
UPDATED: Employer-Mandated COVID-19 Vaccines: Important Considerations

This is an updated version of our memorandum previously published on April 22, 2021. The update incorporates, inter alia, EEOC guidance issued on May 28, 2021 and the first lawsuit filed against a private employer challenging a vaccine mandate.

As COVID-19 vaccines become increasingly available, employers may consider requiring that employees be vaccinated prior to resuming or continuing in-person work. Recent guidance from the Equal Employment Opportunity Commission (“EEOC”) states that employers may require employees to get a vaccine under equal employment opportunity (“EEO”) laws as long as employers make exceptions for employees with disabilities or religious beliefs that prevent them from receiving the vaccine. Employers may also offer incentives to employees to provide proof of vaccination, although EEOC guidance limits the value of the incentives in certain situations. However, many states such as New York (discussed herein) are contemplating more employee-protective legislation limiting employers’ ability to mandate that its employees receive the vaccine. In the midst of this legal uncertainty, companies must also grapple with the reputational and morale risks associated with requiring vaccinations. This memorandum outlines liability risks employers should consider in setting their own vaccine policies.

I. Federal Health Standards for At-Will Employees

Generally, employers can set health requirements for at-will employment. At the federal level, the EEOC has long taken the position that employers may require employees to receive a flu vaccine but generally has recommended that employers encourage, rather than require, vaccination¹. Similarly, the Occupational Safety and Health Administration (“OSHA”) noted in 2009 that employers may require employees receive the H1N1 vaccine, characterizing H1N1 as a “pandemic influenza virus.”² The EEOC issued updated guidance on May 28, 2021, confirming that “[t]he 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” (discussed below).³

¹ *Pandemic Preparedness in the Workplace and the Americans With Disabilities Act*, Equal Employment Opportunity Commission, at III(B) (updated March 21, 2020) available at <https://www.eeoc.gov/laws/guidance/pandemic-preparedness-workplace-and-americans-disabilities-act> (hereinafter “Pandemic Preparedness Guidance”).

² *OSHA’s position on mandatory flu shots for employees*, Occupational Safety and Health Administration (November 2009), available at <https://www.osha.gov/laws-regs/standardinterpretations/2009-11-09>.

³ *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and other EEO Laws*, Equal Employment Opportunity Commission (updated May 28, 2021), available at <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws> (hereinafter “What You Should Know About COVID-19”). The updated guidelines were prepared before the CDC’s May 13 announcement that fully-vaccinated individuals do not need to wear masks or distance from others and therefore do not take that guidance into account.

In many cases, employers may impose a vaccination requirement to ensure employees do not pose a “direct threat” to the health or safety of individuals in the workplace.⁴ A direct threat is one that poses 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.”⁵ In determining whether a particular employment situation presents a “direct threat,” the employer must evaluate “the individual’s present ability to safely perform the essential functions of the job” as well as “(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.”⁶ The EEOC has found that the COVID-19 pandemic meets the “direct threat” standard, but that assessment may change as case numbers decrease in a particular region.⁷ Notably, EEOC regulations provide that the “direct threat” assessment must be based on “a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence.”⁸ Recent EEOC guidance suggests that employers should look to current United States Centers for Disease Control and Prevention (“CDC”) guidance, and “the assessment of direct threat 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.”⁹

In establishing vaccine protocols, employers must also satisfy applicable provisions of the Americans with Disabilities Act (the “ADA”)¹⁰ and Title VII of the Civil Rights Act (“Title VII”).¹¹ Specifically, under the ADA and Title VII, employers must provide reasonable accommodations, absent undue hardship, for those who cannot comply with a vaccine requirement because of disabilities or sincerely held religious beliefs.¹² “A ‘reasonable accommodation’ is a change in the work environment that allows an individual with a disability to have an equal opportunity to apply for a job, perform a job’s essential functions, or enjoy equal benefits and privileges of employment.”¹³ “An accommodation poses an ‘undue hardship’ if it results in significant difficulty or expense for the employer, taking into account the nature and cost of the accommodation, the resources available to the employer, and the operation of the employer’s business.”¹⁴ Accommodations could include requiring, for example, the employee wear a mask and other personal protective equipment (“PPE”) or work remotely. If the employer cannot provide reasonable accommodations that would allow the employee to return to the workplace without posing a direct threat, the employer “must consider

⁴ *Id.* at K.5.

