



EPSTEIN  
BECKER  
GREEN

# The Hottest COVID-19 Employment Issues

**Returning to In-Office Work: Key Employment  
Law Issues Employers Should Consider *Now***

June 8, 2021



# Presented by



**James J. Oh**

Member of the Firm  
Chicago, IL

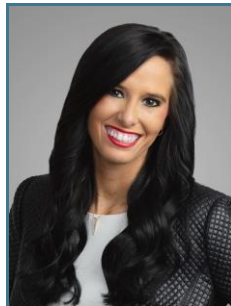
[joh@ebglaw.com](mailto:joh@ebglaw.com)



**Susan Gross Sholinsky**

Member of the Firm  
New York, NY

[sgross@ebglaw.com](mailto:sgross@ebglaw.com)



**Kathleen A. Barrett**

Associate  
Chicago, IL

[kbarrett@ebglaw.com](mailto:kbarrett@ebglaw.com)



**Brenna R. McLean**

Associate  
Chicago, IL

[brmclean@ebglaw.com](mailto:brmclean@ebglaw.com)

# Agenda



1. Vaccines: The Hamlet Question
2. Discrimination and Accommodation Issues
3. In-Office Masking and Social Distancing
4. Frequently Asked Questions Related to In-Office Work

# Vaccines: The Hamlet Question

# Vaccines: To Require or Not To Require

For employees to physically enter the workplace

- EEOC Technical Assistance Q&A issued on May 28, 2021
- Question K.1. Under the ADA, Title VII, and other federal employment nondiscrimination laws, may an employer require all employees physically entering the workplace to be vaccinated for COVID-19?
- A. The 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.
  - Other EEO considerations: e.g., some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination



# Vaccines: To Require or Not To Require

For employees to physically enter the workplace

- Question K.5. Under the ADA, may an employer require a COVID-19 vaccination for all employees entering the workplace, even though it knows that some employees may not get a vaccine because of a disability?
- A. Yes, provided certain requirements are met. Under the ADA, an employer may require an individual with a disability to meet a qualification standard applied to all employees, such as a safety-related standard requiring COVID-19 vaccination, if the standard is job-related and consistent with business necessity. If a particular employee cannot meet such a safety-related qualification standard because of a disability, the employer may not require compliance for that employee unless it can demonstrate that the individual would pose a “direct threat” to the health or safety of the employee or others in the workplace. A direct threat is a significant risk of substantial harm that cannot be eliminated or reduced by reasonable accommodation.





# Vaccines: To Require or Not To Require

## For continued employment

- Under EEOC guidance, comes down to whether the individual who is not or refuses to get vaccinated poses a direct threat to self or others. If so, the employer must consider whether providing a reasonable accommodation, absent undue hardship, would reduce or eliminate that threat. Potential reasonable accommodations could include 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. (EEOC Q&A K.5)
- Florida, Texas, Arkansas, and Montana
  - Maintain bans on vaccine passports, prohibit private employers from mandating vaccines, and/or prohibit retaliating against employees who refuse to get vaccinated
- Washington State bill ([HB 1065](#)) would prevent an employer from requiring an employee to receive the COVID-19 vaccine “as a condition of employment” if they make a “verbal or written declaration of medical, philosophical, or religious objection”
- North Carolina Occupational Safety and Health Act prohibits employers from mandating vaccination for those who object on religious grounds, except where it is necessary for the protection of the health or safety of others
- Numerous states are considering legislation designed to prevent private businesses from mandating COVID-19 vaccinations as a condition of employment, e.g., CT, IA, MI, MN, OK, PA, SC, TN, TX, & WI

# Vaccines: To Incent or Not to Incent

## Can employers offer an incentive to get vaccinated?

- EEOC Guidance issued May 28, 2021:
- Question K.16. Under the ADA, may an employer offer an incentive to employees to voluntarily provide documentation or other confirmation that they received a vaccination on their own from a pharmacy, public health department, or other health care provider in the community.
- A. Yes. Requesting documentation or other confirmation showing that an employee received a COVID-19 vaccination in the community is not a disability-related inquiry covered by the ADA. Therefore, an employer may offer an incentive to employees to voluntarily provide documentation or other confirmation of a vaccination received in the community. As noted elsewhere, the employer is required to keep vaccination information confidential pursuant to the ADA.





# Vaccines: To Incent or Not to Incent

## Can employers offer an incentive to get vaccinated?

- EEOC Guidance issued May 28, 2021:
- Question K.17. Under the ADA, may an employer offer an incentive to employees for voluntarily receiving a vaccination administered by the employer or its agents?
- A. Yes, if any incentive (which includes both rewards and penalties) is not so substantial as to be coercive. Because vaccinations require employees to answer pre-vaccination disability-related screen questions, a very large incentive could make employees feel pressured to disclose protected medical information.



