

# COVID-19 Update: Latest on OSHA Guidelines and Vaccination Policies

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# Today's Presenters

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# Overview of Webinar Topics

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- Overview of New OSHA COVID Guidelines
- Discussion of Guidelines' Bifurcation of Workforce Along Vaccination Lines
- Update on Mandatory Vaccination Policies
- Practical Advice on Handling Reasonable Accommodation Requests Under Vaccination Policies
- Summary of OSHA's New Healthcare Emergency Standard



# New OSHA COVID-19 Guidelines

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## Coronavirus Disease (COVID-19)



### OSHA Requirements

Regulations

**NEW** [Emergency Temporary Standard for Healthcare](#)

National Emphasis Program

Enforcement

Recording and Reporting

- [Non-ETS Reporting and Recording FAQ](#)

[Workers' Rights](#)

### Guidance

For Everyone

- **UPDATED** [Mitigating and Preventing the Spread of COVID-19 in the Workplace](#)
  - [Summary](#)
  - [Hazard Recognition](#)
  - [Control and Prevention](#)

By Industry

By Topic

[Non-ETS COVID-19 FAQ](#)

### Highlights and Tools

[Vaccines.gov](#)

[CDC Coronavirus \(COVID-19\) Page](#)

[CDC Workplaces and Businesses Page](#)

[Job Accommodation Network \(COVID-19\)](#)

[OSHA Newsroom](#)

[Archived OSHA Resources](#)

# OSHA Now Following CDC Guidelines – No More Protections Required for Vaccinated

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## Fully vaccinated? You can ditch the mask, CDC says

"We have all longed for this moment," said the CDC's director, Dr. Rochelle Walensky.

**"Unless otherwise required by federal, state, local, tribal, or territorial laws, rules, and regulations, most employers no longer need to take steps to protect their fully vaccinated workers who are not otherwise at-risk from COVID-19 exposure. This guidance focuses only on protecting unvaccinated or otherwise at-risk workers in their workplaces."**

OSHA, June 10, 2021



# OSHA Recommendations for Unvaccinated

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- Grant paid time off for vaccination
- Contact trace and allow exposed employees to stay home
- Physical distancing for unvaccinated and at-risk
- Provide facial coverings or other PPE
- Education on safety policies
- Suggest that unvaccinated customers, visitors and guests wear face coverings
- Ventilation systems
- Routine cleaning and disinfection
- Implement reporting system and protections from retaliation

# Discussion: What To Do About Unvaccinated And “At-Risk” Employees?

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- “At-Risk” employees include those who cannot wear a mask or get a vaccine for disability reasons as well as employees who take immune-weakening medication that might make them more susceptible to COVID-19
- OSHA’s guidance for employers: provide unvaccinated and “at-risk” employees with face masks unless their work tasks require a respirator or other PPE
- OSHA also suggests employers implement physical distancing in all common work areas
- As a result, some employers and institutions of higher education (not many) are requiring employees to be vaccinated.
- Certain employers have either implemented or are considering implementing a program where employees that are fully vaccinated are given a badge, pin or other type of identification so that supervisors can easily identify unvaccinated or “at-risk” employees



# Pros And Cons Of “Marking” Employees Who Are Fully Vaccinated

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- While “marking” fully vaccinated employees will certainly make management’s job of complying with OSHA’s guidance on safety protocols for unvaccinated and “at-risk” employees easier, the practice presents some privacy concerns for “at-risk” and unvaccinated employees
- Continuing to wear a mask while others do not does not necessarily indicate that an employee is unvaccinated or “at-risk”
- Not being provided a “marker” from your employer, on the other hand, is a statement to everyone else in the workplace that you are continuing to wear a mask because you are either “at-risk,” have been granted a disability or religious exemption or have chosen not become vaccinated for personal reasons.
- The EEOC has not yet provided guidance on the issue, however, it is clear that these personal vaccination identifiers are not needed to comply with OSHA or CDC guidance
- Management should remain diligent in enforcing masks and distancing for the “at-risk” and unvaccinated employees and in requiring proof from fully vaccinated employees (where permitted) but, at the same time, also respect the privacy rights of “at-risk” or unvaccinated workers.