⁵ 29 CFR § 1630.2(r).

⁶ *What You Should Know About COVID-19*, at G.4, K.5.

⁷ *Pandemic Preparedness Guidance*, at I(B).

⁸ 29 CFR § 1630.2(r).

⁹ *What You Should Know About COVID-19*, at K.5.

¹⁰ 42 U.S.C. § 12101.

¹¹ 42 U.S.C. 2000e *et seq.*

¹² *What You Should Know About COVID-19*; see also *Norman v. NYU Langone Health System*, 2020 U.S. Dist. LEXIS 180990, *13 (2020) (“Discrimination in violation of the ADA includes, *inter alia*, not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability.”) (internal quotations omitted) (quoting *McBride v. BIC Consumer Prods. Mfg. Co.*, 583 F.3d 92, 96 (2d Cir. 2009)). See also *Weber v. Roadway Express, Inc.*, 199 F.3d 270, 273 (5th Cir. 2000) (under Title VII, “[a]n employer has the statutory obligation to make reasonable accommodations for the religious observances of its employees, but is not required to incur undue hardship).

¹³ *Pandemic Preparedness Guidance*, at II(C).

¹⁴ *Id.*

accommodations such as telework, leave, or reassignment.”¹⁵ If no other rights apply, the employer may terminate the employee.¹⁶

Finally, employers should ensure that any vaccine program, whether mandatory or otherwise, complies with federal anti-discrimination laws by ensuring that it does not treat employees differently because of protected characteristics. For example, under the Age Discrimination in Employment Act, employers may not “limit, segregate, or classify” employees “because of such individual’s age.”¹⁷ Similarly, employers should not single out employees they believe may be at a higher risk for severe COVID-19 illness based on other medical factors.¹⁸ Employers may classify employees on the basis of job-related characteristics, however. For example, employers could include customer-facing employees in a mandatory vaccination policy while excluding employees who can work remotely, so long as the policy allows for accommodations as discussed above.

II. Incentivizing Employees to Get Vaccinated

The EEOC has stated that an employer may provide an incentive to receive a vaccine administered by the employer or its agent so long as the incentive (which includes both rewards and penalties) “is not so substantial as to be coercive.”¹⁹ The EEOC provides little additional guidance as to the amount that would be considered “coercive.” Moreover, the limitation does not apply if the employer offers an incentive to employees to confirm receipt of a vaccination from a third-party.²⁰ While the EEOC guidance does not specify the limits on incentives that may be offered in this situation, employers should remain cognizant of state and local laws that may be implicated. The EEOC guidance also does not address whether parallel incentives must be provided to employees who are unable or unwilling to receive the vaccine for medical reasons or due to sincerely held religious beliefs.

III. Recent Challenges to Vaccine Mandates

Notwithstanding the EEOC guidance, some commentators have argued that employers may not mandate that employees receive a COVID-19 vaccination because the vaccines currently approved by the Food and Drug Administration (“FDA”) have been approved through its Emergency Use Authorization (“EUA”) process. The subsection of the Federal Food, Drug, and Cosmetic Act that gives the FDA the ability to grant EUAs requires that the Secretary of Health and Human Services ensure individuals receiving the product are informed “of the option to accept or refuse administration of the product, [and] of the consequences, if any of refusing administration.”²¹

¹⁵ *What You Should Know About COVID-19*, at G.4.

¹⁶ *Id.* See also, e.g., *Horvath v. City of Leander*, 946 F.3d 787 (5th Cir. 2020) (finding the defendant not liable for violations of Title VII after the defendant-employer terminated an employee who did not comply with the employer’s flu vaccine policy after the employer offered to transfer the employee to a position that did not require the vaccine).

¹⁷ 29 U.S.C. § 623(a)(2).

¹⁸ HIPAA prohibits discrimination against participants in group health plans on the basis of a “health factor,” which includes health status, medical condition, claims experience, receipt of health care, medical history, genetic information, evidence of insurability, or disability. 29 CFR § 2590.702.

¹⁹ “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.” *What You Should Know About COVID-19*, at K.17.

²⁰ *Id.*, at K.16, K.17.