# Vaccines: To Incent or Not to Incent

## Can employers offer an incentive to get vaccinated?

- EEOC Guidance issued May 28, 2021:
- Question K.18 and K 19: same questions under GINA (Genetic Information Nondiscrimination Act) – answer is yes to both questions.
- However, under GINA, employers may *not* offer an incentive to an employee in return for an employee's *family member* getting vaccinated by the employer or its agent. Providing such an incentive to an employee because a family member was vaccinated by the employer or its agent would require the vaccinator to ask the family member the pre-vaccination medical screening questions, which include medical questions about the family member. Asking these medical questions would lead to the employer's receipt of genetic information in the form of family medical history of the employee. The regulations implementing Title II of GINA prohibit employees from providing incentives in exchange for genetic information.



# Vaccines: To Pay for Time or Not To Pay for Time To Get Vaccine

If an employer mandates the vaccine, must the employer provide paid time off to get vaccinated?

- IDOL guidance: Pursuant to IMWL and FLSA, if employer requires vaccinations, then the time the employee spends getting the vaccine “is likely compensable,” even if employee gets vaccinated during non-working time
- American Rescue Plan Act of 2021 (ARPA) (eff. March 11, 2021)
  - Extends tax credits available under the Families First Coronavirus Response Act (FFCRA) for covered employers who *voluntarily* provide paid sick leave to employees for a qualifying reason, including:
    - Obtaining a COVID-19 vaccine
    - Recovering from conditions related to COVID-19 vaccines
  - Paid time off under ARPA is optional for employers



# Vaccines: To Pay for Time or Not To Pay for Time To Get Vaccine

If an employer mandates the vaccine, must the employer provide paid time off to get vaccinated?

- **California:** (SB 95 eff. Mar. 19, 2021) All employers with 26 or more employees must provide paid sick leave **in addition to** leave that was provided under previous laws
  - Covers vaccine appointments and time required to recover from vaccine-related side effects
  - In effect until September 30, 2021
- **New York:** (S.2588-A/A.3354-B eff. Mar. 12, 2021) All employers must provide up to **four hours** of paid time off **per injection**
  - Employees can only use the time off for their own vaccine appointment
- **Chicago:** Chicago Vaccine Anti-Retaliation Ordinance (effective April 21, 2021)
  - If employer **requires** vaccination, the worker must be provided up to four hours of paid vaccination time off per injection
  - Paid vaccination time off must be compensated at the worker's FLSA regular rate of pay
  - Vaccination appointment must occur during a scheduled work shift, to be eligible for the vaccination time off with pay
  - Workers cannot be required to use paid time off or paid sick leave to cover the hours missed for the appointment



# Discrimination and Accommodation Issues

# The Big Accommodation Issue In The COVID-19 Era

## WFH or Telework as a Reasonable Accommodation

### Those who cannot or will not get vaccinated:

- Pregnant employees and/or those who are contemplating having a family (CDC says it will not impact these individuals)
- Employees with medical issues – e.g., anaphylaxis
- Access or barrier issues to vaccination
- Religious objection
- Anti-vaccination



# The Big Accommodation Issue In The COVID-19 Era

## WFH or Telework as a Reasonable Accommodation

### Roadmap for analysis

- A. Is this a question of accommodation of a disability under the ADA, or is this a question of accommodation of religion under Title VII, or is it neither?
- B. If a question of accommodation of a disability, engage in the interactive process to ascertain whether the accommodation(s) requested is/are reasonable, whether the accommodation(s) would pose an undue burden, or whether the individual poses a direct threat to the health and safety of him/herself or others.
- C. If the accommodation requested is due to a “sincerely held religious belief, practice or observance,” then the employee may be entitled to a reasonable accommodation that does not pose an undue hardship on the operation of the employer’s business. For examples, as a reasonable accommodation, an unvaccinated employee entering the workplace might wear a face mask, work at a social distance from others, work a modified shift, get periodic tests for COVID-19, be allowed to WFH, or accept a reassignment.

# Still Caught Up In A Whirlwind

calm after the storm

Oh, the cool before the warm,  
the calm after the storm

I wish to stay forever, letting  
this be my mood

Oh, but I'm caught up in a  
whirlwind

And my ever changing moods,  
yeah

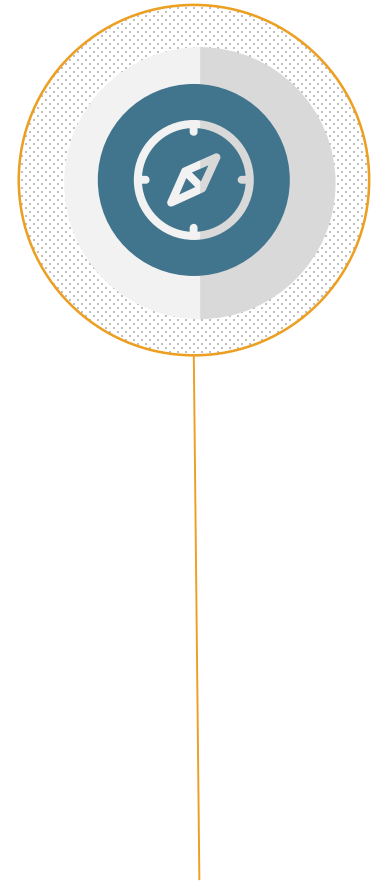
A blurred background image of a modern office hallway with warm lighting and glass partitions.

