

COVID-19 EMPLOYMENT UPDATE VACCINATIONS, INCENTIVES, MASKS AND BEST PRACTICES

Recently, the Michigan Department of Health and Human Services (MDHHS) and the Michigan Occupational Safety and Health Administration (MIOSHA) issued updated emergency rules related to workplace control measures and safety protocols. On May 28, 2021, the Equal Employment Opportunity Commission (EEOC) issued updated guidance related to incentives for employee vaccinations and documentation showing proof of vaccination. This Jaffe Update will provide an overview of this new information and offer best practices for implementing and managing these new rules and guidelines.

MIOSHA UPDATED EMERGENCY RULES

MAJOR DIFFERENCES FROM THE PREVIOUS RULES: MIOSHA updated its Emergency Rules to be consistent with MDHHS guidance, updated CDC guidance and Michigan's "Vacc to Normal" plan. These are the more significant changes:

- **Remote work is no longer required. This means all employees can be physically returned to the worksite, even if they can feasibly do the work remotely.**
- Employers are no longer required to assign risk categories for job tasks and procedures.
- Employers must still ask screening questions related to COVID illness or exposure. However, temperature checks are no longer required.
- Employers are not required to notify the health department when they become aware that an employee, visitor, or customer has a known case of COVID-19.
- The designated safety coordinator does not have to remain on site at all times.
- Fully vaccinated employees no longer need to wear masks or socially distance (more details below).
- Industry-specific rules have been eliminated.
- Training is still required and must now include vaccination information.
- Employers do not have to keep screening records of fully vaccinated individuals and need only maintain records for 6 months from time of generation.

SHOULD EMPLOYERS RETURN REMOTE EMPLOYEES TO WORK? Every employer should consider their business needs, ability to comply with COVID rules, and employee concerns. Important business considerations include overhead costs, employee performance, productivity, management and oversight, and the simple feeling of returning to "normal." Employers must also determine whether they can satisfy safety protocols with a full workforce. Employers should take their time planning a complete return to work for these business reasons. Employers must also be prepared to address employee concerns such as childcare, training, and a general reluctance to return based on a desire to continue remote work or doubts about the health and safety of the work environment.

DO FULLY VACCINATED EMPLOYEES STILL HAVE TO FOLLOW MASK MANDATES AND DISTANCE PROTOCOLS? Under the new MIOSHA rules, fully vaccinated employees: (1) do not have to maintain 6 feet of distance from other fully vaccinated employees, and (2) do not have to wear masks in the workplace. Employees who are not fully vaccinated must continue to maintain 6 feet of distance from other employees whenever possible. Unvaccinated

employees are also still required to wear masks when they cannot consistently maintain 6 feet of distance from other employees. These particular rule changes do not apply to the health care setting where patients are present.

BEST PRACTICES: Employers can still require ALL employees to wear masks and socially distance. Employers should carefully consider their work environment, employee concerns, safety protocols, and industry standards when deciding whether to remove mask mandates and social distancing restrictions for fully vaccinated employees. Employers should also consider the business community and whether the region where they do business has declining COVID numbers. Each employer must make a determination that balances the interests of business productivity, employee safety, and the administrative burden of enforcing the rules.

HOW CAN EMPLOYERS ENSURE COMPLIANCE WITH THESE NEW RULES? Employers can ensure compliance with these new rules by: (1) keeping records of those employees who are fully vaccinated, (2) posting signs in work areas reminding employees who are not fully vaccinated to wear masks and socially distance, (3) allowing or requiring remote work, and/or (4) requiring face coverings and social distancing for all employees.

BEST PRACTICES: Employers should strongly consider requiring fully vaccinated employees to provide proof of vaccination in order to forgo mask requirements and social distancing restrictions. Without proof of vaccination status, employers may find it difficult to defend a MIOSHA investigation related to screening, record-keeping and compliance with safety protocols. Furthermore, there may be greater risk of unvaccinated employees claiming they were exposed to COVID-19 at work by a person who was not fully vaccinated. With proof of vaccine status, employers can more easily defend against these claims of exposure.

For those employers who want to avoid the administrative burden of collecting and maintaining vaccination records, the better approach may be posting signs throughout the workplace reminding employees about mask and social distance rules. This approach is based on the honor system. However, if an employer has a good faith reason to believe that an unvaccinated employee is violating the rules, the employer may require proof of vaccination from that employee. Certainly, employers can also continue to allow remote work or require all employees to wear masks and socially distance.

