

Workplace Vaccine Policies



Catharine Morisset
Partner, Seattle Office
cmorisset@fisherphillips.com



Prepared For:



fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAWSM

1

This content can and will change!



fisherphillips.com

2

COVID-19: Vaccine Resource Center for Employers

<https://www.fisherphillips.com/vaccine-resource-center>



TABLE OF CONTENTS

- > Vaccine Data Bank (Templates and Forms)
- > 50-State Chart On Vaccines, Exemptions, And Related State Issues
- > COVID-19 Vaccine FAQs
- > Events
- > FP Vaccine Subcommittee Members

GENERAL KNOWLEDGE

- > FP Flash Survey Reveals: Most Employers Not Interested In Mandating COVID-19 Vaccination But Uncertain How To Incentivize Workforce Inoculation, February 2, 2021 **(NEW!)**
- > President Biden Focuses On Vaccine Distribution – What Employers Need To Know To Help Employees Roll Up Their Sleeves, January 25, 2021
- > Religious Objections To Mandated COVID-19 Vaccines: Considerations For Employers, January 7, 2021
- > 5 Ways Employers Can Begin Preparing As The COVID-19 Vaccine Priority Order Is Revealed, December 22, 2020
- > Top 7 Things You Need To Know As EEOC Says Employers May Mandate COVID-19 Vaccines, December 17, 2020
- > What Employers Need To Know After FDA Grants Emergency Use Authorization For COVID-19 Vaccine, December 14, 2020
- > Should Gig Workers Get COVID-19 Vaccine Priority?, December 11, 2020

COVID-19: Vaccine Resource Center for Employers

<https://www.fisherphillips.com/resources-alerts-charting-risk-associated-common-workplace>



COVID-19 — Vaccines/ General Questions




1. Mandatory or Voluntary?
2. What is the business reason? Is it “necessary”?
3. How will you educate employees on your policy?
4. Are you prepared to handle accommodation requests if mandatory?
5. Are you prepared to pay employees if mandatory?
6. How can you incentivize workers without violating workplace laws?

fisherphillips.com

5

Key Laws that Apply to Workplace Vaccine Policies



- Health & Safety Regulations, e.g., – Federal OSHA or WA L&I
- Americans with Disabilities Act/Washington’s Law Against Discrimination
- HIPAA
- Wage & Hour, e.g., FLSA and Washington’s Minimum Wage Act
- Taxes: FICA, state payroll taxes

fisherphillips.com

6

Biden Administration

Fisher
Phillips

- <https://www.fisherphillips.com/biden-administration-resource-center>
- OSHA rules?



fisherphillips.com

7

COVID-19 — Vaccines

Fisher
Phillips



- Decision point: Mandatory or Voluntary?
- No mandate from OSHA or WA OSHA (yet?)
- EEOC: Employers *may* mandate that all employees vaccinate (at your cost). <https://www.fisherphillips.com/resources-alerts-top-7-things-you-need-to-know>
 - Not all states have adopted this EEOC guidance

fisherphillips.com

8

COVID-19 — Vaccines

Fisher
Phillips



- What about the ADA/WLAD?
- Neither administering a vaccine nor asking an employee for proof of vaccination constitutes a disability-related inquiry or medical exam.

fisherphillips.com

9

COVID-19 — Vaccines

Fisher
Phillips



- What about the ADA/WLAD?
- Policy should be job related and consistent with business necessity
- Don't forget the duty to provide reasonable accommodations, both medical and based on religion

fisherphillips.com

10

Why “Job Related” and “Business Necessity”?

- If an employee shares they have a medical condition that prohibits vaccination, any follow-up questions are likely prohibited by the ADA/WLAD or GINA because they likely will illicit genetic or disability-related information
- If inquiries are job-related and consistent with business necessity = no violation

COVID-19 — Vaccines



If mandatory, you must:

1. Articulate how the policy is job-related and consistent with business necessity.
2. Have a policy
3. Consider how to communicate to your team
4. Allow for reasonable accommodations for disabilities*
5. Allow for reasonable accommodations for religion*

*Document the interactive process

COVID-19 — Vaccines

Fisher
Phillips



If mandatory, you must:

6. Pay for the vaccine
7. Pay as working time to get the vaccine*

*Don't forget the regular rate of pay.

fisherphillips.com

13

Hours Worked/Regular Rate of Pay

Fisher
Phillips



- Employers must pay employees for **all** hours worked in a workweek.
 - “Hours worked” includes all time an employee must be on duty, on the employer’s premises, or at any other prescribed place of work.”
- Overtime = 1.5 times “regular rate of pay”
- “Regular rate of pay” = Divide the total compensation for an employee in any workweek by the total number of hours worked in the workweek.
- Nondiscretionary bonuses must be included

fisherphillips.com

14

COVID-19 — Vaccines

Fisher
Phillips



If voluntary, can you offer a cash incentive? PTO day? HSA bonus? Prize drawing?

- Wellness rules
 - If the incentive offered is too high, it can violate EEOC wellness rules
- Get tax advice
- Still may create a regular rate of pay issue.

fisherphillips.com

15

COVID-19 — Vaccines

Fisher
Phillips

• Specific EEOC Guidance



- If an employer uses a non-contracted third-party provider to administer employee vaccinations, any pre-screening questions asked of the employee prior to the vaccination do not violate GINA and are not considered a medical test under the ADA (as long as those answers do not make it back to the employer.)
- But if contracted . . .

fisherphillips.com

16

COVID-19 — Vaccines

Fisher
Phillips



If mandatory, you must:

9. Consider Workers Compensation Claims
10. Train managers

fisherphillips.com

17

Fisher
Phillips



fisherphillips.com

18

Thank You!

**Fisher
Phillips**



Catharine Morisset 

Advocate and Advisor Offering Proactive Solutions to
Workplace Legal Challenges

206.693.5076
cmorisset@fisherphillips.com

Find me on Linked In:
[www.linkedin.com/in/catharine-
morisset-FisherPhillips](http://www.linkedin.com/in/catharine-morisset-FisherPhillips)

fisherphillips.com

ON THE FRONT LINES OF WORKPLACE LAWSM