# In-Office Masking and Social Distancing

# In-Office Masking and Social Distancing:

## New CDC guidance and new issues to navigate

- CDC updated guidance for fully vaccinated people in non-healthcare settings;  
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**
  - Refrain from testing before or after travel or self-quarantine after travel
  - Refrain from testing before leaving the United States for international travel (unless required by the destination) and refrain from self-quarantine after arriving back in the United States
  - Refrain from testing following a known exposure, if asymptomatic, with some exceptions
  - Refrain from quarantine following a known exposure if asymptomatic
  - Refrain from routine screening testing if feasible



# In-Office Masking and Social Distancing:

## New CDC guidance and new issues to navigate

- OSHA revising COVID-19 guidance for employers

- On May 17, OSHA updated its website to say it is reviewing the CDC's guidance and will update its materials accordingly.
- "Until those updates are complete, please refer to the CDC guidance for information on measures appropriate to protect fully vaccinated workers."



The Centers for Disease Control and Prevention (**CDC**) has issued new guidance relating to recommended precautions for people who are fully vaccinated, which is applicable to activities outside of healthcare and a few other environments. OSHA is reviewing the recent CDC guidance and will update our materials on this website accordingly. Until those updates are complete, please refer to the **CDC guidance** for information on measures appropriate to protect fully vaccinated workers.

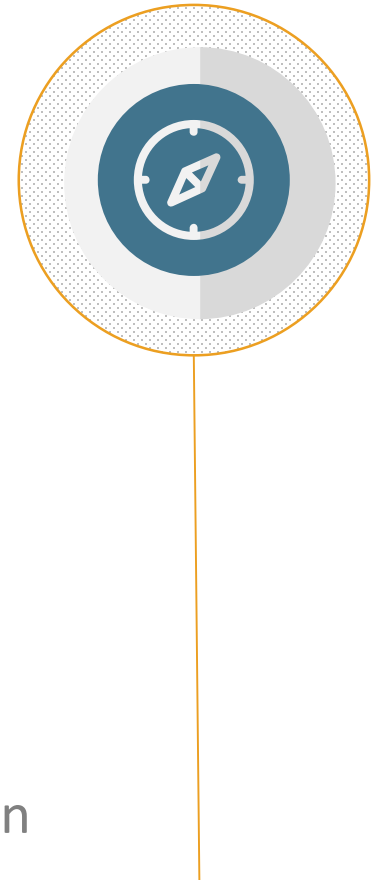


# In-Office Masking and Social Distancing:

*Check state and local rules!*

## ■ Illinois and City of Chicago

- Illinois and City of Chicago revised mask mandate to follow new CDC guidance
- Illinois executive order states “businesses are encouraged to prioritize the health and safety of their workers and customers, and may continue to require face coverings and social distancing, even for those who are fully vaccinated.”
- Chicago businesses must seek to ensure that employees and customers who are not fully vaccinated practice social distancing and wear face coverings
- Chicago businesses must ensure that every employee who interacts with customers and is *not* fully vaccinated continues to wear a mask for the duration of their shift, subject to any medical exceptions
- Chicago Department of Public Health “strongly advises” for face masks to be worn in indoor settings until the City reaches Phase Five





# In-Office Masking and Social Distancing:

## Takeaway

- CDC's guidance is only part of a broader patchwork of recommendations, guidelines and requirements
- State and local rules, in addition to industry specific standards, should be considered before modifying masking or social distancing policies or easing enforcement for fully vaccinated employees



A blurred background image of a modern office hallway with warm lighting and glass partitions.

## Frequently Asked Questions Related to COVID-19 and In-Office Work

# Frequently Asked Questions Related to COVID-19 and In-Office Work



**What about vendors, consultants and clients - can we require them to be tested and/or complete a daily questionnaire/attestation?**

---

**Can we require them to be vaccinated to enter the workplace?**

***If so, what considerations should we be aware of?***

# Frequently Asked Questions Related to COVID-19 and In-Office Work



If my Company allows vaccinated employees to go without masks, how do we find out which employees are fully vaccinated?



Can my Company have different masking policies for vaccinated and unvaccinated employees?



Can employees demand to continue to work from home, as they have been for the last year, even if they have been vaccinated?

# Epstein Becker Green Coronavirus Resource Center

## Epstein Becker Green Coronavirus News and Updates

Employers throughout all industries, and particularly those within health care, are now grappling with how to deal with the various implications of the coronavirus (COVID-19) on their businesses and workforce.

Please see below for our latest news, [subscribe for email notifications](#), and revisit for updates.



OVERVIEW	ALL TOPICS	BENEFITS	CORPORATE/BUSINESS/RETAIL	DATA/PRIVACY/HIPAA	
EMPLOYMENT AND LABOR	FDA	FFCRA/CARES ACT	GLOBAL WORKFORCE MANAGEMENT	GOVERNMENT RESOURCES	
HEALTH CARE	IMMIGRATION	OSHA	RETURN TO WORK	WAGE AND HOUR	VIDEOS & PODCASTS
EBG EVENTS					

<https://www.ebglaw.com/coronavirus-resource-center/>





EPSTEIN  
BECKER  
GREEN

# Questions?