



Aon Webinar: Managing a Partially Vaccinated Workforce

Q&A follow-up from March 9, 2021 Webinar

Part of the Aon COVID-19 Vaccination Webinar Series

Webinar Q&A

The following questions were submitted by attendees of Aon Webinar: Managing a Partially Vaccinated Workforce, an installment in the Aon COVID-19 Vaccination Webinar Series. All names and identifiable information have been removed to ensure full confidentiality.

The responses are provided as guidance on the applicability and impact of the COVID-19 vaccination, with an understanding this is a dynamic and fluid subject. While the information provided is current at the time of publication (March 2021), changes are expected, and determinations and decisions are evolving.

ADA Exposures

Are we anticipating a flood of ADA claims requesting Work from Home (WFH) accommodations?

- We certainly do expect an increase, but likely not a flood. Employees still need to present a legitimate disability to bring an ADA claim forth. We expect, in the short term at least, that employers will be relatively flexible around granting accommodation requests as employees gradually get more comfortable returning to the office. These factors make us less concerned about a true flood of claims and more of a modest increase.

CDC & OSHA Vaccination Guidance

We are struggling with new guidance from the CDC as it relates to fully vaccinated employees. The new OSHA guidance states that employers cannot treat vaccinated employees differently from non-vaccinated. Does that mean we still have to force quarantines in the event of exposures, even if the employee is fully vaccinated? We are struggling with "treating the groups differently" as it relates to contact tracing, etc.

- OSHA's guidance on Jan 29, 2021 states that vaccinated workers should continue to wear masks, social distance and abide by any other workplace requirements to minimize the spread of COVID-19. The CDC's guidance of Mar 8, 2021, states that "fully vaccinated employees of non-healthcare congregate settings and other high-density workplaces (e.g., meat and poultry processing and manufacturing plants) with no COVID-like symptoms do not need to quarantine following an exposure; however testing following an exposure and through routine workplace screening programs (if present) is still recommended."

It is our understanding fully vaccinated individuals do not need to quarantine after exposure. Is there a time limit on this guidance (i.e. vaccinated individual must quarantine after exposure up until 3 months have passed since the individual became fully vaccinated)?

- Time limits related to vaccination and exposure quarantines from the CDC recommendations have not been published to date. CDC continues to monitor data relative to fully vaccinated individuals and future guidance on quarantine may change based on the data the CDC gathers and analyzes.

If the rules are different in the office for employees whom are vaccinated (i.e. no masks or social distancing required) how does the company ensure that non vaccinated employees still wear masks and social distance? Also, with privacy issues it will be very clear which employees are not vaccinated since they will be required to still wear their masks

- Rules for the office should not be different between fully vaccinated and non-vaccinated employees. Thus, there will not be a means of knowing who has been vaccinated and who has not based on safety practices.

Do you expect OSHA or EEOC to provide specific guidance for a partially vaccinated workforce?

- Current guidance is that vaccinated employees should not be treated any differently than non-vaccinated employees. National Emphasis Program document issued on Mar 12, 2021 references only previous OSHA guidance on not treating vaccinated employees any differently than non-vaccinated employees.

As of today, are employers require to have a COVID-19 questionnaire in place for any new people being hired?

- Employers may ask all employees and applicants who will be physically entering the workplace if they have COVID-19 or symptoms associated with COVID-19 and ask if they have been tested for COVID-19. Symptoms associated with COVID-19 include, for example, fever, chills, cough, and shortness of breath. The CDC has identified a current list of symptoms.

The CDC says that those fully vaccinated should still take precautions, including mask wearing and social distancing in public. Do you consider the workplace to be public? We are asking because we are unsure if we should allow vaccinated employees to meet without a mask on campus. Any guidance is appreciated.

- OSHA guidance of Jan 29, 2021 states that vaccinated employees should not be treated any differently than non-vaccinated employees. If non-vaccinated employees cannot meet on campus without wearing masks, then vaccinated employees must also wear masks.
- Most workplaces will have a mix of vaccinated and unvaccinated individuals, and it is therefore important to continue to maintain all COVID-19 protocols generally, including masking and distancing. While some local jurisdictions are relaxing COVID-19 requirements (i.e. face masks), OSHA requirements are enforceable in private entity workplaces and some State OSHA enforcements also cover public entity workplaces which supersede local regulations.

