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NAVIGATING THE NEXT.

COVID-19 Vaccines: Legal Considerations for Retailers in Light of Latest Developments

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Vaccine Distribution

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Vaccine Distribution CDC Recommendations

Advisory Committee on Immunization Practices (ACIP)

Phase 1a

Frontline healthcare workers; residents of long-term-care facilities

Phase 1b

Frontline essential workers (teachers; childcare, meat plant, grocery store, prison, public transit employees); individuals age 75+

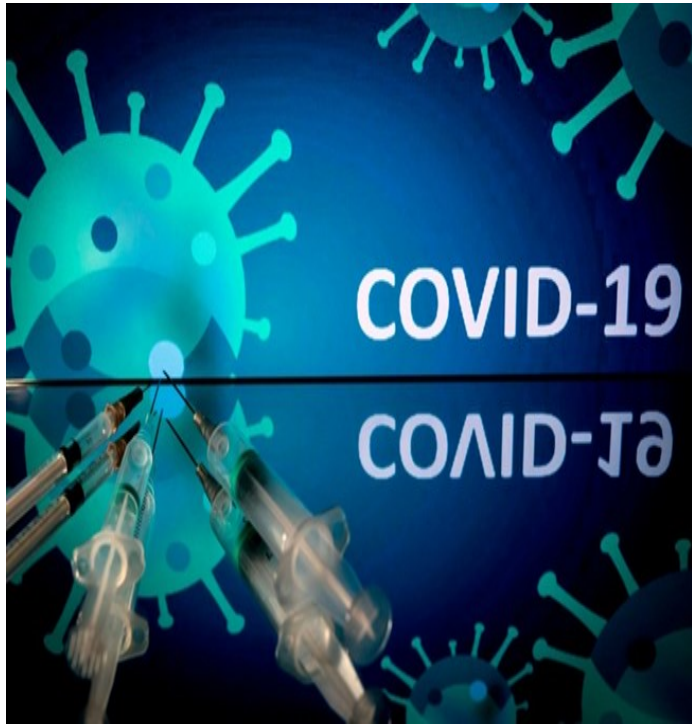
Phase 1c

Individuals age 65-75; individuals age 16+ with high-risk medical conditions; other essential workers