²¹ 21 U.S.C. § 360bbb-3(e)(1)(A)(iii)(III).

However, the statute regulates the actions of public officials, not private employers. The EEOC noted that “[i]t is beyond the EEOC’s jurisdiction to discuss the legal implications of the EUA or the FDA approach.”²²

Plaintiffs in three recent lawsuits have challenged their employers’ vaccine mandates on this basis:

- In a lawsuit filed in the District of New Mexico in February of 2021, an employee at the Dona Ana County Detention Center, a public entity, challenged a “Mandatory COVID-19 Vaccine Directive” requiring first responders to receive a COVID-19 vaccination as a condition of ongoing employment.²³ The employee initially moved for, but then withdrew, a motion seeking a temporary restraining order or injunction preventing his termination. The defendants then filed a motion to dismiss for failure to state a claim under FED. R. CIV. P. 12(b)(6), which is currently pending.
- In March of 2021, teachers and employees of the Los Angeles Unified School District, a public entity, brought a similar suit challenging its vaccine mandate.²⁴ The plaintiffs also brought claims asserting their due process rights had been violated, and their rights under California’s Protection of Human Subjects in Medical Experimentation Act by subjecting them to medical experimentation without consent. The plaintiffs filed a notice of dismissal of the claims against the school district in May of 2021, leaving only the claims against the Director of Human Resources remaining in the case.
- A recent lawsuit in Texas is the first suit challenging the vaccination mandate of a private entity. In May of 2021, employees of Houston Methodist Hospital filed suit against the hospital challenging a policy requiring employees to submit documentation of vaccination or an applicable exemption or otherwise face suspension and termination.²⁵ The court granted Houston Methodist Hospital’s motion to dismiss, dismissing the lawsuit on June 12, 2021.²⁶ Rejecting the plaintiffs’ arguments that the vaccine mandate was impermissible because the vaccines’ authorizations are for emergency use only, the court confirmed that the statute relating to EUA does not “apply to private employers.”²⁷ The court also held that a choice between receiving a vaccine or being terminated is not “coercion.”²⁸ The plaintiffs have filed an appeal.

The plaintiffs in the first two cases have raised the additional argument that the law governing EUAs preempts state law and does not permit the defendant employers to require vaccinations where a vaccine has been authorized under an EUA.²⁹ This may be a challenging argument for the plaintiffs. When analyzing if a federal statute preempts state laws, courts apply the “presumption against preemption” and require evidence that preemption was “the clear and manifest purpose of Congress.”³⁰ Such purpose may be particularly difficult to demonstrate given that the CDC has stated that: “whether a state, local government, or employer, for example, may require or mandate COVID-19 vaccination is a matter of state or other applicable law.”³¹

²² *What You Should Know About COVID-19*, at K.

²³ *LeGaretta v. Macias*, 2:21-cv-00179-MV-GBW (D.N.M. Feb. 28, 2021).

²⁴ *See California Educators for Medical Freedom v. Los Angeles Unified School District*, 2:21-cv-02388-DSF-PVC (C.D. Cal. March 17, 2021).

²⁵ *See Jennifer Bridges et al v. The Methodist Hospital*, Docket # 4:21-cv-01774 (Tex. Cnty. Ct. May 28, 2021).

²⁶ *See Jennifer Bridges et al v. The Methodist Hospital*, Docket # 4:21-cv-01774 (Tex. Cnty. Ct. June 12, 2021).

²⁷ *Id.* at p. 3.

²⁸ *Id.* at p. 4.

²⁹ *See* 21 U.S. Code § 360bbb-3, Section (e)(1)(A).

³⁰ *Medtronics, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)).

³¹ *Workplace Vaccination Program*, Centers for Disease Control and Prevention (updated March 25, 2021), available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html>.

IV. New York State Legislation Regarding Vaccine Mandates

New York state legislators have recently introduced several bills addressing COVID-19 vaccinations. Assembly members David DiPietro, Karl Brabenec, and Brian Maktelow have proposed A4602, which would prohibit the COVID-19 vaccine from being required for: employment or continued employment; attendance or employment at a public or private educational institution; or residency at a nursing home. On the other hand, Assembly member Richard Gottfried is sponsoring A2081, which would require residents and employees of long-term care facilities to receive the COVID-19 vaccine in addition to the vaccines already required. Two other proposed laws, S02677 (religious exemption) and S02678 (physician liability), add an exemption to school vaccine requirements for those with sincerely held religious beliefs that prohibit them from receiving the vaccine and clarify that a physician's failure to immunize a patient or provide a certificate exempting a patient does not constitute professional misconduct. As of June 21, 2021, all of these bills are pending before the relevant legislative committees.