What is the definition of a "high density" workplace?

- While OSHA has not specifically defined "high density workplaces", they do reference this term in their definition of a medium exposure risk workplace. This definition states that "Work environments with medium exposure risk occupation are those that have frequent close contact with the general population (i.e., within 6 feet) and include: schools, high density workplaces, and high-volume retail operations."

CDC references "Workers in high-density settings in which workers are in the workplace for long time periods (e.g., for 8-12 hours per shift), and have prolonged close contact (within 6 feet for 15 minutes or more) with coworkers may be at increased risk for exposure to SARS-CoV-2." CDC says there are 16 critical infrastructure sectors whose assets, systems, and networks, whether physical or virtual, are considered so vital to the United States that their incapacitation or destruction would have a debilitating effect on security, national economic security, national public health or safety, or any combination thereof. Presidential Policy Directive 21 (PPD-21): PPD-21 identifies 16 critical infrastructure sectors: Chemical Sector; Commercial Facilities Sector; Communications Sector; Critical Manufacturing Sector; Dams Sector; Defense Industrial Base Sector; Emergency Services Sector; Energy Sector; Financial Services Sector; Food and Agriculture Sector; Healthcare and Public Health Sector; Information Technology Sector; Nuclear Reactors, Materials, and Waste Sector; Transportation Systems Sector; Water and Wastewater Systems Sector

Collective Bargaining and COVID absence

How should we address CBA allowances with employees that go out for long periods of time due to COVID?

- We recommend you work with your labor lawyers in addressing all CBA matters.

COVID & Return to the Office

When do you expect we will return to the office?

- Questions remain about whether remote work, at the current levels, will last as a permanent work arrangement. There are indicators that many companies plan to allow employees to continue working from home at least some of the time, but we expect business necessity and productivity needs will ultimately drive decisions on how companies address remote work in the future. Employers considering this approach should seek advice from counsel.

HR Allowances & Proof of Vaccination

Does it violate privacy to have a list of who is vaccinated and who isn't available to the executive team?

- Currently, there is no directive or requirement for employers to maintain a record of employee's vaccinations. However, employers should closely monitor developments, including those at the federal, state, and local level. Records and documents related to an employee's medical history or vaccination must be maintained as confidential medical records in separate files/records from the usual personnel files and in conformance with confidentiality requirements under the federal ADA, Genetic Information Nondiscrimination Act of 2008 (GINA), and HIPAA privacy requirements.
- Employers can require employees provide proof of their vaccinations however, employers should avoid asking employees why they did not receive a vaccine, because those questions could prompt information about a medical condition, and therefore implicate the ADA and/or Title VII.

Will proof of vaccination be considered medical information in California?

- Employers can require employees provide proof of their vaccinations however, employers should avoid asking employees why they did not receive a vaccine, because those questions could prompt information about a medical condition, and therefore implicate the ADA and/or Title VII.

Are you allowed to ask employees to confirm if they have received the vaccination or does that impact HIPPA privacy?

- Employers can require employees provide proof of their vaccinations however, employers should avoid asking employees why they did not receive a vaccine, because those questions could prompt information about a medical condition, and therefore implicate the ADA and/or Title VII.

If an employee is fully vaccinated, can we ask for documentation to prove it? How do we, as employers, know how to handle an exposure without it?

- Employers can require employees provide proof of their vaccinations however, employers should avoid asking employees why they did not receive a vaccine, because those questions could prompt information about a medical condition, and therefore implicate the ADA and/or Title VII.

Can employers require employees to disclose whether they have been vaccinated or not?

- Employers can require employees provide proof of their vaccinations however, employers should avoid asking employees why they did not receive a vaccine, because those questions could prompt information about a medical condition, and therefore implicate the ADA and/or Title VII.

