

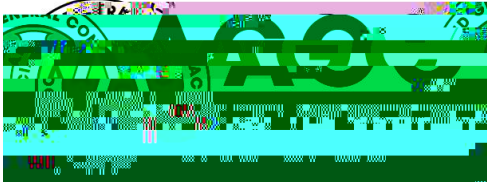
## Vaccination Q&As for Construction Employers

*This guidance is provided by AGC of America (AGC) and the law firm Fisher Phillips to inform AGC members about their rights and obligations under federal law so that they can make well-informed decisions when adopting employment policies and practices related to COVID-19 and other vaccinations. It is in no way intended to signify that AGC recommends employer vaccination mandates. AGC opposes government mandates requiring construction firms to require employee vaccination and supports construction firms' freedom to choose the best approach for their individual businesses and workforces.*

*AGC and Fisher Phillips provide this document in hopes that it will be helpful to you but without any promises that the information is accurate, complete, or up-to-date. Nothing in this document should be considered legal advice. Readers are encouraged to consult legal counsel for advice in making the best choices based on their particular circumstances, including consideration of any relevant contractual obligations and state and local laws.*

### 1. Can we require employees to be vaccinated?

The Equal Employment Opportunity Commission (EEOC) issued [updated guidance](#) on this issue on December 16, 2020. The Agency's updated FAQs do not unequivocally state that "employers can require the vaccine." However, it repeatedly answers questions discussing what actions employers can take in response to various circumstances *after* an employer has mandated the vaccine. This language plainly



The law does not permit employers to unilaterally ban employees whose underlying condition may make them especially vulnerable to COVID-19 unless the employee's condition poses a "direct threat" to their health that cannot be eliminated or reduced by reasonable accommodation. On the other hand, employers must consider *requests* for accommodation from employees with particular underlying vulnerability to COVID-19.

The Americans with Disabilities Act and provisions of Title VII of the Civil Rights Act of 1964, as amended, provide most of federal legal framework that requires employers to consider requests for accommodation based upon an employee's medical condition or sincerely held religious beliefs or practices. General philosophical objections to vaccinations do not implicate these federal laws. State or local law may also limit an employer's right to require vaccinations. These circumstances can change rapidly.

## 2. *Should* we require our employees to get a vaccine?

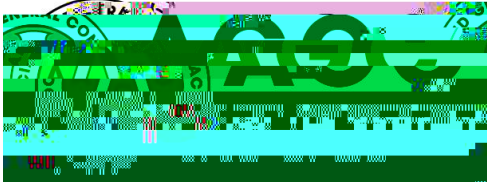
AGC of America takes no position as to whether employers should require vaccination. This is a decision that employers should make based on their particular legal obligations (federal, state, and local) and business needs.

One factor to consider is the "general duty" clause of the OSH Act, which requires employers to "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." While we [anticipate](#) that OSHA will issue standards specific to COVID-19 vaccination in 2021, in the absence of such standards, OSHA theoretically could rely on the general duty clause to cite employers who do not offer employees vaccines or keep employees safe from co-workers who refuse to get vaccinated. At the same time, workers with medical conditions who refuse to be vaccinated may be protected by the OSH Act's whistleblower provisions if they have a reasonable belief that vaccination could lead to serious illness or death.

Thus far, studies indicate that many employers have chosen to *encourage* rather than *require* flu shots, even though the CDC has said it is more important than ever to receive the flu vaccine this year. Under such a policy, employees who do not get the flu shot may be required to wear face masks at all times while on premises or near coworkers, customers or patients. Studies also indicate most employers will likely encourage, but not require, the COVID-19 vaccine when it is available to their workforce. According to the EEOC, mandating vaccines is only permitted if workers would pose "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by [some] reasonable accommodation." This is why the question of mandating vaccines is job-specific.

Additionally, a vaccine mandate would also represent a potentially enormous employee relations issue, which may vary be largely, based upon on the nature of your business. A substantial segment of the workforce may still be skeptical or resist receiving the COVID-19 vaccine for various.