Implementation of ACIP's recommendations varies by jurisdiction

States may determine any limits and restrictions on vaccine distribution

Vaccine Distribution Rollout

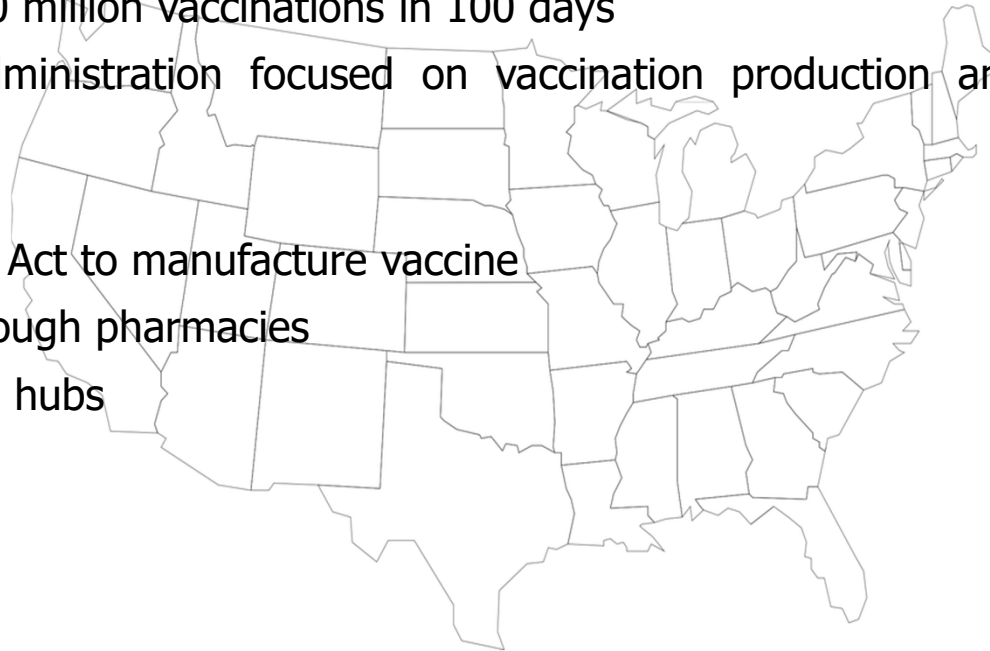


- CDC ACIP guidelines followed by states, but distribution timing differs state to state
 - Practically, we have seen:
 - Supply hasn't kept up with demand
 - Disparity in distribution across United States
 - Workforce capacity issues with putting "shots in arms"
 - Vaccine hesitancy among several ethnic and cultural groups, women of child-bearing age

Vaccine Distribution Rollout

Biden Administration

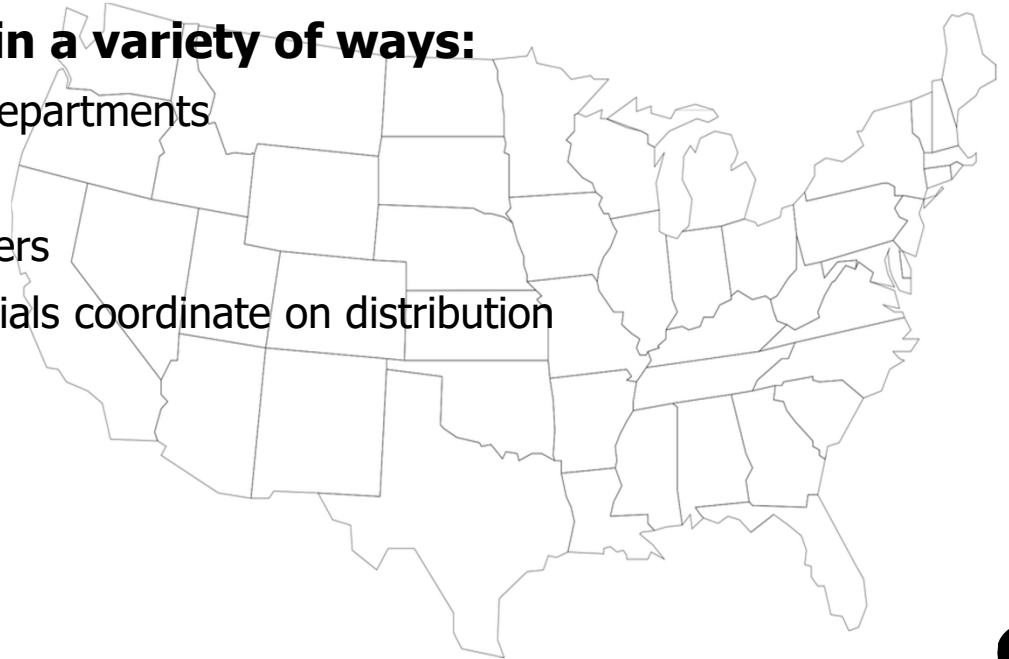
- Purchase of additional vaccines manufactured by Pfizer and Moderna
- Goal set of 100 million to 150 million vaccinations in 100 days
- First days of the Biden administration focused on vaccination production and distribution issues:
 - ❑ uneven distribution
 - ❑ use of Defense Production Act to manufacture vaccine
 - ❑ deployment of vaccine through pharmacies
- Large community vaccination hubs
- COVID-19 stimulus package



Vaccine Distribution Rollout

States organizing distribution in a variety of ways:

- Commissions under state health departments
- Via the governor's offices
- Task forces that include stakeholders
- State and county/local health officials coordinate on distribution



Vaccine Points of Dispensing (PODs)

Community Locations	Closed PODs
State/local agencies that dispense and administer vaccines	Closed PODs staffed and managed by organizations for their own workers (e.g., employees and possibly their family members)
	Closed POD Obligations: <ul style="list-style-type: none">• Provide clinical personnel (or third-party vendors) qualified to administer the vaccine• Vaccine storage and transportation from the local public health agency to the workplace
	Reach out to local public health agencies to determine feasibility

Vaccine Points of Dispensing (PODs)

Employers Establishing Vaccine PODs:

- Open vs. closed PODs: contracts with local health authorities, third-party administrators.
- Employment law concerns: GINA; ADA – prescreening questions could implicate these laws if not appropriately outsourced to third party and carefully managed.
- Healthcare regulatory concerns: CDC guidelines for storage and maintenance of vaccines; medical direction and oversight of administration; medical evaluation for adverse reactions; use of Drug Enforcement Agency (DEA) issued license for receipt of vaccine and oversight by pharmacy board.
- PREP Act liability issues: must meet definition of “program planner” to obtain liability protection afforded under PREP Act.
- Employee benefits issues: if not conducted as voluntary wellness program.

