

U.S. Department of Justice

Guidance: Coronavirus/COVID-19 Questions Regarding Vaccinations

U.S. Government agencies face a variety of legal issues concerning employee vaccinations, including privacy, office safety, and discrimination issues. This FAQ is designed to provide components some guidance on common issues involved with employee vaccinations. It is not intended as legal advice.

May components of the Department of Justice (“Department” or “DOJ”) track employees and vaccinations?

The Department of Justice (“Department” or “DOJ”) is subject to the Privacy Act of 1974 and other laws, regulations, and policies that impact how DOJ generally collects and uses personally identifiable information (“PII”), as well as laws, regulations, and policies focused specifically on personal health information. As further described below, under applicable requirements and only as needed for the components’ business purposes, components may create lists of employees to track vaccinations, e.g., who would like to receive a vaccine, who has received the vaccine, who has been offered a vaccine, and who was offered a vaccination but declined. Such tracking lists should be maintained in secure administrative or management files, retrieved by the topic of the list, e.g., “COVID-19 Vaccinations in [field office],” and accessible only to component personnel who need this tracking information to perform their job duties, i.e., those who have a “need to know.” It would be best not to include on the list any PII that is not necessary for tracking; for example, when an employee declines a vaccination for health reasons, the list should not identify or describe the health condition or other personal information provided by the employee. In fact, it may not be necessary to record an employee’s declination at all.

Can employers require employees to be vaccinated before returning to work?

At present, the Department is not requiring employees to be vaccinated, and will provide additional guidance about requiring vaccinations at a future date.

The Equal Employment Opportunity Commission (EEOC) has issued guidance that allows employers, when vaccines are generally available and under certain circumstances, to require employees, even outside of certain essential and/or healthcare related occupations, to get vaccinated against COVID-19 before returning to the workplace.¹ However, the component should provide alternatives, such as telework, for employees who cannot receive the vaccine due to personal or health reasons. The employer should also be cautious when mandating vaccination, due to potential tort claims arising out of any employees who suffer health

¹ U.S. Equal Employment Opportunity Commission, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, (Dec. 16, 2020), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

complications from the vaccination.² While a mandatory vaccination policy is lawful, there are many risks that accompany such mandatory programs.³ As an alternative for the time being, Components should strongly consider policies that encourage vaccination and continue to consider alternative work options for unvaccinated employees.

Can a supervisor ask an employee for documentation or other verification of that employee's vaccination status?

Components should have a valid business reason for requesting this information (including a request to merely indicate if he or she has been vaccinated). Inquiring about an employee's vaccine status for business purposes does not likely implicate discriminatory issues. According to the EEOC, asking or requiring an employee or provide proof of their receipt of the COVID-19 vaccine does not implicate the American Disabilities Act (ADA).⁴ To avoid implicating the ADA and other issues, supervisors should avoid asking further questions that elaborate on why the employee chose not receive the vaccine, because such questions could elicit information about health or disability. If documentation of vaccination is needed, supervisors should also warn employees that they should not include other medical information.⁵

Can a supervisor ask an employee if the employee has had COVID-19 in the past?

As a general matter, there should be no business need to request this information. the Centers for Disease Control and Prevention (CDC) notes that, if an employee has had a mild case of COVID-19 in the past, they may still be permitted to be around others if 10 days have passed since symptoms first appeared and 24 hours have passed with no fever without the aid of fever-reducing medications.⁶ This guidance does not apply to those who had a severe case of COVID-19.⁷

Questions have been raised about whether those who had COVID-19 in the past could be reinfected, or instead, whether they have some level of protection against reinfection, possibly similar to receiving a vaccination. The CDC has stated that "cases of reinfection with COVID-19 have been reported, but remain rare."⁸ Nonetheless, it appears there is no concrete evidence as to whether having had COVID-19 provides protection similar to that of a vaccine. CDC continues to study this issue.

