

What Franchisees Need to Know About Vaccinations, Masks & Other Return to Work Issues

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Top Topics to Consider

- Workplace Health and Safety
- Mitigating and Preventing the Spread of COVID-19 in the Workplace
- Vaccination Questions
- Discrimination, Privacy and Fairness Concerns
- Leave Considerations

THE LEGAL LANDSCAPE

- Employers must keep workplace free of recognized hazards while respecting employees' individual rights
- Most Relevant Federal Laws
 - OSHA, ADA, Title VII, HIPPA, GINA, FLSA
- EEOC Guidance:
 - Employers may require vaccines, but...
 - *Enforcement* may hinge on evaluation of “direct threat” issues or “qualification standard”
 - Giving the vaccine is not an ADA medical exam
 - Pre-Vaccine questions may implicate the ADA
 - Issues regarding vaccine incentives.



OSHA's Updated COVID-19 Guidance for Non-Healthcare Settings

Executive Order (“EO”) on Protecting Health and Safety

- Signed by Biden on Jan. 22, 2021 – instructs OSHA to revise its COVID-19 safety recommendations.
- The EO declared that ensuring the health and safety of workers is a national priority and a moral imperative.
- The order directed OSHA to take action to reduce the risk that workers may contract COVID-19 in the workplace.
- Emergency standard was supposed to be issued by March 15, 2021.

OSHA's Emergency Temporary Standard ("ETS") for COVID-19

- **June 10, 2021**: OSHA issued COVID-19 ETS Subpart U for healthcare settings.
- The ETS is effective immediately upon publication in the Federal Register and employers must comply with most provisions within 14 days, and with provisions involving physical barriers, ventilation, and training within 30 days.
- OSHA has included a provision for discretionary enforcement for employers making a good faith effort to comply with the ETS.
- Was published June 21, 2021.

Non-Healthcare Guidance from OSHA

- **June 10, 2021**: Guidance focuses primarily on protecting **unvaccinated or otherwise at-risk workers** in their workplaces (or well-defined portions of workplaces).
- Reasoning - CDC's [Interim Public Health Recommendations for Fully Vaccinated People](#) explain that under most circumstances, fully vaccinated people need not take all the precautions that unvaccinated people should take and can resume most activities without wearing masks or physically distancing

Who Are At Risk Workers?

- OSHA specifically identifies:
 - Workers with a prior transplant;
 - Prolonged use of corticosteroids or other immune-weakening medications, which may affect workers' ability to have a full immune response to vaccination;
 - Individuals identified in the CDC's guidance on those with underlying medical conditions.
- Workers with disabilities may be legally entitled to reasonable accommodations under the ADA 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.

OSHA Encourages Vaccinations

- OSHA has recognized vaccine efficacy.
- Vaccination is the key in a multi-layered approach to protecting workers.
- 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.
- 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.

Guidance For Employees

Encourage unvaccinated and at-risk workers to help protect themselves by:

- Identifying opportunities to get vaccinated. Inform employees about opportunities for paid leave, if necessary, to get vaccinated and recover from any side effects.
- Properly wearing a face covering over your nose and mouth.
- If working outdoors employees may opt not to wear face coverings in many circumstances; however, employees should be supported in continuing face covering use if they choose, especially if they work closely with other people.
- Staying far enough away from other people so that they are not breathing in particles produced by other people – generally at least 6 feet (about 2 arm lengths)

Guidance For Employees

Encourage unvaccinated and at-risk workers to help protect themselves by:

- Performing work tasks, holding meetings, and taking breaks outdoors when possible.
- Participating in any training offered by you to learn how rooms are ventilated effectively and notifying the building manager if they see vents that are clogged, dirty, or blocked by furniture or equipment.
- Practicing good personal hygiene and washing their hands often.
- Always covering their mouth and nose with a tissue, or the inside of their elbow, when they cough or sneeze, and do not spit.
- Monitoring their health daily and be alert for COVID-19 symptoms (e.g., fever, cough, or shortness of breath).

Guidance For Employers

Most employers no longer need to take steps to protect their workers from COVID-19 exposure where **all** employees are fully vaccinated.

Key controls to help protect unvaccinated and at-risk workers include:

- Separating from the workplace all infected people and 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
- Properly using face coverings or personal protective equipment (PPE) when appropriate.

Guidance For Employers

Key controls to help protect unvaccinated and at-risk workers include:

- Granting paid time off for employees to get vaccinated.
- Instructing any workers who are infected, unvaccinated workers who have had close contact with someone who tested positive for COVID-19, and all workers with COVID-19 symptoms to stay home from work.
- Implementing physical distancing for unvaccinated and otherwise at-risk workers in all communal work areas
- Provide unvaccinated and otherwise at-risk workers with face coverings or surgical masks, unless their work task requires a respirator or other PPE.
- Educate and train workers on your COVID-19 policies and procedures using accessible formats and in language they understand.