Vaccine Legal Issues at the Federal Level

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No Federal Mandates . . . Yet

- Currently:
 - No federal requirement for employers to provide or offer to provide the vaccine.
 - No federal prohibition on employers mandating or recommending the vaccine.
- Caveats:
 - OSHA's General Duty Clause concerns (particularly in light of new guidance).
 - State laws may provide otherwise, in terms of either prohibiting or requiring mandatory vaccinations or creating paid leave requirements.
 - Multiple pending state law bills on whether a vaccine can be mandatory.

EEOC: An Employer May Mandate COVID-19 Vaccines

- Provided that reasonable accommodations (absent undue hardship) are provided under the ADA (for disabilities) and Title VII (for sincerely held religious beliefs).
 - Qualifying disabilities likely narrow
 - May ask for proof of sincerely held religious beliefs, in some circumstances
- Caveats:
 - Likely a mandatory subject of bargaining for unionized companies (if permitted at all by a CBA)
 - EEOC position may not be accepted by the courts
 - State laws may provide additional exceptions or broader accommodation requirements (e.g., political objectors)

Supporting a Vaccine Mandate under the ADA

- EEOC: Vaccine requirement is a permissible safety-based qualification standard under the ADA, if an unvaccinated employee poses a direct threat to the health and safety of others in the workplace.
 - Direct Threat: “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.”
 - Must conduct individualized assessment and rely on current medical judgment.
 - “Direct Threat” is unlikely to exist for remote workers.
 - EEOC: An employer’s “conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus in the worksite.”
 - Assessment should be ongoing and evolve, as risk factors may change over time.

Accommodating Unvaccinated Employees

- Accommodations may include providing additional protective gear, isolating or moving an employee's workstation, modifying nonessential job duties, or providing temporary reassignment.
- EEOC: It is lawful to exclude an employee who cannot get vaccinated because of a disability or sincerely held religious belief if there is no available reasonable accommodation.
 - ADA: Consider undue hardship and direct threat analysis
 - Title VII: Consider undue hardship analysis (which may include safety risks)
- If no workplace accommodations are available, consider whether the employee may be able to perform the position remotely.
- If remote work is not possible, consider available leave options under federal, state, and local laws and the employer's policies.

Mandating Vaccines – Practical Considerations

Consider the impact on employee morale

- Safety concerns (particularly with respect to vaccines approved under an EUA)
- Ideological or political objections
- Potential for increased union-organizing efforts

Potential turnover and staffing shortages

- Some employees may feel so strongly in their convictions that they choose to quit
- If a significant number of employees stand to quit, then what?
- Must be prepared and willing to terminate (otherwise high-performing) employees who refuse vaccination

Voluntary Vaccines – Incentives Generally

Big Question: How to increase the number of employees who get vaccinated if it's not mandatory?

- Employers have broad discretion in encouraging employees to get vaccinated.
- Incentive efforts:
 - Financial incentives
 - Health and wellness campaign
 - Video of senior leadership getting vaccinated (if eligible)
 - Gift cards/swag/store credit
 - PTO time

Voluntary Vaccines – Financial Incentives

Big Question: Who is providing the vaccine?