# Fallout of the New CDC Guidelines

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- Employers have largely settled into three options:
  - **Don't Ask, Don't Tell:** Allow vaccinated workers to remove masks and discontinue other COVID protocols but don't require proof of vaccination for privacy reasons.
  - **Soft Enforcement:** Use incentives or other methods to encourage voluntary reporting of vaccination to create records to use in enforcement.
  - **Strict Enforcement:** Require proof of vaccination as condition for removing masks and discontinuing COVID protocols (may be required in some states, i.e. Oregon)

# Update on Mandatory Vaccination Policies

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# Updated EEOC Guidelines – May 28, 2021

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## What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws

**i** These materials were prepared prior to the [CDC's updated guidance for fully vaccinated individuals](#) issued on May 13, 2021, and any supplements. The EEOC is considering any impact of these developments on COVID-19 technical assistance provided to date.

*Technical Assistance Questions and Answers - Updated on May 28, 2021.*

# Can Employers Mandate Vaccines?

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- Yes, but...

**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?**

*(5/28/21)*

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 discussed below](#). These principles apply if an employee gets the vaccine in the community or from the employer.

- “It is beyond the EEOC’s jurisdiction to discuss the legal implications of EUA or the FDA approach ... The EEOC’s jurisdiction is limited to the federal EEO laws.”

# Mandatory Vaccination and Disparate Impact

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- EEOC’s May 28 Updated Guidance: “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” Section K, Vaccinations.
  - Employers should not enforce a vaccine requirement that has a “disparate impact on—or disproportionately excludes—employees based on” a protected category (i.e. race, color, religion, age, sex, or national origin).
  - “Employers should keep in mind that because some individuals or demographic groups **may face greater barriers to receiving a COVID-19 vaccination** than others, some employees may be more likely to be negatively impacted by a vaccination requirement.”

# Litigation Over Mandatory Vaccination Policies

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National

## 117 staffers sue over Houston hospital's vaccine mandate, saying they don't want to be 'guinea pigs'

The lawsuit could test whether employers can require vaccinations as the country navigates out of a pandemic that has killed nearly 600,000 people in the U.S.

By [Derek Hawkins](#)

May 29, 2021 at 3:31 p.m. CDT

An experimental vaccine is one that has not gone through clinical trials and authorization or approval processes. While the coronavirus vaccines used in the United States have not received full approval from the Food and Drug Administration, they have completed rigorous clinical trials and have been authorized for emergency use. Pfizer this month asked the FDA for [full approval](#) of the coronavirus vaccine it developed with German company BioNTech.



# Dismissal of Methodist Lawsuit – June 12, 2021

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Although her claims fail as a matter of law, it is also necessary to clarify that Bridges has not been coerced. Bridges says that she is being forced to be injected with a vaccine or be fired. This is not coercion. Methodist is trying to do their business of saving lives without giving them the COVID-19 virus. It is a choice made to keep staff, patients, and their families safer. Bridges can freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else.

If a worker refuses an assignment, changed office, earlier start time, or other directive, he may be properly fired. Every employment includes limits on the worker's behavior in exchange for his remuneration. That is all part of the bargain.



# What About Vaccine Side Effects

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- Normally, OSHA would require reporting of certain covered adverse health effects related to vaccination if it is required as a condition of employment. OSHA has temporarily waived that requirement for the COVID-19 vaccine:

## Vaccine Related

### Are adverse reactions to the COVID-19 vaccine recordable on the OSHA recordkeeping log?

DOL and OSHA, as well as other federal agencies, are working diligently to encourage COVID-19 vaccinations. OSHA does not wish to have any appearance of discouraging workers from receiving COVID-19 vaccination, and also does not wish to disincentivize employers' vaccination efforts. As a result, 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. We will reevaluate the agency's position at that time to determine the best course of action moving forward.