In setting vaccine policies, employers should be cognizant of pending legislation in their states and may want to seek specific legal guidance.³²

V. Collecting Vaccination Status Information from Employees

Generally, employers may collect information about whether employees have been vaccinated and, under federal law, may require employees to show proof of receipt of a COVID-19 vaccination.³³ However, employers should be aware of prohibitions in the ADA on making inquiries regarding the existence, nature or severity of an employee's disability. The EEOC recently stated that inquiring about whether an employee has received a vaccine from a third party is not a disability-related inquiry and is not subject to the EEOC's regulations on disability-related inquiries and medical examinations.³⁴ Employers should exercise caution if asking follow-up questions about the employee's vaccination status, however, because the questions may elicit disability-related information.

Employers must also ensure the confidentiality of vaccination-related information collected. The confidentiality provisions in the ADA³⁵ apply to data gathered related to employee vaccinations. For diagnoses of COVID-19, the EEOC has advised that "[t]he ADA requires that all medical information about a particular employee be stored separately from the employee's personnel file, thus limiting access to this confidential information."³⁶ The EEOC has similarly stated that employers must ensure vaccine-related information is kept private and confidential.³⁷

³² For example, the Arkansas legislature recently passed House Bill 1547, which prohibits the state and state-affiliated entities from requiring vaccination as a condition of education, employment, entry, receipt of services, or issuance of a license, certificate, or permit. State-owned or controlled medical facilities must receive approval from the Legislative Council to require vaccination. As of June 4, 2021, the bill is awaiting the Governor's signature.

³³ *What You Should Know About COVID-19*, at K.9. See also *Workplace Vaccination Program*, Centers for Disease Control and Prevention (updated March 25, 2021), available at <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations/essentialworker/workplace-vaccination-program.html>.

³⁴ *What You Should Know About COVID-19*, at K.9

³⁵ See 29 C.F.R. § 1630.14(c)(1) (providing that information regarding the medical history or condition of any employee that has been voluntarily collected "shall be collected and maintained on separate forms and in separate medical files and be treated as a confidential medical record, except that: (A) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations; (B) First aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment. . . .")

³⁶ *What You Should Know About COVID-19*, at B.1.

³⁷ "[D]ocumentation or other confirmation of vaccination provided by the employee to the employer is medical information and must be kept confidential." *What You Should Know About COVID-19*, at K.9.

VI. Additional Liability Considerations

When drafting vaccine policies, employers should also consider their duty to provide a safe workplace. Under Section 5 of the Occupational Safety and Health Act of 1970, employers must provide “employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm.”³⁸ Employees who feel their employer is not taking adequate COVID-19 precautions may request OSHA inspect their workplace by filing a complaint with the Secretary of Labor. As of January 2021, OSHA issued 310 COVID-19-related citations with total initial penalties of \$4,034,288.³⁹ Employees may also sue the employer, but employees run the risk of the case being dismissed under the doctrine of primary jurisdiction if the court determines OSHA is better suited to assess the workplace.⁴⁰

Employers should also be aware that they may face legal liability for violations of equivalent state laws as well. For example, New York Attorney General Letitia James filed a lawsuit against Amazon for failing to provide a safe workplace in violation of New York state law on February 17, 2021. The complaint alleges that Amazon did not comply with cleaning and disinfection requirements, provide adequate contract tracing, or permit employees to engage in necessary social distancing and hygiene practices.⁴¹ While likely a remote possibility, an employee may try to argue that a lax vaccination policy would also create an unsafe work environment.

