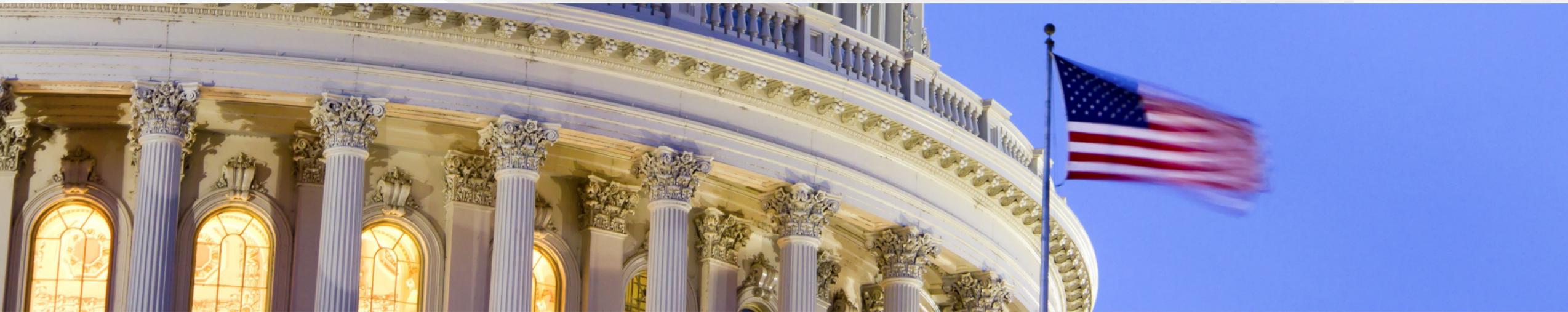


# Requiring the COVID-19 Vaccine?



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# Vaccines and the Workplace

- These general comments are based upon current guidance and circumstances.
- Decisions regarding these issues are very fact-specific.
- Always take state and local law into account.
- This situation is very fluid and could change rapidly due to a variety of factors.
- Two vaccines under FDA emergency use authorization

# Vaccine Issues – An Overview

- Flu Shots
  - CDC guidance
- CDC comments regarding the flu
- Possible Exemptions?
  - Medical
  - Sincerely-held religious beliefs
  - Other?
- COVID-19 vaccinations



# OSHA General Duty Clause

- Describes the employer's duty to maintain a workplace free of recognized hazards



# Executive Order (1/21/2021)

- Increase enforcement efforts
  - Targeted toward larger employers and employers with whistleblower complaints
  - Since pandemic started: 300 citations, about \$4m in fines
  - Adding investigators
- Revise its COVID-19 guidance by February 4
- Determine whether emergency standards are needed, implement by March 15
  - Mandatory masking?

# Role of Vaccination in Workplace Safety



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- Could it be required in certain business models?
- Can herd immunity be achieved without employers taking a stance?
- Will state tort laws protect employers who don't take steps to ensure employees get vaccinated?

# ADA – American with Disabilities Act

- 15 or more employees
- Prohibits discrimination
- Requires “reasonable accommodation”
- Limits employer’s rights to inquire/conduct medical exams
  - Must be job related, consistent with business necessity
  - Significant risk of substantial harm
  - Reliable, objective information must support employers’ concern
- Protects privacy of each employee’s medical information
- Similarly, **Title VII** may require accommodation of an employee’s [sincerely-held religious beliefs](#) or practices.

# What Does the EEOC Have to Say?

[Guidance updated on December 16, 2020](#)

- Requiring vaccination or proof of vaccination isn't a medical exam under the ADA
- Pre-screening questions asked by an employer before administering the vaccine must be job related and consistent with business necessity
- If asked for accommodation under ADA or Title VII for religious reasons, is this an undue hardship on the employer?
  - Title VII- more than a minimal cost or burden
  - ADA- significant difficulty or expense

# Policy Addressing Vaccine Expectations

- Consider *required* v. *strongly encouraged*
- Any requirement should be based on objective facts; tied to employee's job duties/job descriptions; and consistently administered.
  - Clearly describe expectations and rationale
  - Explain how to seek an exemption as an accommodation
  - Follow the *individualized* accommodation process diligently
  - Ensure no retaliation (or appearance of retaliation)
  - Safeguard all medical information - separate from general personnel files

# May Employers require a *COVID-19 Vaccine*?

- *Probably* – subject to the same exceptions as the flu vaccine.
  - Emergency Authorization only?
- Does it need to be all employees or certain positions?
- Does the requirement need to be delayed for certain employees?



# ***Should an Employer Require Vaccinations?***

- Good employee relations are vital for many reasons:
  - Clients, customers and the public notice
  - Critical to maintaining focus, productivity and community relations
- Validate approvals and appropriate delivery of the vaccine.
- Employer pays for mandatory vaccines.
- Evaluate the likely response of your employees.
- Think through logistics (i.e., on-site?)
- Do not underestimate the importance of effective communications.

# Vaccine Status-Plans for Distribution

- [FDA.gov](https://www.fda.gov) (COVID-19 Vaccines)
- [CDC.gov](https://www.cdc.gov) (COVID-19 Vaccination Program Interim Playbook)
- [COVID-19 Vaccine](#)
  - Operation Warp Speed (HHS and DoD)
  - States have discretion
- Phase 1- Healthcare Personnel
  - Long-Term Care
  - Hospitals
  - Public Health
  - Other Essential Healthcare Workers
- Phase 2- High Risk Occupations and Individuals
- Phase 3- General Population
  - Uncertain whether children will be vaccinated

# Biden Jumpstarting the Process

- Directing relevant agencies to exercise all appropriate authorities, including engaging the powers of the Defense Production Act to help “accelerate the manufacture, delivery, and administration of COVID-19 vaccine”;
- Authorizing the Federal Emergency Management Agency to begin standing up the first federally supported community vaccination centers, with the goal of 100 vaccinations centers in the next month;
- Directing the Centers for Disease Control and Prevention (CDC) to launch the federal pharmacy program with the goal of providing vaccines to community pharmacies beginning in February;
- Tasking the U.S. Public Health Service Commissioned Corps with expanding its workforce to prepare for the increased deployment of the vaccine; and
- Establishing COVID-19 Response Liaisons for each state.

# Vaccination Realities

- Unknown what percentage of Americans need to be vaccinated to achieve herd immunity
- Masks and social distancing will likely be the norm throughout much of 2021



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# What You Can Do Now

- Determine whether to mandate, encourage, or stay neutral
- Develop A plan and appoint a vaccine coordinator or committee
- Educate your employees
- Request priority status (essential workers)
- Consider vaccine registration when provided



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# What about College and University Students

- Public v. Private
- Age group is low on the distribution list
- Once readily available, balance the ongoing risk with or without requiring vaccination
- Sororities- private member organization
  - Live in v. Live out
  - Risk to chapter employees



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# Visit **FISHER PHILLIPS** **VACCINE RESOURCE CENTER** for **Employers**

Fisher Phillips has a number of resources to aid employers with the upcoming COVID-19 vaccine that can also be used during flu season. We encourage you to check back often.

- COVID-19 Vaccine FAQs
- Sample policies and procedures
- Data Bank of templates and forms
- 50-state issues
- COVID-19 Vaccine and Flu insights
- ... and more

Visit [fisherphillips.com](https://fisherphillips.com) for up-to-date information

# Final Questions



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