² Natalia Oehninger Deluane et al., *Legal and Practical Considerations for Employers Weighing COVID-19 Vaccination as a Condition of Continued Employment*, (Dec. 2020), <https://www.jonesday.com/en/insights/2020/12/legal-and-practical-considerations-for-employers-weighing-covid19-vaccination>.

³ *See Can employers adopt mandatory COVID-19 vaccination programs? Should they? Key considerations in light of the EEOC's COVID-19 vaccine guidance.*

⁴ *See id.* K.3.

⁵ *See id.* K.2; K.5.

⁶ Centers for Disease Control and Prevention, *When You Can Be Around Others*, (Updated Dec. 1, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/if-you-are-sick/end-home-isolation.html>; also *FAQs for Workplaces and Businesses*, <https://www.cdc.gov/coronavirus/2019-ncov/community/general-business-faq.html#Suspected-or-Confirmed-Cases-of-COVID-19-in-the-Workplace>.

⁷ *See id.*

⁸ *See Reinfection with COVID-19*, CDC (Oct. 27, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/your-health/reinfection.html>.

Absent a business need for information about previous illness, it should not be requested. The CDC currently advises against requiring that sick employees provide a negative COVID test or a note from their health care provider prior to returning to the workplace.

What are the best practices for collecting and maintaining information relating to employees who are offered the vaccine?

Employers that offer the COVID-19 vaccination to their employees may keep track of how or if employees are receiving the vaccine. However, those States and other jurisdictions that are making vaccines available to DOJ employees are going about it in different ways, necessitating differing information requirements. For example, some States may only request the numbers of employees willing to receive the vaccine, and may merely provide vouchers for employees to take to a vaccination site. Alternately, a jurisdiction may ask DOJ to provide names of approved employees directed to a testing site. When tracking the necessary information, supervisors should avoid keeping records of unnecessary personal information, including health information. See response above for more information on records related to tracking vaccinations.

If an employee refuses the offer to get vaccinated, he or she should not be required to disclose any further reasoning. Such disclosures may be unnecessary unless the employer mandates vaccinations and is unable to provide alternative work options.⁹ For the limited purposes of recordkeeping and keeping abreast of risks in the workplace, the supervisor can record the names of employees and their respective vaccination status.¹⁰

To comply with the Privacy Act of 1974, the employer should obtain the vaccination status directly from the employee in question,¹¹ and maintain records of the information only to the extent that it is “relevant and necessary” to accomplish workplace health and safety requirements under Executive orders and statutes,¹² such as the Occupational Safety and Health Act of 1970 (*see* Section 19¹³). Employers should maintain this information for such limited purposes only and avoid sharing with third-parties without employee consent. If a DOJ component receives a request for personally identifiable information about employees from a public health authority or other organization, the component should contact its Senior Component Official for Privacy (SCOP). Employers should also ensure that this information is kept confidential and secure, so as to avoid “substantial harm, embarrassment, inconvenience, or unfairness to any individual.”¹⁴

Best practices include maintaining tracking information in files retrieved by date, location, or situation, rather than by employee name, e.g., “COVID Vaccinations in [field office].” Such a file may include communications about the vaccinations. Communications with a specific employee and documentation concerning a specific employee’s vaccination status, including evidence of vaccination when provided, should be maintained in a supervisor’s

⁹ *See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws* at A.8.

¹⁰ *See* Occupational Safety and Health Act, 29 U.S.C. § 668 (1998).

¹¹ *See* The Privacy Act of 1974, 5 U.S.C. § 552a(e)(2) (2012).

¹² *See id.* at 5 U.S.C. § 552a(e)(1)-(e)(11).

¹³ *See id.* at 5 U.S.C. § 552a(e)(1).

¹⁴ *See id.* at 5 U.S.C. § 552a(e)(10).

medical file for that employee, separated from other personnel files for that employee, and kept confidential and secure.

If additional questions arise concerning vaccinations or employee COVID-19 issues, please contact your component's SCOP or the Office of Privacy and Civil Liberties (OPCL), at privacy@usdoj.gov.