to that setting and not everywhere else in the facility
  - Not if exceptions apply

# What does the ETS require of healthcare workplaces?

Requirements include, but are not limited to:

- Develop and implement a COVID-19 plan for each workplace
- Conduct a hazard assessment
- Designate a COVID-19 safety coordinator
- Conduct screening of those entering the facility
- Provide appropriate PPE
- Follow requirements for aerosol-generating procedures
- Implement physical distancing and physical barriers as appropriate
- Implement cleaning and disinfecting measures
- Follow rules regarding ventilation

(continued)

## What does the ETS require of healthcare workplaces? (continued)

- Notify employees of COVID-19 exposures as required
- Implement procedures for “medical removal from the workplace” (employee’s own illness or symptoms, or exposure to COVID-19)
- Provide “Medical removal protection benefits” (potentially including requirement to provide pay and benefits)
- Support vaccination (including providing “reasonable time and paid leave” for vaccinations and side effects)
- Provide training
- Implement anti-retaliation measures (inform employees of their rights to protection; no discharge of or discrimination against employees exercising their rights to raise workplace safety concerns)
- Follow record-keeping and reporting rules

# What's new in the OSHA guidance for workplaces not covered by the ETS?

Per OSHA:

- Focus protections on unvaccinated and otherwise at-risk workers
- Encourage COVID-19 vaccination
- Add links to guidance with the most up-to-date content

**Unless otherwise required by federal, state, local, tribal, or territorial laws, rules, and regulations, most employers no longer need to take steps to protect their fully vaccinated workers who are not otherwise at-risk from COVID-19 exposure. This guidance focuses only on protecting unvaccinated or otherwise at-risk workers in their workplaces (or well-defined portions of workplaces).**<sup>1</sup>

See <https://www.osha.gov/coronavirus/safework>

# What is OSHA's position on vaccinations?

Note that OSHA encourages vaccination, but the new guidance did not state a position on mandatory vaccination policies.

One recommendation by OSHA:

***“Grant paid time off for employees to get vaccinated.*** *Note:* Businesses with fewer than 500 employees may be eligible for [tax credits under the American Rescue Plan](#) if they provide paid time off for employees who decide to receive the vaccine and to recover from any potential side effects from the vaccine.”

## Who are “otherwise at-risk workers?”

Some conditions, such as a prior transplant, as well as prolonged use of corticosteroids or other immune-weakening medications, may affect workers' ability to have a full immune response to vaccination ... Under the Americans with Disabilities Act (ADA), workers with disabilities may be [legally entitled](#) to reasonable accommodations that protect them from the risk of contracting COVID-19 if, for example, they cannot be protected through vaccination, cannot get vaccinated, or cannot use face coverings. Employers should consider taking steps to protect these at-risk workers as they would unvaccinated workers, regardless of their vaccination status.

# What are the ADA implications for unvaccinated employees?

If you are unvaccinated or otherwise at-risk (e.g., because of a prior transplant or other medical condition), you should follow recommended precautions and policies at your workplace...Ask your employer about plans in your workplace. ***In addition, employees with disabilities who are at-risk may request reasonable accommodation under the ADA.***

(Emphasis added.)

## What does OSHA mean by “multiple layers of controls?”

Vaccines authorized by the U.S. Food and Drug Administration in the United States are highly effective at protecting most fully vaccinated people against symptomatic and severe COVID-19, and OSHA encourages employers to take steps to make it easier for workers to get vaccinated. ***However, for workers who are unvaccinated or who are otherwise at-risk, OSHA recommends implementing multiple layers of controls.*** Key controls to help protect unvaccinated or otherwise at-risk workers include separating from the workplace all infected people, all people [experiencing COVID symptoms](#), and any unvaccinated people who [have had a close contact](#) with someone with COVID-19, implementing physical distancing, maintaining ventilation systems, and properly using [face coverings](#) or personal protective equipment (PPE) when appropriate.

(Emphasis added.)

## What should be considered in implementing workplace controls?

Note OSHA's explicit acknowledgement about aerosols:

- The virus can travel more than 6 feet.
- While physical distancing of more than 6 feet is recommended, it is “not a guarantee of safety, especially in enclosed or poorly ventilated spaces.”

# What are appropriate measures for high-risk workplaces with mixed-vaccination status workers?

Settings where there is heightened risk:

- Close contact
- Duration of contact
- Type of contact
- Other factors, such as common transportation

What to do in higher-risk workplaces (in addition to general precautions):

- Stagger break times
- Stagger departure and arrival times
- Provide cues to maintain physical distancing
- Improve ventilation
- See specific recommendations for processing or assembly lines, retail workplaces, and travel in buses and vans (but note lack of industry-specific guidance, at least at present)

# What workplace safety issues to watch going forward?

- State Plans
  - No specific HIOSH COVID-19 plan
  - See HIOSH COVID-19 information page (updated 2/25/21), <https://labor.hawaii.gov/hiosh/covidresourceemployers/>
- Whistleblower/retaliation claims
- OSHA enforcement
- ADA Implications

# What other return to work issues to consider?

- Advance planning
  - Risk assessment
  - Update safety plans, policies, procedures
  - Form return to work taskforce; seek employee input
- Workplace communications &, training on new policies and procedures, complaint procedure
- Furloughs, layoffs, hiring, termination
- Privacy duties & notices: applicants, employees, vendors and other third parties
- Remote work: future role, remote work policies, cybersecurity & data privacy
- Wage & hour issues; work scheduling

**Resource:** Dentons Return to Work Toolkit, <https://www.dentons.com/en/insights/guides-reports-and-whitepapers/2020/june/3/dentons-us-covid-19-return-to-work-toolkit>

# Thank You

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