

GIBSON DUNN

COVID-19 Vaccines: Employer Strategies and Considerations

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The end of the beginning...



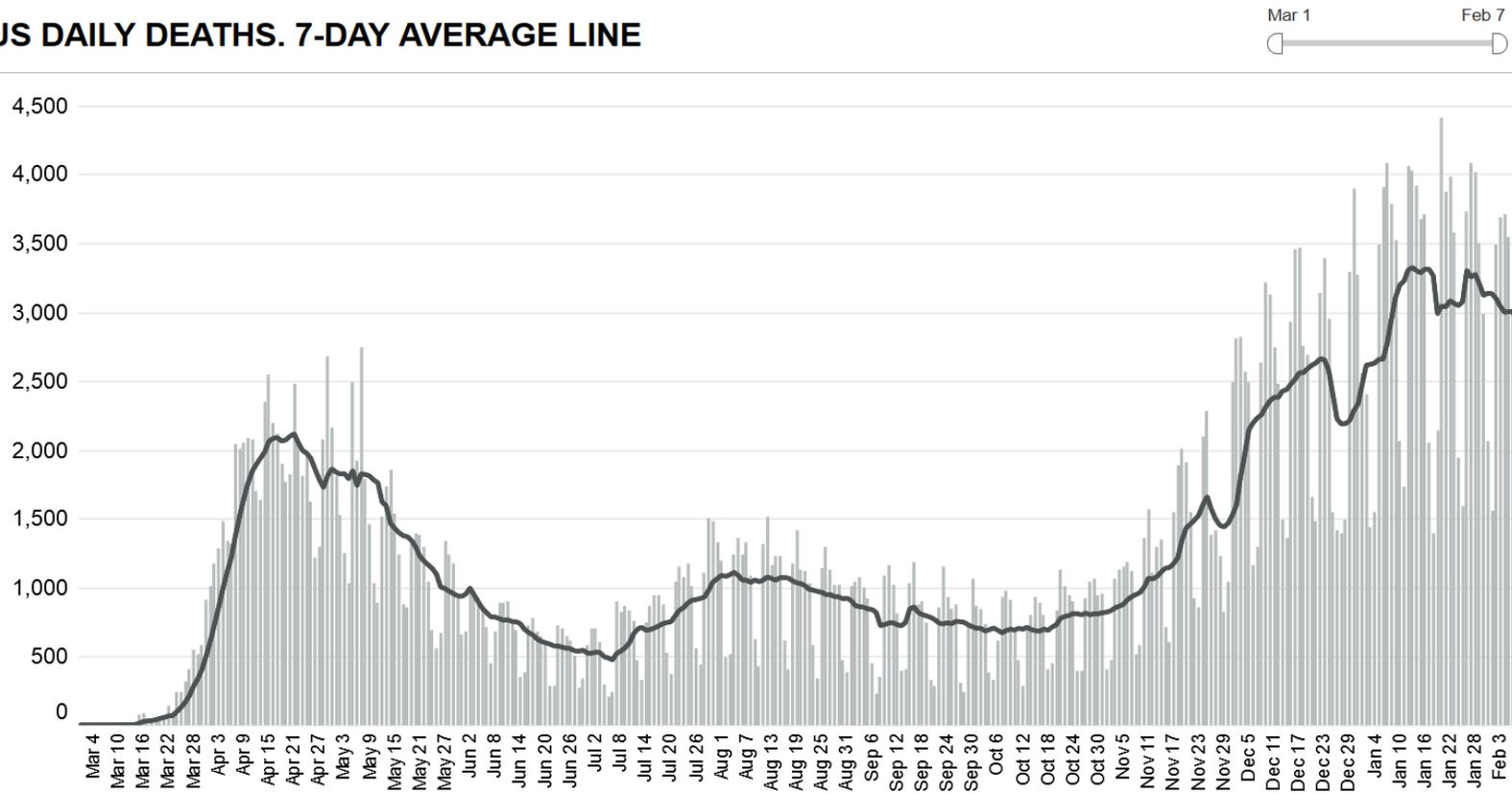
Sandra Lindsay, pictured, as first U.S. nurse to receive the COVID-19 Vaccine
Credit: N.Y. Times

The vaccines have arrived, and should be at scale by June

Vaccine	Pfizer-BioNTech	Moderna	Johnson & Johnson
Efficacy Rate	≈ 95%	≈ 95%	≈ 66% ≈ 85% in preventing severe cases
Emergency Use Authorization	Issued on December 11, 2020 for 16 years of age and older	Issued on December 18, 2020 for 18 years of age and older	Application submitted, but authorization not before February 26, 2021 VRBPAC Meeting
Dose Modality	Two-dose delivery	Two-dose delivery	One-dose delivery
Projected U.S. Distribution	200 million by July 21, 2021	200 million by June, 2021	100 million by end of June, 2021

Not a moment too soon . . . Covid-19 deaths are above what they were last spring

US DAILY DEATHS. 7-DAY AVERAGE LINE



The most frequently asked question: What are other employers doing?

- Some are considering mandates or conditional mandates.
- Some are considering encouragement, ranging from persuasion campaigns to incentives.
- Some are considering making vaccines available without expressly endorsing them.
- Many are taking a “wait-and-see” approach, particularly before vaccines are widely available to all workers.

Can employers mandate Covid-19 vaccination?

On December 16, 2020, the EEOC issued guidance indicating that employers **can mandate** vaccination, subject to reasonable-accommodation requirements for medical disability or sincerely held religious practice or belief.

- EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, December 16, 2020 (emphases added).

Can employees be terminated for refusing to be vaccinated?

