

# HR Insights

## Top 10 COVID-19 Vaccine FAQs

This issue of *HR Insights* provides a list of the top 10 most frequently asked questions about COVID-19 vaccinations and the workplace. With the now widespread availability of vaccines in Massachusetts, CDC's announcement on May 13 lifting mask wearing requirements, and Governor Baker's announcement on May 17, it is important to consider how all this impacts your business. The FAQs that follow focus on issues to consider when determining the best policy to put in place for your business.

### FAQ 1. May we require our employees to get vaccinated for COVID-19?

In general, yes. At this time, there are no laws that expressly prohibit employers from mandating COVID-19 vaccinations as a condition of employment.

However, it is important to understand that certain anti-discrimination laws may come into play with respect to vaccinations. ADA and Massachusetts General Law Chapter 151B prohibit discrimination against individuals with disabilities. Under these laws an employee may ask for an accommodation to not get vaccinated because of a disability. If so, the employer must engage in an interactive process with the employee to determine if a reasonable accommodation can be made without causing undue hardship to the business.

Similarly, under Title VII and M.G.L. c 151B., pregnancy and religion are also protected classes, both of which require an employer to engage in an interactive process to determine whether a reasonable accommodation can be made for a pregnant employee or an employee with a sincerely held religious belief.

For more information regarding the federal laws, see EEOC's website at:

<https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>

### FAQ 2. Must my company pay for mandatory vaccinations?

Currently, all COVID-19 vaccines are being purchased by the federal government and provided to the public free of charge. (Note: Some providers may charge an administration charge.) This is expected to remain the case for the time being in light of the federal government's purchase of enough vaccine for 300 million individuals.

### FAQ 3. Can I require employees to provide proof of having been vaccinated?

Yes. However, if you require employees to provide proof, you cannot mandate that the employee provide any medical information as part of the proof.

EEOC's guidance explains that requiring proof is permissible because an employee who refuses to get vaccinated may have reasons for not being vaccinated that are entirely unrelated to a disability. EEOC states that requesting proof is not likely to elicit information about a disability, and therefore is not a disability-related inquiry. However, asking questions like why an individual did not get vaccinated may elicit information about a disability, which would be subject to the ADA standard that they be "job-related and consistent with business necessity." EEOC guidance cautions employers that, to avoid ADA implications, they may want to warn employees not to include any medical information when submitting proof of vaccination.

### FAQ 4. When is an adverse reaction to the vaccine considered work-related for OSHA purposes?

An employer must record an adverse reaction to the vaccine if it is:

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- Work related
- A new case AND
- Meets one or more of the general recording criteria in 29 CFR 1904.7 (e.g., days away from work, restricted work or transfer to another job, or medical treatment beyond first aid)

If your company requires employees to be vaccinated as a condition of employment, then adverse reactions are work related. If you only recommend that employees get vaccinated, and the employee's decision to get vaccinated is truly voluntary, then OSHA does not require an employer to record the adverse effects. This is true even if you make vaccines available at work, arrange for offsite receipt of the vaccine, or offer vaccines as part of a health and wellness program. For more information, access <https://www.osha.gov/coronavirus/faqs>.

## FAQ 5. If employees get vaccinated, are other safety measures such as masks and social distancing still needed and testing if exposed to COVID-19?

On May 13, 2021, CDC updated its website with regard to its guidance on mask wearing for fully vaccinated individuals. CDC posted the following recommendations for non-healthcare settings saying that fully vaccinated people no longer need to:

- Wear a mask or physically distance in any setting, except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance
- Get tested following a known exposure, if asymptomatic, unless they are residents or employees of a correctional or detention facility or a homeless shelter
- Get routine screening testing if feasible

CDC also stated that fully vaccinated people should continue to:

- Get tested if experiencing COVID-19 symptoms

- Follow CDC and health department travel requirements and recommendations
- Get tested before leaving the United States for international travel (unless required by the destination) and self-quarantine after arriving back in the United States

Massachusetts Governor Baker announced on May 17 that the mask mandate will end for fully vaccinated individuals in most settings as of May 29. In addition, Governor Baker said that businesses may still require masks and that fully vaccinated individuals may continue to wear masks if they choose to do so. Masks will still be required in certain settings such as school buses, childcare facilities, nursing homes, hospitals, health care centers, and public and private transportation.

## FAQ 6. What can we do if an employee refuses to wear a mask?

First, you should ensure that you have established face covering and other COVID-19 policies if you wish to enforce the requirements with all employees.

Also, remember that employees have the right to request an accommodation to not wear a face covering due to a medical condition or disability or a sincerely held religious belief, which obligates the employer to engage in an interactive discussion with the employee to determine if a reasonable accommodation can be made without causing the company an undue hardship.

The policy should make it clear that if an employee refuses to wear a mask, they will be subject to disciplinary action up to and including termination of employment absent a situation where an employer should be engaged in determining whether a reasonable accommodation can be made. An employee can be disciplined and/or terminated in the name of keeping other employees and the public safe from the spread of COVID-19.

Employment in Massachusetts is "at will," meaning employers can terminate employment for any reason as long as it does not violate the law. Those reasons can

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include an employee's failure to adhere to safety precautions.

### FAQ 7. Can we require just unvaccinated employees to wear masks in the workplace?

It may not be prudent to implement measures that would single out employees who are not vaccinated, such as requiring only unvaccinated employees to wear a mask. For example, if the employees are not vaccinated because of a disability, pregnancy, or sincerely held religious belief requiring them to wear masks may be perceived as discriminatory. We strongly recommend seeking legal counsel before creating policies based on singling out unvaccinated employees.

### FAQ 8. Must we pay employees for time spent getting vaccinated?

In Massachusetts, "working time" includes all time during which an employee is required to be on the employer's premises or at any other location. Therefore, if an employer mandates that employees get vaccinated at a specific location and/or on a specific date, this is likely to be considered "working time" and therefore, compensable.

If an employer simply requires proof of a vaccine, but does not mandate when, where, and how to obtain it, this is unlikely to be considered compensable time. For a formal opinion, please contact the Massachusetts Department of Labor Standards at [dlsfeedback@state.ma.us](mailto:dlsfeedback@state.ma.us).

Similar rules apply under the federal Fair Labor Standards Act.

### FAQ 9. How should records of employee vaccinations be maintained?

Documentation of an employee's vaccination status (such as a copy of the employee's vaccination record card) is not subject to the ADA's confidentiality requirements. This is because requesting proof of being

vaccinated is not a disability-related inquiry or medical examination under the ADA.

However, the ADA's confidentiality requirements apply to other employee medical information obtained in the course of a vaccination program, such as responses to pre-screening inquiries (if vaccination occurs on-site). Such information must be collected on separate forms from other employment information and stored separately with appropriate security safeguards from the employee's ordinary personnel file.

### FAQ 10. May we disclose to customers, visitors, or the public information about the vaccination status of employees?

In general, no. The ADA prohibits employers from disclosing an employee's personal medical information to a customer, visitor, or the public. However, statistical information about those who have been vaccinated, without any employee-identifying information, is not confidential medical information and may be disclosed. For example, you could say that "all of our employees have been vaccinated" without identifying individual employees.

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