- Employees who suffer adverse reactions may, however, be entitled to recover benefits under an employer's workers' compensation policy.

# What Does “Mandate” Mean?

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- Mandating vaccination does not require a “one size fits all” approach.
- Some employers are not terminating unvaccinated employees and instead requiring vaccination to:
  - Return to the office
  - Travel
  - Meet with customers



# Takeaways on Employer Right to Mandate

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- The EEOC has taken the position that mandatory vaccination is legal under federal law, but identified significant exceptions that create legal risk. The EEOC also failed to address state laws, which are equally important.
  - Accommodating religious and medical objections are significant legal risks that should not be taken lightly, and disputes could lead to litigation.
  - Protected concerted activity in opposition to a vaccine policy could be legally protected
  - There are significant legal concerns related to the vaccines' limited Emergency Use Authorization, and whether state law claims would be available, i.e. public policy exception to employment at will.
  - Some states may pass laws prohibiting mandatory employer vaccination policies. Bills have been introduced in South Carolina, Florida, Kentucky, Missouri, Tennessee and Washington. Montana was the first state to pass such a law.

# EEOC Updated Guidelines on COVID-19 Vaccine: Incentives

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- EEOC’s May 28 Updated Guidance: “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” Section K.3, 17, Vaccinations.
  - Employers offering the vaccine may offer incentives **so long as they are not coercive**. Because vaccinations require disclosure of potential disability related questions, overly large incentives could pressure employees to disclose protected medical information. (See Section K.17, Vaccinations)
  - Employer may provide employees and their families with educational information about the vaccine to raise awareness about the benefits of vaccination. (See Section K.3, Vaccinations)

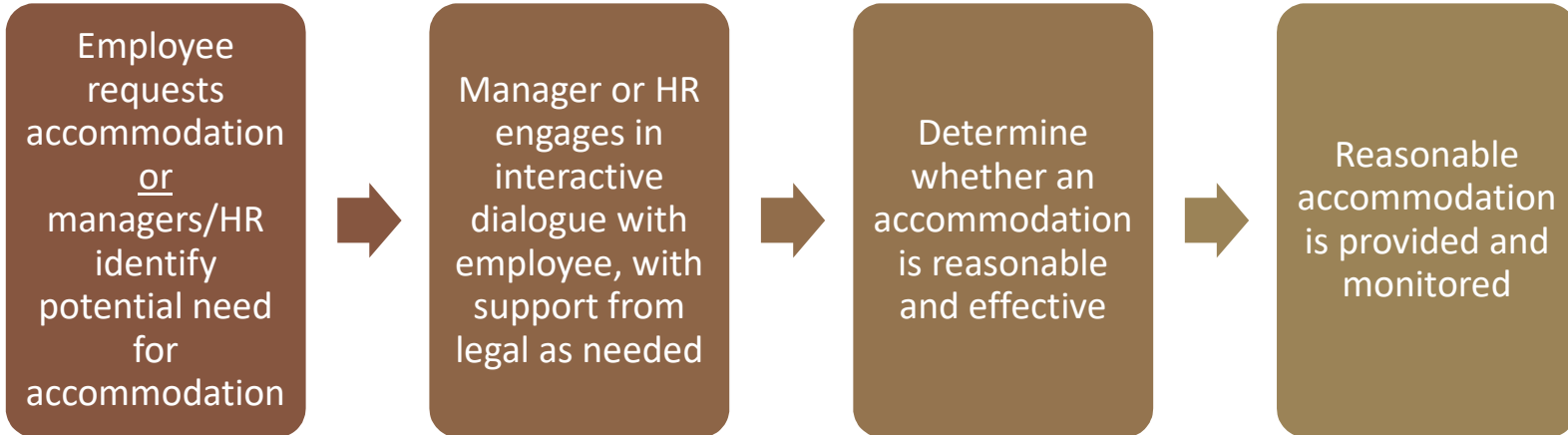


# Requests for Reasonable Accommodation Under Vaccine Policies

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# Overview of the ADA Process