- Any contractual relationship with the employer?
 - If no contractual relationship, no limit on incentives
 - If contractual relationship, unsettled area of law
- Although the vaccine itself is not a medical exam, prescreening questions are disability-related inquiries
- Prescreening questions by an employer must be “job-related and consistent with business necessity” OR part of a “voluntary” wellness program

Voluntary Vaccines – Financial Incentives

- Possible interpretations:
 - Vendor questions – not employer inquiries (like EAP) → no limits
 - Questions are job-related and consistent with business necessity → no limits
 - Questions are part of a voluntary wellness program
- Under voluntary wellness program, EEOC's position is that if the financial incentive is too high, it could be deemed coercive
 - Proposed EEOC regulations state that incentives can only be *de minimis* (such as a water bottle or "a gift card of modest value," but these are not final
- EEOC has not yet issued guidance specific to giving incentives for a COVID-19 vaccine
 - Most conservative way to proceed is to only provide *de minimis* incentives if there is a contractual relationship with vaccine provider

Financial Incentives and Reasonable Accommodations

Question: Do employers need to provide reasonable accommodations for incentives if an employee cannot get vaccinated because of disability or religious objection?

- Incentives not necessary to perform the essential functions of the job
- Term or condition of employment?
- Disparate treatment? Who is the comparator?
- Yet another issue where guidance from the EEOC would be helpful

Vaccine Wage and Hour Concerns

Question: Do employers need to pay for the cost of vaccines?

- Not currently. All vaccines available now are paid for by federal government, but this could change in the future as vaccines supplies/producers increase

Question: Do employers need to pay employees for time spent getting vaccinated?

- Likely not, particularly if an employer is recommending, but not requiring, that employees get vaccinated
- Good federal law on “preliminary and postliminary” activities, but state law can differ (particularly in CA)
- If getting vaccinated is mandatory or employees must report to a company location at a certain day/time, pay might be required

Vaccine Wage and Hour Concerns

Question: Do incentives need to be included in regular rate calculations?

- Generally, no.
- Assumes incentives not tied to hours worked, services rendered, job performance, or the quality/quantity of the employee's work.

Proof of Vaccination – Employees

Big Question: Can an employer require its employees to show proof of vaccination?

- Whether a vaccine is mandatory, incentivized, or purely voluntary, employers can ask for proof of vaccination.
 - However, questions about why an employee was not vaccinated can only be asked where they are job-related and consistent with business necessity
- Vaccination documents should be treated as confidential records under the ADA.
- Employers with a mandatory vaccine requirement for new hires can refuse employment for those who have not received a vaccine.
 - But must provide accommodations to candidates for disability or religious needs.

Proof of Vaccination – Customers

Big Question: Can an employer require its customers to show proof of vaccination?

- Currently, no law prohibits retailers from requiring customers to show proof of vaccination
- But ADA/Title III for people with disabilities who cannot get vaccinated
- Customer relations issues – how to deal with customers who are not vaccinated or simply do not want to show proof of vaccination to enter a store

Safety Measures after Vaccination

Big Question: Can we get rid of mask standards/social distancing for vaccinated employees?

- Not so fast; state and local guidance is still in place requiring safety measures for all in-person work
- These requirements were drafted before vaccines were available and generally do not sunset for vaccinated employees
- Datasets are promising, but not definitive, regarding the risk of transmission for vaccinated workers
- Potential liability if an employer relies only on vaccines to prevent the spread of COVID-19 and removes other workplace safety measures

Representations to Customers

Big Question: Can a retailer advertise that all its employees have been vaccinated?

- Likely not
- Must permit accommodations for disability/religious reasons
- Risk of discrimination claims if an employer only gives opportunities (such as lucrative personal sales relationships) to vaccinated employees
- Better approach → Announce that all employees “eligible for a vaccine” have been vaccinated

Workers' Compensation

- State-specific analysis, potentially dependent on:
 - Whether vaccination is mandated
 - Where vaccination occurs
- If mandatory, likely covered*
 - Resulting injuries from other required inoculations found to be “in the course of employment” or “for the employer’s benefit,” and, thus, compensable
 - Potential caveat for vaccines approved only under EUA
- If optional:
 - Vaccination at the workplace is potentially covered*
 - Vaccination at another location (e.g., public distribution) is likely not covered

Practical Guidance

- If providing vaccines on-site, consider logistical issues (freezers/dry ice, trained personnel, storage of medical records, time off for side effects, etc.)
- Clear communications to employees on vaccine requirements and expectations
 - Consider union concerns (careful drafting to avoid encouraging organization efforts)
- If offering an incentive, make clear what an employee must do to be eligible
 - Will accommodations be provided for those unable to participate in incentive program?
- Provide training or dos/don'ts to managers
 - What they can say (company encourages employees to get vaccinated)
 - What they cannot say (“Why didn’t you get vaccinated?”)
 - Reiterate importance of protecting confidentiality of those requesting an accommodation
 - Avoid scheduling vaccinated employees for “better” shifts or directing customers only to work with vaccinated employees

Questions?