Maybe. Per the EEOC:

“If an employee cannot get vaccinated for COVID-19 because of a disability or sincerely held religious belief, practice, or observance, and there is no reasonable accommodation possible, then **it would be lawful for the employer to exclude the employee from the workplace.**”

- EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, December 16, 2020 (emphasis added).

Can employers make Covid-19 vaccination a condition of employment (pre-hire)?

Generally yes, if subject to reasonable-accommodation obligations under the ADA and Title VII

“Prior to making a conditional job offer to an applicant, disability-related inquiries and medical exams are generally prohibited. They are permitted between the time of the offer and when the applicant begins work, provided they are required for everyone in the same job category.”

- EEOC, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, December 16, 2020.

What is the impact of EUA status on ability to mandate?

EUA status does not seemingly affect ability to mandate.

- Before an EUA drug is administered, individuals must be “informed” that the product is subject to an EUA, told the benefits and risks of the product, and given the “option to accept or refuse administration of the product.”

21 U.S.C. § 360bbb-3(e)(1)(A)(ii).

- Q: Does this “option” mean that the vaccine cannot be mandated?
- A: This language requires that the patient be given “informed consent” in the medical sense; it does not address employer rights.

Should employers mandate COVID-19 vaccination?

It depends

Either way, employers should build workplace buy-in

- Whether mandatory *or* voluntary, employers need to ensure buy-in.
- Develop clear workplace communications — explain *why* the policy is in place; dispel myths (<https://www.uofmhealth.org/coronavirus/vaccine-faq>).
- Consider tying vaccine requirements to re-opening and a return to normal, to emphasize the benefits.
- Consider reducing the “cost” of vaccination
 - Direct costs (*e.g.*, covering extra paid sick time for side effects, paying for vaccine administrative costs if out-of-plan for workers).
 - Indirect costs (*e.g.*, reducing travel time by having on-site vaccination).
- Prepare for some workplace disagreement and hard conversations.

Why consider a mandate or conditional mandate?

- Benefiting public health by ensuring higher vaccination rates.
- Protecting worker health.
- Reducing the costs of absences and lost productivity.
- Getting and staying open.
- Reducing civil liability risk (customers, contractors, or other stakeholders might sue for failing to impose a mandate, on the theory that falls below a reasonable standard of care for safe workplace).
- Possible protection from state or federal regulatory action (*e.g.*, OSHA finding non-vaccination to be a dangerous work condition, violation of General Duty Clause).

What might a conditional mandate look like?

- The law firm Davis Wright Tremaine LLP (Seattle-based) will be requiring proof from lawyers and staff of Covid-19 vaccination in order to come into the office and attend firm events once employees are eligible for vaccination.
 - The firm encouraged those who cannot be vaccinated to contact the HR department to determine what accommodations can be made.
 - The firm is offering two additional days off to get a vaccine or cope with side effects, if needed.
- Managing Partner Jeff Gray explains rationale:
 - The policy will “safeguard the health of our employees and their families, our clients and visitors, and our communities.”
 - “We need everyone’s help to be able to get back to more normalized operations as quickly as we can.”

What type of accommodations are required?

- If mandating (or conditionally mandating), must have disability (ADA) and religious (Title VII) exemption accommodation programs:
 - This does not guarantee a right to opt-out of vaccination — only the right to an interactive process to assess if accommodation is possible without imposing “undue hardship” on the workplace.
 - It may be difficult to argue undue burden with regard to accommodations that have been working thus far. But employees are not necessarily entitled to the accommodation of their choice.

Why consider a voluntary approach?

- Employee morale and retention.
- Avoids administrative challenge of administering medical and religious exceptions.
- Eliminates liability for medical or religious discrimination claims.
- Mandate may be less important to protect against spread of the virus in certain industries.
- Does not foreclose mandating in the future.

Can employers offer incentives?

- The EEOC has proposed wellness program rules on incentives for review and comment. Industry has requested more specific guidance.
- A number of companies are offering incentives such as cash bonuses, paid time off, gift cards, etc.
 - For example, Kroger is offering \$100 to employees who get vaccinated.
- Must offer alternatives to individuals entitled to exemptions or face possible discrimination claims.
 - For example, Kroger is offering an educational safety course as an alternative.

Should employers offer vaccines on-site?

Reduces barriers to vaccination by making vaccines more accessible.

But, be wary of offering on-site and mandating:

- Employers who administer or contract to have the vaccine administered must be mindful of obligations under the ADA and the Genetic Information Non-Discrimination Act (GINA)

If mandating or offering more than de minimis incentives, avoid ADA and GINA issues by not offering vaccines on site, but requiring proof of vaccination.

- EEOC has indicated that proof of receipt of vaccination is not, by itself, a disability- or genetic- related inquiry – warn employees not to provide any medical information for protection.

What should employers do with personal medical information collected?

If collecting employee health information (i.e., beyond proof of vaccination):

- Ensure that any health questions are job-related and consistent with business necessity
- Describe intent to collect, use, and share information
- Minimize level of detail to that necessary for program
- Keep health information secure (e.g., through encryption) and separate from personnel files
- Limit access to HR and medical personnel, or others who must know (consider aggregating anonymous reports)
- Limit data retention

When can employers stop requiring masks?

- In the short term, mask mandates and distancing are still necessary even for vaccinated workers.
 - We are still learning whether or not the vaccines prevent transmission of the virus.
 - The vaccines are not 100% effective.
 - Individuals with certain medical conditions will not be able to be vaccinated.
 - The vaccines may be less effective against variants such as the South African variant.

Questions?

For questions, please contact the presenters:



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