Guidance For Employers

- Suggest that unvaccinated customers, visitors, or guests wear face coverings, especially in public-facing workplaces if there are unvaccinated or otherwise at-risk workers in the workplace who are likely to interact with these customers, visitors, or guests.
- Maintain Ventilation Systems - Improving ventilation is a key engineering control that can be used as part of a layered strategy to reduce the concentration of viral particles in indoor air and the risk of virus transmission to unvaccinated workers in particular.
- Perform routine cleaning and disinfection - If someone who has been in the facility within 24 hours is suspected of having or confirmed to have COVID-19, follow the CDC cleaning and disinfection recommendations.

Guidance For Employers: Record and Report

- Employers subject to OSHA recordkeeping requirements must determine whether employees' COVID-19 cases are work-related and, if so, record them on the OSHA 300 log if:
 - (1) the case is a confirmed case of COVID-19; (2) the case is work-related (as defined by 29 CFR 1904.5); and (3) the case involves one or more relevant recording criteria (set forth in 29 CFR 1904.7) (e.g., medical treatment, days away from work).
- Follow the requirements in 29 CFR 1904 when reporting COVID-19 fatalities and hospitalizations to OSHA.
- Report outbreaks to health departments as required and support their contact tracing efforts.

Guidance For Employers: Adverse Reactions

- For adverse reactions to vaccines:
 - OSHA will not enforce 29 CFR 1904's recording requirements to require any employers to record worker side effects from COVID-19 vaccination through **May 2022**.

Guidance For Employers: Retaliation and Discrimination

- Implement protections from retaliation and set up an anonymous process for workers to voice concerns about COVID-19-related hazards.
- Be aware that Section 11(c) of the Act prohibits reprisal or discrimination against an employee for speaking out about unsafe working conditions or reporting an infection or exposure to COVID-19 to an employer.
- [29 CFR 1904.35\(b\)](#) also prohibits discrimination against an employee for reporting a work-related illness.

Higher-Risk Workplaces

- OSHA specifically identifies:
 - Manufacturing
 - Meat and Poultry Processing
 - High-volume retail and grocery
 - Seafood processing
- Where there are unvaccinated or at-risk workers:
 - Stagger break times in high-population workplaces
 - Stagger workers' arrival and departure times
 - Provide visual cues to maintain physical distancing

Guidance For Employers: Reminder of OSHA Standards

- ***Follow other applicable mandatory OSHA standards.***
- Specifically references:
 - PPE (29 CFR 1910, Subpart I (e.g., [1910.132](#) and [133](#)))
 - Respiratory protection ([29 CFR 1910.134](#))
 - Sanitation ([29 CFR 1910.141](#))
 - Bloodborne pathogens: ([29 CFR 1910.1030](#))
 - Employee access to medical and exposure records ([29 CFR 1910.1020](#)).
 - Where the ETS does not apply, employers are required under the General Duty Clause, [Section 5\(a\)\(1\)](#) of the OSH Act, to provide a safe and healthful workplace free from recognized hazards that are causing or likely to cause death or serious physical harm.

Expect Increase in General Duty Clause Citations

- General Duty Clause used only where there is no OSHA standard that applies to the particular hazard, like the COVID-19 pandemic.
- Number of General Duty Clause citations issued by OSHA during the pandemic has been limited.
- Look for OSHA to immediately begin issuing more General Duty Clause citations if employers violate these or other (CDC) guidelines.

INFECTIOUS DISEASE STANDARD?

- During H1N1 pandemic, Obama Administration spent years preparing a permanent infectious disease standard.
- Would have required health facilities and certain other high exposure workplaces to permanently implement infection control programs to protect their workers.
- Biden Administration may resurrect the proposed infectious disease standard.



Mitigating and Preventing the Spread of COVID-19 in the Workplace

Mitigating and Preventing the Spread of COVID-19 in the Workplace

- Engage workers in programs to include:
 - Assign a workplace coordinator to address COVID-19 issues.
 - Hazard assessment, to ID where and how workers might be exposed at work.
 - Identify measures to limit spread in the workplace, including engineering hazards, admin policies and additional PPE.
 - Consider ***protections for unvaccinated and at-risk worker*** through “supportive policies and practices.”
 - Establish system for communicating effectively with workers in a “language they understand,” including a system to self-report symptoms or exposure.