Finally, another concern faced by employers is whether they face liability if an employee has an adverse reaction to a vaccination they have required. Employers are unlikely to face civil liability in this situation. Although the law differs by state, in most states, this type of injury will be deemed to fall under workers’ compensation laws, which typically supply an employee’s exclusive remedy.⁴² Where worker’s compensation law applies, employers generally face tort liability only for gross negligence, recklessness, or intentionally exposing employees to harm. And even where the workers’ compensation law does not apply, employers will generally be held to at least a negligence standard. Given the safety information currently available about the vaccines, it is unlikely that a court would find an employer was negligent, let alone grossly negligent, in requiring their use.⁴³

³⁸ 29 U.S.C. § 654. See also *Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace*, Occupational Safety and Health Administration (June 2021), available at <https://www.osha.gov/coronavirus/safework> (hereinafter “*Protecting Workers*”). For further analysis see Cahill Gordon & Reindel LLP Firm Memo, “Employer Waivers of COVID-Related Liability” (Feb. 12, 2021) at <https://www.cahill.com/publications/covid-19-insights/2021-02-12-employer-waivers-of-covid-related-liability/> res/id=Attachments/index=0/Employer%20Waivers%20of%20COVID-Related%20Liability.pdf.

³⁹ *Inspections with COVID-related Citations*, Occupational Safety and Health Administration (January 14, 2021), available at <https://www.osha.gov/enforcement/covid-19-data/inspections-covid-related-citations>.

⁴⁰ See e.g., *Palmer v. Amazon.com, Inc.*, 2020 U.S. Dist. LEXIS 203683 (E.D.N.Y. 2020) (granting defendant’s motion to dismiss failure to provide a safe workplace claim because plaintiffs did not request an OSHA inspection).

⁴¹ *People of N.Y. v. Amazon.com, Inc.*, Index No. 45362/2021 (N.Y. Sup. Ct. Feb. 16, 2021).

⁴² For example, in a 2015 decision, the New York State Workers’ Compensation Board found that a social worker’s arm injury stemming from a flu vaccine arose out of and in the course of employment where, *inter alia*, her employer offered the vaccine on premises, strongly encouraged employees to receive the vaccine, and in the absence of receiving the vaccine, required employees in her position to wear masks, which would be detrimental to their work. *Matter of Mt. Sinai Medical Center*, Case No. G0695787, 2015 NY Wrk. Comp. LEXIS 11474 (Dec. 2, 2015). See also generally 1 New York Workers’ Compensation Handbook § 1.01 (2020).

⁴³ According to the FDA, the COVID-19 vaccines in use are safe and effective. For the most serious potential side effect, anaphylaxis, the FDA reported an anaphylaxis rate of 2.5 out of one million first doses of the Moderna vaccine and 11.1 cases of anaphylaxis for every million first dose of the Pfizer-BioNTech vaccine. Allergic Reactions Including Anaphylaxis After Receipt of the First Dose of Moderna COVID-19 Vaccine — United States, December 21, 2020–January 10, 2021, *Centers for Disease Control and Prevention* (Jan. 29, 2021); Allergic Reactions Including Anaphylaxis After Receipt of the First Dose of Pfizer-BioNTech COVID-19 Vaccine — United States December 14–23, 2020, *Centers for Disease Control and Prevention* (Jan. 15, 2021), at <https://www.cdc.gov/mmwr/volumes/70/wr/mm7002e1.htm#>. The CDC and FDA have also shown they will act quickly to pause the

VII. Practical Considerations

As employers consider implementing a mandatory vaccine policy, they should weigh the benefits against potential liability, legality in their state, customer expectations, and employee morale.

It appears that the majority of employers so far have been encouraging or incentivizing, rather than requiring, employees to get the vaccine, though policies continue to evolve.⁴⁴ For example, many employers require employees report their vaccination status before allowing them to return to the office or work in the office without wearing a mask.⁴⁵ Some employers, including Amazon and JBS SA (meatpacking), have offered employees cash bonuses to get vaccinated.⁴⁶ Other employers, including United Airlines, offer vaccinated employees additional vacation days.⁴⁷ In some states, such as New York, employers may be required by law to provide paid leave for employees to receive the vaccine and recover from any side effects,⁴⁸ and President Biden has likewise called on all employers to provide employees with paid time off to get vaccines and recover from any after effects, and OSHA has adopted the recommendation as well.⁴⁹

Given the complications associated with administering vaccinations, employers may want to consider implementing vaccination policies that require or encourage employees to provide proof they received a vaccine administered by a third party. Employers can also engage in educational efforts to better inform their employees about the safety and utility of the vaccine. Indeed, OSHA has recommended educating employees on the importance of vaccination.⁵⁰

use of a vaccine where there are even suspicions of safety concerns. See *Joint CDC and FDA Statement on Johnson & Johnson COVID-19 Vaccine* (Apr. 13, 2021), available at <https://www.cdc.gov/media/releases/2021/s0413-JJ-vaccine.html>.