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# Putting the Reasonable in an Accommodation

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## Consideration of Reasonableness involves:

- Does the proposed accommodation allow the Employee to perform the essential functions of their job? *(Is it effective?)*
- Does the proposed accommodation reallocate or eliminate the essential functions of their job? *(Is it realistic?)*
- Are there alternatives to the accommodation requested? Remember, the employer gets to pick, not the employee. *(Is it efficient?)*
- Undue Hardship *(Is it feasible?)*
  - The nature and cost of the accommodation requested.
  - The overall financial resources and size of the facility; the number of persons employed at the facility; the effect on expenses and resources of the facility and of the employer if the accommodation is made.
- Direct Threat *(Is it safe?)*

# EEOC Updated Guidelines on COVID-19 Vaccine: Reasonable Accommodations

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- EEOC’s May 28 Updated Guidance: “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” [Section K, Vaccinations](#).
  - Reasonable accommodations for those who do not get a vaccine may be available because of a disability or a sincerely held religious belief, unless providing an accommodation would pose an **undue hardship** on the operation of the employer’s business or pose a **direct threat** to any employee.
  - **Examples of reasonable accommodations** for employees who do not get a vaccination include requiring “unvaccinated employee entering the workplace [to] wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, be given opportunity to telework, or finally, accept a reassignment.”



# EEOC Updated Guidelines on COVID-19 Vaccine: Direct Threat

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- EEOC’s May 28 Updated Guidance: “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” Section K.5, Vaccinations.
  - Direct Threat (ADA)
  - A “direct threat” is a “significant risk of substantial harm” that cannot be eliminated or reduced by reasonable accommodation. [29 C.F.R. 1630.2\(r\)](#).
  - This determination can be broken down into two steps: (1) determining if there is a direct threat and, if there is, assessing (2) whether a reasonable accommodation would reduce or eliminate the threat.
  - Individualized assessment of the employee’s present ability to safely perform the essential functions of the job. These factors include (1) the duration of the risk; (2) the nature and severity of the potential harm (taking into account the employee’s work environment); (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm.
  - Determination should be based on **reasonable medical judgment** relying on most current medical knowledge (e.g. community spread at the time of assessment, statements from CDC, internal healthcare providers, etc.).

# EEOC Updated Guidelines on COVID-19 Vaccine: Undue Hardship

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- EEOC’s May 28 Updated Guidance: “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” [Section K.6, Vaccinations](#).
  - Undue Hardship – Disability (ADA)
  - An “undue hardship” on the operation of an employer’s business means a proposed accommodation imposes a significant difficulty or expense. [29 C.F.R. 1630.2\(r\)](#).
  - The proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, who may be ineligible for a vaccination or whose vaccination status may be unknown, can impact the ADA undue hardship consideration.
  - Employers may rely on **CDC recommendations** when deciding whether an effective accommodation is available that would not pose an undue hardship.

# EEOC Updated Guidelines on COVID-19 Vaccine: Undue Hardship

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- EEOC’s May 28 Updated Guidance: “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” Section K.12, Vaccinations.
  - Undue Hardship – Religious Accommodation (Title VII)
  - Under Title VII, courts define “undue hardship” as having more than minimal cost or burden on the employer.
  - Considerations relevant to undue hardship can include the proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, whose vaccination status could be unknown or who may be ineligible for the vaccine.
  - The employer should ordinarily assume that an employee’s request for religious accommodation is based on a sincerely held religious belief, practice, or observance.
  - However, if an employee requests a religious accommodation, and an employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information. *See* 29 C.F.R. 1605.

# EEOC Updated Guidelines on COVID-19 Vaccine: Pregnancy

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- EEOC’s May 28 Updated Guidance: “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” Section J, Pregnancy; K.13, Vaccinations.
  - Under Title VII, some employees may seek job adjustments or may request exemptions from a COVID-19 vaccination requirement due to pregnancy.
  - If an employee seeks an exemption from the vaccine requirement due to pregnancy, the employer must ensure the employee is being treated the same as others who are similar in the their inability to work, meaning they may be entitled to job modifications (including telework), changes to schedules or leave to the extent such modifications are provided for other employees unable to work.