Are employers considering housing information on who is vaccinated? Is this even possible due to privacy laws? I am not advocating it - just wondering how employers who use field or lease employees would handle, if at all.

- Currently, there is no directive or requirement for employers to maintain a record of employee's vaccinations. However, employers should closely monitor developments, including those at the federal, state, and local level. Records and documents related to an employee's medical history or vaccination must be maintained as confidential medical records in separate files/records from the usual personnel files and in conformance with confidentiality requirements under the federal ADA, Genetic Information Nondiscrimination Act of 2008 (GINA), and HIPAA privacy requirements.

Has any guidance been provided to employers regarding letters/proof of employment they can provide to employees eligible to receive a vaccine based on job status?

- Not that we are aware of as of today.

COVID & Travel Policies

Should employers prepare travel policies, business and leisure?

- It is always a best practice to have a clear travel policy for a variety of reasons, but the pandemic has only made employers more aware of the need to review and revise or implement such policies. We suggest working with employment counsel to draft or update your travel policies if you have not done so since the beginning of the pandemic.

Long Hauler & COVID

Is the loss of IQ a long term effect or are those with long hauler syndrome getting those IQ points back after they fully recover?

- To date, there is no evidence that brain fog is permanent. This is an active area of investigation.

What are your thoughts regarding Long Haulers and the potential impact on Workers' Compensation?

- It is still too early to tell at this point the extent of Post-Acute COVID-19 syndrome on accepted COVID-19 claims based on current workers' compensation data. This aside, our team feels certain the unknowns around the extent of the lingering effects tied to the virus will likely result in delayed resolution of accepted claims, resolution of future medical costs in those states that allow settlement of future medical exposure. In those jurisdictions where future medical exposure cannot be settled, we anticipate some reluctance on

the part of carriers to administratively close files in the manner we are used to today, thus forcing longer durations of reserves posted on COVID-19 claims for future medical costs.

Has anyone done a study on language lost after having COVID-19? For example, the loss of vocabulary?

- It is being studied. We do know that many with brain fog from COVID-19 seek help from speech therapists to improve their language skills.

Vaccine Type, Efficacy & Safety

Have you heard anything about the vaccine causing a year loss of life expectancy?

- To date, there is no data to support that COVID-19 vaccines reduce longevity.

What did the CDC say about proof of getting COVID in lieu of vaccination?

- The CDC recommends those that have had COVID wait until symptoms have resolved and the isolation period has been met before proceeding to get vaccinated. Those previously infected should still get vaccinated.

Which vaccine is the most effective?

- It is difficult to compare the vaccine since they were tested at different times with different populations against different emerging strains. All are safe and effective at reducing death and severe COVID symptoms.

Which vaccine is best for the variants?

- Per the CDC, full coverage of the coronavirus outbreak evidence so far suggests that the COVID-19 vaccines authorized in the U.S. appear to offer good protection against new variants.

Is there a known timeline to the study and evaluation of improvements in COVID transmission from those that have been vaccinated? CDC indicated yesterday that this remains an unknown.

- Research continues on this subject. We anticipate more information by summer on this important topic.

Are there known side-effects to mixing the vaccines?

- To date, there are no known side effects to mixing vaccines. This is an area of active investigation.

Why so many vaccines? As in why are there 3 different ones available now?

- Prior to COVID, humanity had never developed a successful vaccine against any coronavirus. So many manufacturers rolled the dice and several genomic insights about the virus were exploited. Thankfully, several approaches appear to provide strong immunity and safety.

Should someone with breathing issues get the COVID-19 vaccine?

- Yes, a history of asthma, COPD, or emphysema, for example, does not preclude one from getting the vaccine. Rather, these individuals are excellent candidates for the vaccine.

Vaccines & Incentives

What is the recommendation for incentivizing employees to get vaccinated?

- We can give you some examples of what other employers are doing. Many employers are providing approved time off from regularly scheduled work (paid or unpaid) to encourage employees to get vaccinated. As an example, Aon created a global policy to provide employees who choose to receive the COVID-19 vaccine with access to up to 16 hours of additional paid time off per injection, recognizing the time commitment associated with receiving each injection and any potential recovery.