- For follow-up on any unanswered questions, email:
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Coronavirus COVID-19 Resources

We have formed a multidisciplinary **Coronavirus/COVID-19 Task Force** to help guide clients through the broad scope of legal issues brought on by this public health challenge.

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To help keep you on top of developments as they unfold, we also have launched a resource page on our website at www.morganlewis.com/topics/coronavirus-covid-19

If you would like to receive a daily digest of all new updates to the page, please visit the resource page to [subscribe](#) using the purple “Stay Up to Date” button.

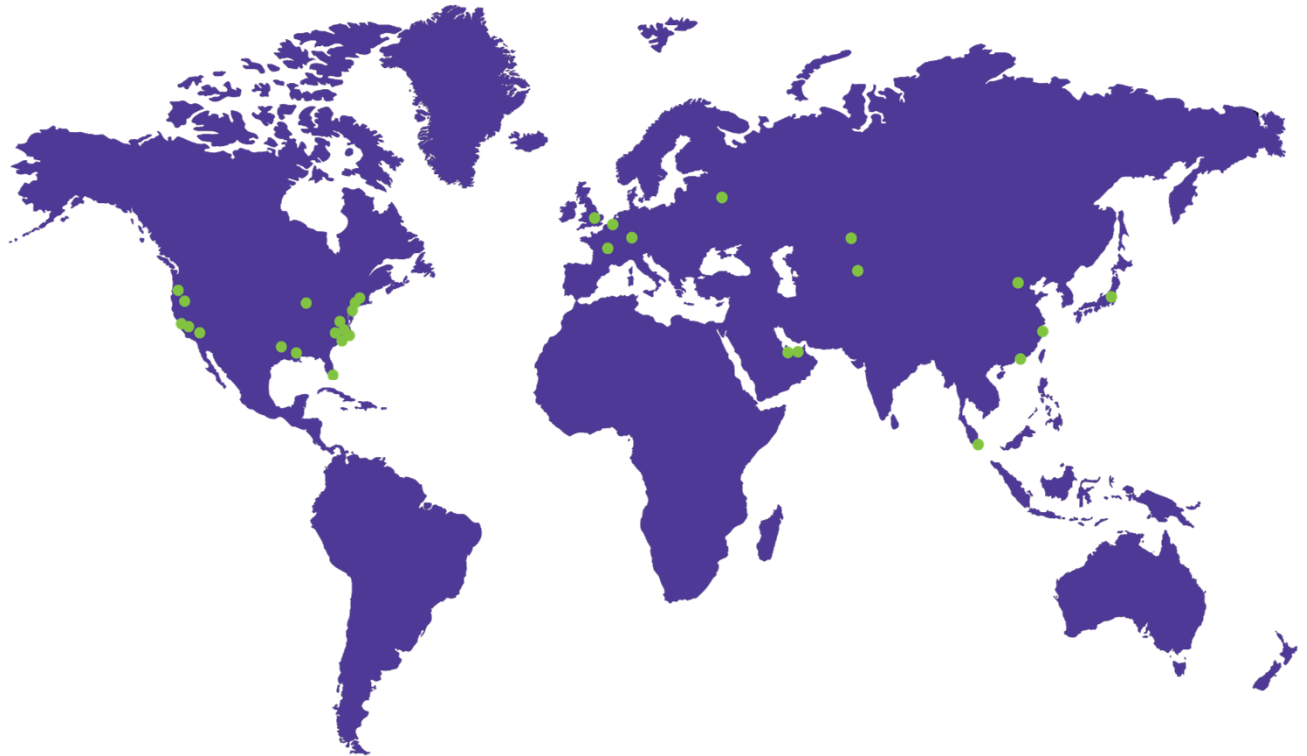


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