# EEOC Updated Guidelines on COVID-19: Teleworking as an Accommodation

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- EEOC’s Updated Guidance: “What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” Section D.15, Reasonable Accommodation.
  - An employer who grants telework for the purpose of slowing COVID-19 does not have to automatically grant telework as a reasonable accommodation when it reopens the worksite. For example, if:
    - there is no “disability-related limitation”
    - “the employer can effectively address the need with another form of reasonable accommodation, then the employer can choose that alternative to telework”
    - the “employer is permitting telework to employees because of COVID-19 and is choosing to excuse an employee from performing one or more essential functions, then a request – after the workplace reopens- to continue telework as a reasonable accommodation does not have to be granted if it requires continuing to excuse the employee from performing an essential function.” **Temporarily excusing performance of essential job functions due to COVID-19 does not permanently change a job’s essential functions.**

# Discussion: Examples of Religious Requests

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- “Vaccination violates my religious beliefs [undefined]”
- “I can’t take any vaccine that was created using fetal tissue because of my opposition to abortion.”
- “Vaccination is against the teachings of the Catholic Church.”
- “I won’t take a drug that is experimental.”

# OSHA's New Healthcare Emergency Temporary Standard

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# OSHA's COVID-19 Emergency Temporary Standard (ETS) for Health Care

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- **New Enforcement Directive**

- OSHA just released its directive for Compliance Officers for the enforcement of all aspects of the ETS' requirements, most of which became effective on July 5, 2021.
- The Enforcement directive details the items that Compliance Officers should be reviewing and considering during an inspection, including interviews with workers, direct inspection of safety gear and, most importantly, whether the ETS applies at all.
- Notably, the directive leaves the coverage questions to the discretion of the Compliance Officer in many cases.
- With regard to the ETS' exemption from coverage for employees "whose workforce is fully vaccinated with no reasonable expectation that any person with suspected or confirmed COVID-19 will be permitted entry," the directive states that the Compliance Officers may verify the employer's statements by interviewing employees at the site about their "vaccination status" and request documentation.



# Health Care Providers Covered By The ETS Should Now Be In Compliance

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- Develop and implement a COVID-19 Plan
- Report COVID-19 cases to OSHA
- Provide pay to workers when a confirmed or suspected diagnosis of COVID-19 makes them unable to work
- Outline procedures for determining an employee's vaccination status, such as asking the employee and documenting the employee's answer, photocopying the employee's vaccination card and/or requesting that the employee provide other evidence such as a letter from a physician.

# Legal Challenges To ETS

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- The AFL-CIO and the UFCW filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit on June 24, 2021
- National Nurses United filed a Petition for Review in the 9<sup>th</sup> Circuit the same day
- The nurses union withdrew its petition for review on July 7, 2021
- The petitioners will be facing an uphill battle due to a unanimous DC Circuit panel decision issued on June 11 and July 28, 2020 denying a similar suit from the AFL-CIO last summer attempting to force OSHA to issue a COVID-19 ETS

# Return to Work Checklist (available upon request)



## Return to Work Post-Coronavirus Checklist

### 1. Planning and Communication

- Decide the right time to reopen**
  - Monitor federal, state, and local closure orders, re-opening guidelines, industry practices, and geographic considerations
  - Comply with state and local orders regarding return to work and capacity limits
- Formulate return-to-work plan based on business needs and employee communication**
  - Consider surveying the employee population to gauge attitudes regarding returning to the workplace
  - Return to work plan options include:
    - Returning all employees to in-office work on the same timeline
    - Returning employees in an incremental timeline, based on employees' willingness and desire to return to the office
    - Staggering days or weeks employees are on the job site
    - Transitioning certain workers or jobs to remote only positions
- Prepare communication to employees regarding return to work plan**
  - Announce return to work details in advance to allow employees to plan ahead
  - Establish a plan for employees to maintain communication with management
  - Communicate details regarding COVID-19 safety precautions and protocols and their duration
  - Review any applicable collective bargaining obligations to make changes to the workplace upon re-opening