⁴⁴ According to a report in February, before vaccines were widely available, “just 0.5% of U.S. companies mandate COVID-19 vaccination for all employees. See <https://www.marketwatch.com/story/just-0-5-of-u-s-companies-mandate-covid-19-vaccination-for-all-employees-11612928585>. A more recent survey of over 1,300 businesses in the U.S. and U.K. conducted in March by Arizona State University’s College of Health Solutions found that 40% of the businesses surveyed planned to require the vaccine for all employees (44% requiring it for employees working in-person), while 60% planned to require proof of vaccination. See <https://www.rockefellerfoundation.org/wp-content/uploads/2021/04/ASU-Workplace-Commons-Phase-2-Report-4-28-21.pdf>.

⁴⁵ CNN, “These companies are paying their employees to receive the Covid-19 vaccine” (Mar. 25, 2021), at <https://www.cnn.com/2021/03/24/business/covid-vaccine-incentives-companies/index.html>; The Wall Street Journal, “Companies Push Employees to Prove They Are Vaccinated for Covid-19,” (June 14, 2021), at <https://www.wsj.com/articles/companies-push-employees-to-prove-they-are-vaccinated-11623672001> (companies are increasing pressure on employees to report that they have been vaccinated).

⁴⁶ Dallas Morning News, “Amazon, Aldi, Walmart, Trader Joe’s and other retailers begin to encourage workers to get the vaccine” (Jan. 22, 2021), at <https://www.dallasnews.com/business/retail/2021/01/22/amazon-aldi-walmart-trader-joes-and-other-retailers-begin-to-encourage-workers-to-get-the-vaccine/>.

⁴⁷ Jenny Gross, “Yes, Your Employer Can Require You to Be Vaccinated,” N.Y. Times (June 16, 2021), at <https://www.nytimes.com/2021/06/09/business/covid-vaccine-employer-rules.html>.

⁴⁸ See *Public and Private Employees Will Be Granted Up to Four Hours of Excused Leave Per Injection*, Governor Andrew M. Cuomo (March 12, 2021), available at <https://www.governor.ny.gov/news/governor-cuomo-signs-legislation-granting-employees-time-receive-covid-19-vaccination>; see also *Guidance On Use Of Paid Sick Leave For Covid-19 Vaccine Recovery Time*, New York Department of Labor, available at <https://dol.ny.gov/system/files/documents/2021/05/psl-and-vaccine-recovery-guidance.pdf> (employees may use previously-required sick leave days for recovery from side effects due to receipt of vaccination).

⁴⁹ See *FACT SHEET: President Biden to Call on All Employers to Provide Paid Time Off for Employees to Get Vaccinated After Meeting Goal of 200 Million Shots in the First 100 Days*, the White House (Apr. 21, 2021), available at <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/21/fact-sheet-president-biden-to-call-on-all-employers-to-provide-paid-time-off-for-employees-to-get-vaccinated-after-meeting-goal-of-200-million-shots-in-the-first-100-days/>; see also *Protecting Workers*.

⁵⁰ *Protecting Workers*.

Educational efforts and policies to encourage vaccination, in addition to following other best practices recommended by the CDC like requiring PPE and distancing for non-vaccinated individuals, can help employers fulfill their duty to provide both a safe work environment and safe environment for customers.

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If you have any questions about the issues addressed in this memorandum, or if you would like a copy of any of the materials mentioned in it, please do not hesitate to call or email authors Helene Banks (partner) at 212.701.3439 or hbanks@cahill.com; Geoffrey E. Liebmann (partner) at 212.701.3313 or gliebmann@cahill.com; Lauren Perlgut (counsel) at 212.701.3558 or lperlgut@cahill.com; or Taylor Elicegui (associate) at 212.701.3062 or telicegui@cahill.com; or email publications@cahill.com.

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