



GBS Compliance

# Employee Vaccinations - To Ask or Not to Ask

This article explores strategy, communication and policy steps for organizations looking for a road map through the question of vaccination verification and overall mask and vaccine issues. This document explores the newest questions for employers regarding asking, documenting or tracking employee participation in the COVID-19 vaccination process.

## Job Summary

On May 13, 2021 the CDC updated their recommendations and announced that fully vaccinated individuals in the United State no longer need to wear masks - both indoors and outdoors. On that same afternoon President Biden echoed the announcement from the CDC, sending a new message and expectations from the federal level. While the communication clarified some of the expectations nationally, many questions remained with respect to state and local mandates, organizational mandates and exceptions to the new guidelines. The announcements clarified that some segments of the economy including employers in transportation (trains, busses, planes) and direct healthcare (hospitals and other institutions) will continue to carry the federal mask requirements.

In the days following these announcements many companies quickly ended their published mask mandates. Mask signs have come down often replaced with signs communicating recommendations in place of mandates. As each organization is unique, it is suggested that a planned, transparent path be taken in the communication and implementation of any new rules. Employers are now faced with the central question of **'Have you been vaccinated?'** Two thoughts on this topic have come to the forefront, including: Can an employer ask this question to employees? And perhaps the more difficult question is: Should employers be asking this question? What might be the risk in this approach?

The short answer for employers seeking to ask the vaccination question has been outlined at the federal level through the Equal Employment Opportunity Commission (EEOC). They have determined that it is not unlawful to ask an employee whether they have been vaccinated or not. Once the question is asked the resulting answer and the recorded information then becomes protected information under HIPAA. The information cannot be shared with others. In addition, the ADA requires that all medical information related to the health information of an employee must be stored and maintained separately from the employee's HR file.

Similar questions were posed several months ago regarding vaccine mandates. The EEOC communicated in a formal departmental FAQ stating, "There are many reasons that may explain why an employee has not been vaccinated, which may or may not be disability-related. Simply requesting a response or proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry. However, subsequent employer questions, such as asking why an individual did not receive a vaccination, may elicit information about a disability and would be subject to the pertinent ADA standard that they be "job-related and consistent with business necessity."

One early indicator in this puzzle can be found in how large retailers across the country are responding to the news. Costco, Walmart and others have communicated their intention to lift their mask mandates for fully vaccinated people. Costco has also stated that they will not be requiring any proof of vaccination, while Walmart will be asking Walmart employees through their daily health assessment questions whether they have been vaccinated. A visit to Walmart on May 18<sup>th</sup> showed a mix of employees wearing and not wearing masks. Walmart has stated they will require masks for those who have not been inoculated and they will allow the voluntary use of masks for those who choose.

As of this article the Occupational Safety and Health Administration has not issued formal guidance. However, they have indicated on their website that they are reviewing the CDC guidance and that employers should refer to the CDC guidance until additional information is released.

As we have discussed earlier there are multiple reasons why an employee may refuse the opportunity to get vaccinated. Many of these reasons also fall under the protective laws of the federal government. Pregnant employees, those who are looking to become pregnant, employees with compromised immune systems and those who reject vaccinations for religious reasons are a few of the protected examples.

In the week following these new communications from the CDC and the President we are seeing the following trends:

1. Very few companies are moving to have a system whereby employees will be asked directly if they have been vaccinated. Delta Airlines has communicated that candidates for new positions will hold the requirement to be vaccinated, while current employees will not need to meet the same requirement. In addition, their CEO reported that unvaccinated employees will probably not be working international flights.

2. Continued moves to end current employer mask mandates are coming in the next few weeks.
3. We are seeing a trend where companies are leaving their COVID-19 mask policy open whereby any employee or guest who wishes to wear a mask may do so.

**Sample Communication** - We have scripted the following communication template as a tool for you to create a communication of your own. Feel free to use, modify and rework this content to make it your own.

*Our next chapter ...*

*Since the start of the pandemic and the entry of the virus into the U.S. in early 2020 employers have listened to and followed the recommendations of the federal government including the Centers for Disease Control (CDC) and periodic administrative communications. Our response has been to implement policies with you in mind, to provide a workplace of protection and safety.*

*On May 13th the CDC and President Biden provided updated guidance regarding the wearing of masks in the workplace and outdoors. In the latest guidance the CDC clearly indicates that those who are fully vaccinated in the U.S. do not need to wear protective masks either indoors or outdoors. Sectors including bussing, airlines, hospitals and medical facilities will continue to mandate masks.*

*We are committed to a thoughtful decision and a communicate process. We are also hoping for a written communication from OSHA on the matter. Our plan is to remove our employee mask requirement on (date). We believe we will have OSHA input at that time. This reversal of the mask mandate will occur only in cities, counties and states where public mandates have been lifted. We are proud of our employees and your commitment to adhering to the guidelines we have instituted and modified over the past 14 months.*

*We recognize that many people may continue to feel more comfortable wearing a mask—we welcome and honor that decision and ask for kindness and patience toward everyone in our organization and our surrounding communities as we progress back to “normal.” The past year has been long and difficult. At the core of who we are, is the ability to serve our customers. We are excited that our services will continue to be available in a safe setting.*