### 2. Workplace Safety

- Review applicable OSHA and CDC standards**
  - Monitor local and federal guidance for best practices and requirements for employers ([OSHA guidance](#), [CDC guidance](#))
- Continue encouraging employee hygiene and social distancing measures**
  - To the extent possible, implement social distancing requirements, such as staggered shifts, breaks, spacing between desks and community areas
  - Consider adapting the workspace as much as possible to facilitate social distancing
  - Limit large in-person meetings in favor of virtual meetings where possible
  - Minimize physical contact (*i.e.* handshakes, cough etiquette, etc.)
  - Limit gatherings in common areas (*e.g.* breakrooms or kitchens)
  - Intensify janitorial sanitation, particularly in commonly areas, touched surfaces, and make hand sanitizer, wipes, and soap readily available
  - Make efforts to increase air exchange in the building, if possible
  - Educate employees regarding best hygiene practices (*e.g.* proper handwashing, avoid touching face, practice social distancing)
  - Promptly respond to any safety related concerns raised by employees
  - Comply with protocol for confirmed or suspected COVID
- Consider whether face masks, gloves, or other protective equipment are mandatory or optional**

### 3. Vaccinations

- Mandatory or Voluntary?**
  - Federal employment 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 or the ADA.
  - If an employer elects to maintain a voluntary vaccination policy, it may offer incentives (*e.g.* PTO, bonuses, prizes, etc.) so long as they are not coercive. Because vaccinations require disclosure of potential disability related questions, overly large incentives could pressure employees to disclose protected medical information.
  - If an employee seeks an exemption from the vaccine requirement due to pregnancy, the employer must ensure the employee is being treated the same as others who are similar in their inability to work, meaning they may be entitled to job modifications (including telework), changes to schedules or leave to the extent such modifications are provided for other employees unable to work.
  - Employers should ensure their vaccine requirement (if any) does not treat employees differently, or have a disparate impact upon them, based on their race, color, religion, age, sex or national origin.
  - Employee vaccination information is considered confidential medical information and should be appropriately protected.
- Vaccine Reasonable Accommodations**
  - In some circumstances, Title VII and the ADA require an employer to provide reasonable accommodations for employees who, because of a disability or a sincerely held religious belief, do not get vaccinated for COVID-19, unless providing an accommodation would pose a direct threat (29 C.F.R. 1630.2(r)) or an undue hardship (29 C.F.R. 1630.2(p)) on the operation of the business.
  - 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

### 4. Preparation for a Physical Return to Work

- Update documentation on essential job functions (job postings, internal job descriptions, etc.) in anticipation of physical return to work policy rollout and additional requests for a reasonable accommodation.
- Articulate and document justifications for the physical return to work. For example, fewer mentorship opportunities, less visibility and collaboration with co-workers, blurred boundaries between work and home life, limited opportunities to get to know colleagues (particularly new hires), etc.
- Reminders**
  - It is unlawful for an employer to disclose that an employee is receiving a reasonable accommodation or to retaliate against an employee for requesting an accommodation.
  - All documentation relating to an employee's disability or reasonable accommodation (including the interactive process), must be treated as confidential and stored in a medical file separate from the personnel file.

### 5. Employee Benefits and Compensation

- Review whether any changes need to be made to health and welfare plans**
  - Determine whether employees returning to work will need to re-enroll or update prior plan elections
  - For cafeteria plans which may have offered individual spending accounts for a year, determine whether unused portions during an interim absence will be restored upon rehire
  - Determine whether any probationary periods apply during which a rehired employee will not be covered (for instance, Union benefit programs)
  - If special COVID-19 related benefits were offered under the health plan (for example, reduced co-pays and deductibles for COVID-10 care), confirm whether the health plan document needs to be amended and a Summary of Material Modifications (SMM) issued to