Mitigating and Preventing the Spread of COVID-19 in the Workplace

- Education and training on COVID-19 policies and procedures.
- Instructing workers who are infected or potentially infected to stay home and isolate or quarantine.
- Minimize the negative impact of quarantine and isolation on workers through telework and flexible paid leave policies.
- Isolating workers who show symptoms at work.
- Performing enhanced cleaning and disinfection after a suspected or confirmed case of COVID-19.

Mitigating and Preventing the Spread of COVID-19 in the Workplace

- Providing guidance on screening and testing.
- Recording and reporting COVID-19 infections and deaths.
- Implementing protections from retaliation and setting up an anonymous process for employees to voice concerns about COVID-19 hazards.
- Making COVID-19 vaccine ***available at no cost*** to employees.

Mitigating and Preventing the Spread of COVID-19 in the Workplace

- Prescreen Employees
 - Before returning to physical workplace
 - Pre-shift
 - Policy and procedure
 - Wage and hour
 - Additional considerations
- Social Distancing & PPE
 - Shifts
 - Layout
 - Clear guidelines
 - Postings in the workplace
 - Strictly enforce the six-feet apart rule
 - Enforce mask wearing for unvaccinated or at-risk workers
 - Continue remote work where possible

Mitigating and Preventing the Spread of COVID-19 in the Workplace

- Many workplace safety and health issues implicate state/local requirements or guidelines, which overlap with federal workplace standards or CDC guidelines.
- Keep up-to-date with rules, guidance, laws and regulations.
- How else do COVID-19 vaccines impact?



VACCINES: WHAT'S THE LATEST?

COVID-19 VACCINE HEADLINES


- **Vaccine confidence**
 - One in five adults (20%) still say they will refuse the shot unless mandated by their job or school
- **No more vaccine restrictions**
 - States have opened vaccinations to all adults, and children 12+
- **Pfizer study shows vaccine is still 90% effective for at least 6 months**
 - Based on 46,000-person clinical trial, the results are very promising showing a 90% efficacy after six months
- **Vaccines found to be safe in adolescents**
 - 100% efficacy with no serious side effects based on clinical trial in adolescents aged 12-15

 The New York Times

Covid-19: U.S. Vaccine Confidence Rises Though Skeptics Remain, Survey Says

As eligibility expands to all adults in many states, a new poll shows an increase in Americans who want to get a shot. Chile's surge in cases, ...
13 hours ago



 CNBC

U.S. Covid cases rising again as restrictions ease despite benefits from increased vaccinations

As Covid-19 cases rise once again in the United States, the country is also administering vaccinations at a faster pace than ever.
3 days ago




 USA Today

Pfizer COVID-19 vaccine is 90% effective for at least 6 months and protects against South Africa variant, study...

Volunteers receiving a second dose of the Pfizer-BioNTech vaccine remained more than 90% protected against symptomatic COVID-19.
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 NBC News

Pfizer says Covid vaccine 100 percent effective in children ages 12 to 15

Pfizer says its Covid-19 vaccine is 100 percent effective in preventing illness in teens ages 12 to 15 years old. The company plans to request ...
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COVID-19 VACCINE HESITANCY

- Initial recipients of the vaccine were generally limited to healthcare personnel, residents of long-term care facilities, frontline essential workers, educators, and persons aged 65 years and older.
- Currently, nearly every American age 12 and above can get vaccinated.
- BUT....many are still hesitant to get vaccinated.

Top stories



Chicago Tribune

Massive supply imbalance fueled by vaccine hesitancy: Illinois' latest struggles...

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abc NEWS

3 things scientists have learned about vaccine hesitancy: Analysis

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2 WBRZ

Officials use various means to allay vaccine hesitancy as federal site reopens Tuesday

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COVID-19 VACCINE TAX CREDIT

- In April 2021, Biden announced tax credit to fully offset the for providing paid leave for employees to get vaccinated.
- Part of the American Rescue Plan, would allow small- and medium-sized businesses to get reimbursed for any vaccine-related paid time off they provide, up to \$500 per day per employee, according to a senior administration official.
- Tax credit applies to paid time off to get vaccinated and to recover from any side effects of the vaccine.
- Applicable between April 1 and September 30, 2021.
- Re-sets 10-day limit for the tax credit for EPSLA beginning April 1, 2021

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Biden announces small business tax credits for vaccine PTO

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Biden calls on employers to provide paid time off for COVID-19 vaccines, offers tax credits

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Other Considerations



TRAVEL



MASKS



REMOTE WORK
REQUESTS

COVID-19 VACCINES CDC GUIDANCE

- **CDC Guidance on Fully Vaccinated People**

- Fully vaccinated means 2 weeks after the last dose of Pfizer or Moderna vaccines or 2 weeks after the single dose of J&J
- Fully vaccinated do not need to get COVID-19 test before or after travel and do not need to quarantine after travel.
- Gatherings
 - They can resume normal activity in most settings without having to wear masks or socially distance
- Quarantine
 - Fully vaccinated people don't need to quarantine or take a COVID-19 test if they've been exposed, unless they're symptomatic (more on this later)

USA Today

Vaccinated Americans can gather inside without masks or social distancing in certain circumstances, CDC guidelines...