5. Are there state and local laws that should be considered?

Yes. For more information, please refer to Fisher Phillips' [50-STATE CHART ON VACCINES, EXEMPTIONS, AND RELATED ISSUES](#).

6. How can we ensure the confidentiality of employee medical information with regard to a vaccine?

The ADA requires employers to keep all employee medical information separate from employee personnel files. You may store COVID-19 and/or vaccine-related medical information in existing medical files, which should be accessible only on a strict need-to-know basis. As a rule, employees' direct supervisors should not have access to their medical information.

Regarding the vaccination process, the entity that administers the vaccine must ask medical prescreening questions. Employers can minimize their exposure regarding these medical inquiries by either: a) making vaccinations voluntary; or b) by obtaining proof of vaccination through a third party (such as a clinic or pharmacy) who is not contracted with the employer.

7. If we require our employees to get a vaccine, what proof of vaccination can we require?

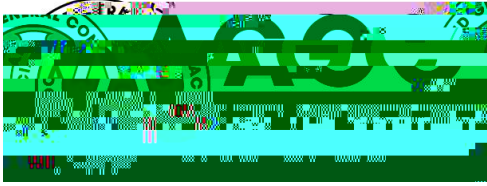
Employers can require employees to provide proof of vaccination from the administering healthcare provider or pharmacy. If an employee has chosen not to be vaccinated, employers may not inquire into the employee's reasons without being prepared to establish the job-related business necessity for doing so, based upon a reasonable, objective belief that the unvaccinated worker's presence in the workplace would constitute a significant risk of substantial harm that cannot be eliminated by a reasonable accommodation. Best practice would also be to advise employees to avoid providing any genetic information, such as family health history.

8. Can we disclose which employees have or have not been vaccinated?

You should not disclose a particular employee's vaccination status. Doing so would likely violate employee privacy laws, including but not limited to the ADA. Best practice would be, if applicable, to assure another party with a legitimate need to know that you will not send them employees who have not been vaccinated.

9. Can we mandate that our subcontractors require their employees to be vaccinated? And if so, how?

This is partially a contract issue, but if you issue such a mandate, you are far more likely to be included in any litigation that may arise from the requirement. Please see the discussion above regarding when vaccines may be mandated.



10. What if a project/property owner requires all workers on the site/project be vaccinated?

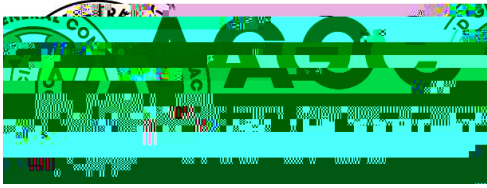
Please see the preceding response. Also, please note that even if a project/property owner requires all workers on site to be vaccinated, that does not relieve you company of its legal obligations to comply with the law as the employer. By way of example, consider what you would do if a project/property owner instructed you not to hire women – this would be illegal and your company would be responsible for following such a request or requirement.

11. We are a union contractor. Is there anything else we need to consider with respect to our vaccine policy?

If you operate your worksite under a collective bargaining agreement (including any project labor agreement), you may be required to bargain with the union over adoption of a vaccination mandate or over the effects of any vaccination policy. You should consult the management rights, health and safety, and any other applicable provisions within such agreements that may permit or restrict your authority to unilaterally adopt or implement a vaccination policy, along with any analogous past practices in effect. Before implementing any changes in that regard, you should also furnish advance notice to the incumbent union(s) and be prepared to bargain over the effects of such changes upon request. Check with your labor counsel for specific guidance.

12. Once our workers prove they have been vaccinated for COVID-19, can we relax our social distancing and facemask requirements?

For several reasons, we recommend that you not relax your social distancing and facemask requirements, even after workers are vaccinated. First, in most cases, not every worker at the jobsite will be vaccinated. Moreover, the CDC has said that experts need to understand more about the protection that COVID



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