HOW SHOULD EMPLOYERS MAINTAIN DOCUMENTATION SHOWING PROOF OF VACCINATION? Employers should only ask for a copy of the vaccine card that shows proof of vaccination. Employers should not ask for or accept proof of vaccination that includes the pre-screening questions or other health information. Proof of vaccination constitutes health information that must be kept separate from employment records in a confidential medical file.

BEST PRACTICES: Copies of vaccination cards or other proof of vaccination should be maintained in a medical file that is separate from employment records. The information should be treated as confidential medical information that is protected under the American's with Disabilities Act (ADA). Personnel outside of Human Resources should not have access to the information. For purposes of managing mask mandates and other safety protocols, if a supervisor has a question about a particular employee's vaccination status, the supervisor should bring that concern to Human Resources for investigation.

MANDATORY VACCINATIONS

CAN EMPLOYERS MANDATE VACCINATIONS? According to the EEOC, employers are allowed to mandate vaccinations for those employees physically entering the workplace. However, because mandatory vaccinations must be justified by business necessity, forcing remote employees to vaccinate may not satisfy the business necessity requirement. Further, employers who decide to mandate vaccinations must comply with federal anti-discrimination statutes – like Title VII and the ADA – and provide reasonable accommodations for those employees who are unable to get vaccinated for protected reasons. For more information on this topic, please see the [April 21st Jaffe Update](#).

MANDATE VS. STRONGLY ENCOURAGE: There are several factors that employers should consider when deciding whether to mandate vaccinations in their workplace. These factors include legal requirements, risk of liability, and the human impact of these mandates. Mandatory vaccinations might make the workplace safer and reduce employee absenteeism, but it may create other complications. On the other hand, strongly encouraging vaccinations can promote a healthier and more productive workforce without the legal and human resource ramifications. Please see the April 21st Jaffe Update (link above) for pros and cons of mandating versus strongly encouraging vaccinations.

BEST PRACTICES: For some industries where employees work closely together or closely with the public (like manufacturing, health care, retail, food service, etc.) it might make more sense to mandate vaccinations. In these industries, employers might find that the pros outweigh the cons to ensure widespread vaccination. However, even in these industries, and certainly in office settings or industries with continued remote work, the recommended approach is to strongly encourage employees to get vaccinated. Employers can achieve the results of a fully vaccinated workforce by strongly encouraging vaccinations, leading by example, and offering incentives for employees to show they were vaccinated by a third-party provider. Jaffe can assist in preparing communications to employees to encourage vaccinations.

EMPLOYER INCENTIVES & PROOF OF VACCINATION

CAN EMPLOYERS OFFER INCENTIVES TO SHOW PROOF OF VACCINATION? Yes! The EEOC recently updated its guidance to reflect the allowance of incentives to encourage employees to get vaccinated with some caveats. Employers can offer incentives to employees to voluntarily provide proof that they received the vaccine on their own from a third party provider, like a pharmacy or doctor’s office. Employers may also offer modest incentives for employees to voluntarily receive the vaccine administered by the employer or its agent IF the incentive is “not so substantial” as to be coercive. Because vaccinations require employees to answer pre-vaccine screening questions that may reveal a disability or health history, employers cannot offer “very large” incentives that would cause an employee to feel pressured to get the vaccine at the risk of revealing their health information. Unfortunately, the EEOC did not define “very large” or “not so substantial.” So for now, employers must use caution in offering incentives for employer-sponsored vaccines that could be viewed as coercive.

BEST PRACTICES: Employers can offer incentives to employees to voluntarily show proof of vaccination by a third party. Many employers are offering modest cash incentives or gift cards for each employee who provides documentation. Other employers are offering larger incentives such as a substantial cash lottery. Both of these are now sanctioned by the EEOC and have proven an effective means of encouraging employees to get vaccinated and show proof of vaccination. If an employee chooses not to get vaccinated (under a voluntary system) or chooses not to show proof of vaccination, the employee should not be punished. Rather, they simply do not get to participate in the incentive program.

For questions related to COVID-19 vaccinations, updates, and any other COVID-related issues, please contact Jaffe’s COVID-19 employment law experts:

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