The CDC says vaccinated Americans may get together with other fully vaccinated individuals in small groups inside their homes without masks.

1 month ago



Healio

CDC: Fully vaccinated people do not have to quarantine after COVID-19 exposure

People who are fully vaccinated against SARS-CoV-2 do not necessarily have to quarantine following an exposure to someone with suspected ...

1 month ago



COVID-19 CDC GUIDANCE ON TRAVEL

- **Unvaccinated Individuals**

- Must take a COVID-19 test 1-3 days BEFORE travel
- Must take a COVID-19 test 3-5 days after travel
- Must self-quarantine for 10 days if you don't get tested

- **Both Groups**

- Must self-monitor for symptoms
- Wear a mask and take other precautions during travel

Domestic Travel Recommendations Quick Reference

[alternative text for web accessible infographic](#)

Domestic Travel RECOMMENDATIONS AND REQUIREMENTS	Not Vaccinated		Fully Vaccinated	
Get tested 1-3 days before travel	✓			
Get tested 3-5 days after travel and self-quarantine for 7 days. Self-quarantine for 10 days if you don't get tested.	✓			
Self-monitor for symptoms	✓		✓	
Wear a mask and take other precautions during travel	✓		✓	

COVID-19 CDC GUIDANCE ON MASKS



- Fully vaccinated people can resume activities without wearing masks or physically distancing, except where required by federal, state, local, tribal, or territorial laws, rules and regulations, including local business and workplace guidance.
- Non-vaccinated employees should continue to wear masks and socially distance.
- Masks must continue to be used in healthcare settings, regardless of vaccination status.
- Regardless of vaccination status, people should continue to follow state and local governments, and companies may choose to continue requiring masks and social distancing.

What if employees request to continue working remotely?

Claimed Reason

- Fear of contracting COVID-19
- Fear of exposing someone in a vulnerable population to COVID-19
- Childcare concerns
- Personal Preferences

Considerations

- OSHA
- NLRA
- ADA
- Benefits to Employees

Risky Business?

- Local laws and regulations may still require you to enforce such rules regardless of vaccine status.
- Federal OSHA has not yet relaxed its COVID-19 standards for workplaces for unvaccinated workers.
- States with their own OSHA equivalents may also have different standards to consider and these state agencies could step in as necessary.
- If you choose to mandate the vaccine, there remains an outside risk of a lawsuit from someone hesitant to get inoculated.
- Even if you do not mandate the vaccine, should you inquire about and track the vaccine status of your workers to determine whether someone is fully vaccinated? Will this raise privacy and disability discrimination concerns?
- Some of your workers may have legitimate medical or religious reasons for abstaining from the vaccine, requiring you to take their accommodation status into account when developing business-wide policies.
- Workers who are unvaccinated and thus required to continue wearing masks and maintain social distancing could have a claim for retaliation if they are harassed or discriminated against in violation of federal safety laws or other legal principles

EEOC COVID-19 VACCINE GUIDANCE

- Issued on December 16, 2020.
- Employers *can require* workers to get COVID-19 vaccine.
 - **EUA** status does not appear to negate this.
 - Consider the employee's duties and work setting.
- When may an employee be "*excluded from the workplace*" for not being vaccinated?
 - **Direct Threat** – would an unvaccinated worker pose significant risk of substantial harm, based on reasonable medical judgment, which cannot be eliminated by a workplace accommodation? This is a high standard.
 - Vaccination as safety **Qualification Standard** – requires an objective basis for the standard, historically tied to jobs protecting public safety. Standard must be job-related and consistent with business necessity.

DIRECT THREAT

- To evaluate a possible direct threat, the employer should *individually* assess these factors:
 - The duration of the risk;
 - The nature and severity of the potential harm;
 - The likelihood that the potential harm will occur; and
 - The imminence of the potential harm.
 - Example: if employee can fully perform job duties remotely without a potential spread → Cannot require vaccination.