Can we use wellness funds for incentivizing employees to get vaccinated?

- Aon recommends consultation with your HR and Legal teams to determine the IRS impact on incentives and HSA accounts.

Are you seeing employers offer incentives? If so, what kind?

- Decisions such as this should be made in consultation with counsel. Many employers are considering the option of encouraging employee vaccinations using incentives. If you choose this option, you will need to consider the rules applicable to wellness programs and IRS requirements. In addition, per the EEOC, if an award is to be provided for participation in an activity, there must be some accommodation available to guarantee that all employees can participate, regardless of their ADA status. Where accommodation is not available, the EEOC regulations provide that a reasonable alternative to the activity must be available so that the employee could still earn the award without engaging in the activity.
- Important Note: On February 1, 2021, a group of over 40 business groups and associations submitted a letter to the EEOC requesting guidance on what's allowed and what might violate federal law when it comes to offering incentives to employees who receive the COVID-19 vaccination. Many employers want to help facilitate the vaccination process but need clarification on the extent to which they can offer vaccination incentives without facing ADA and other legal ramifications enforced by the EEOC.
- The letter asks the EEOC to define what qualifies as a permissible incentive and for guidance explaining how vaccine incentives can be distinguished from wellness programs (understanding that wellness incentives have been closely scrutinized over the years and are the subject of recent regulations).

- We believe that additional guidance will be forthcoming from the EEOC that will provide more definitive direction for employers to follow regarding incentives and vaccinations.

How does having points in a wellness plan for vaccination differ from asking employees if they have been vaccinated?

- It doesn't. But a wellness plan incentive requires a reasonable alternative for employees for whom it is unreasonably difficult to satisfy the standard.

Vaccines & Workers' Compensation Exposure

If employers are requiring vaccination, what is the liability when/if an employee has a severe adverse reaction to the vaccine?

- Recognizing that specific claim facts and jurisdictional state laws govern compensability determinations, most opinions indicate that an adverse medical reaction from a mandated vaccine will likely be deemed compensable. However, opinions regarding potential compensability are more jurisdictionally varied in situations where the vaccine is not mandated. Compensability in these non-mandated scenarios might be contingent on if the employer pays for the vaccine or if the employer is highly marketing or promoting participation. So, the level of encouragement and benefit to the employer beyond simply having healthy employees may be relevant in the compensability determination.

Can you please address how workers comp coverage will be impacted with workplace vaccination policies?

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It my understanding, that Texas Workers Compensation Board is automatically denying COVID-19 Cases. Your thoughts?

- We are not aware of any jurisdictionally driven directive from Texas denying COVID-19 illness claims. A recently released information (February 2021) by the Texas Department of Insurance, Division of Workers' Compensation, provides detail on COVID claims and disposition rates, including claims accepted, denied and under investigation.

Mandating vs. Encouraging Vaccination

Would you say there has been an overall shift in employers' position regarding encouraging and incenting the vaccine vs. the previous educate/communicate approach?

- If you make any vaccine mandatory, you should ensure that your policies fully inform employee of how to seek an exception as an accommodation. You must also be prepared with a full accommodation procedure. Many of the employers we work with are encouraging, but not requiring, the COVID-19 vaccine.

Can an employer refuse to return employees back to work if they are not vaccinated? To avoid them exposing others who are vaccinated.

- Decisions such as this should be made in consultation with counsel. The December 16, 2020 EEOC guidance identified instances in which employees who are not vaccinated may be excluded from the workplace. However, Employers may be required to provide reasonable accommodations to employees who are unable to take the vaccine due to certain medical or religious reasons.

Are you aware of any current litigation involving employer mandated vaccinations?

- Not directly, but as we have mentioned in this webinar series, decisions related to mandating vaccinations should be made in consultation with counsel. Care must be taken before excluding an employee from the workforce who indicates that he or she cannot take the vaccination due to a disability or because of a sincerely held religious belief or practice based on the requirements of the Americans with Disabilities Act (ADA) and Title VII of the 1964 Civil Rights Act (Title VII), respectively.

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