SAFETY QUALIFICATION STANDARD

- Not as difficult to meet as “direct threat” standard.
 - Direct threat requires establishing that threat cannot be eliminated by a reasonable accommodation.
- Objective basis for the standard, historically tied to jobs protecting public safety. Standard must be job-related and consistent with biz necessity.
- Be prepared to support imposition of that standard on a job.

EMERGENCY USE AUTHORIZATIONS

- An Emergency Use Authorization (EUA) is a mechanism to facilitate the availability and use of medical countermeasures, including vaccines, during public health emergencies, such as the current COVID-19 pandemic.
- FDA may allow the use of unapproved medical products, or unapproved uses of approved medical products in an emergency to diagnose, treat, or prevent serious or life-threatening diseases or conditions when certain statutory criteria have been met, including that there are no adequate, approved, and available alternatives.
- Under 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III), each individual must be informed “of the option to accept or refuse administration of the product, of the consequences, if any, of refusing administration of the product, and of the alternatives to the product that are available and of their benefits and risks.”

EMPLOYER MANDATE LEGAL CHALLENGE

Legaretta v. Macias

- Facts: Doña Ana County in NM issued a mandatory vaccination directive for its first-responders
- Legal Claims: violation of Emergency Use Authorization
- Procedural Posture: complaint filed in NM District Court



EEOC: REGARDING PROOF OF VACCINATION

- Seeking proof of vaccination is not a medical examination.
- Such a request, *by itself*, is unlikely to elicit disability info.
- This is not a disability-related inquiry.
- Inquiries should stop there, however.
 - Further inquiry implicates more ADA limitations/protections.
- Any medical information received must be kept confidential.
- Employee should be instructed **not** to provide genetic information (such as family members' medical history).

THOSE REQUIREMENTS ARE UNNECESSARY *IF*:

- Vaccination is voluntary.
 - Employee's decision to answer would also be voluntary.
 - Cannot retaliate if employee changes his mind.
- ***Or*** the employee receives vaccination from a third-party not contracted to employer (e.g., pharmacy or other healthcare provider).
 - **Medical information should always be kept confidential.**

SUMMARY REGARDING VACCINE MANDATES

- An employee *may* be entitled to exemption from “required” vaccines:
 - due to an ADA-covered disability or other medical circumstances
 - based on sincerely-held religious beliefs, practices, or observances
- In either case – the “interactive process” is critical
- Employer must consider reasonable accommodations
- Document communications with employee
- Employer’s rights to make medical inquiries are limited
- “Process” may be as important as the final accommodation decision
- Supervisor training is vital – avoid inadvertent medical inquiries

Vaccination Incentives – a not-so-simple alternative?

ADA: Wellness Program Rules

- Status of the January 7, 2021 proposed rules - ***subsequently withdrawn***.
- Employers offering incentives to employees receiving the COVID-19 vaccine do not have to establish job-relatedness and business necessity of pre-vaccine screening questions if:
 - The pre-exam questions come from a third party that is not contracted with the employer to conduct testing (such as neighborhood pharmacy or clinic); *or*
 - The employee's participation and responses to the screening inquiries are "voluntary."
- If the employer *requires* vaccines, consider administration of the shot by an independent third party.

ADA Wellness Rule Component – Potential Complications

- May arise if:
 - Program is not “voluntary,” in view of applicable history, guidance, and court decisions.
 - If the incentive offered is too high.
 - EEOC: employees could feel coerced to participate → leading to wellness program rules violations when employees are “forced” to disclose protected medical information in order to gain the incentive.
 - EEOC proposed rule permitted only de minimis incentives.
 - Biden administration withdrew proposed rule during administrative transition.
 - Takeaway: Higher incentives seem to equal higher risk.

Reasonable Accommodations

- Employers must also consider offering alternative means for an employee to earn an incentive if unable to be vaccinated due to a disability or religious objection.
- Some potential options:
 - Watching a workplace COVID-19 safety video.
 - Reviewing CDC literature on how to mitigate the spread of COVID-19 in the workforce.
- Consider other creative vaccine alternatives offered by employer in the past (i.e., incentives for flu shot).

Incentive Risk Chart

- *Educating Employees:*
Little To No Risk – Big reward?
- *Providing Paid Time Off For All Workers:*
Low Risk
- *Offering A De Minimis Incentive For Those Who Get The Vaccine:*
Low Risk
- *Providing Paid Time Off For Those Who Get the Vaccine:*
Medium Risk
- *Providing Compensation To Cover “Costs” Associated With Vaccine:*
Medium Risk
- *Offering A Higher Value Incentive For Those Who Get The Vaccine:*
Higher Risk

Questions?

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