

COVID-19 Vaccines in the Dental Workplace: FAQs for Practice Owners

1. Can I as a healthcare employer require my employees to get COVID-19 vaccines?

Answer: The answer is likely yes, at least with respect to practice staff with direct patient contact in the operatory, including any employed dentists.* Yet, much remains to be determined, not the least of which includes how available vaccines are and will become (currently, the only vaccines authorized by the Food and Drug Administration are for emergency use and do not have final approval; in addition, they are not yet widely available). [See this FAQ page from the CDC for more information.](#) State health departments are in the process of prioritizing the classes of individuals to receive vaccines as and when they become available. And, even assuming a vaccine were widely available, the question raises a range of potential legal issues, and some practical challenges, you may wish to consider before making a business decision to require some or all of your staff to be vaccinated.

If your practice has 15 or more employees, any staff vaccination requirement would be subject to federal legal requirements to accommodate disabilities, including pregnancy-related disabling health conditions (e.g., preeclampsia, hyperemesis gravidarum) under the Americans with Disabilities Act (AwDA), as well as genuinely held religious beliefs and Title VII of the Civil Rights Act of 1964 (Title VII). On December 16, 2020, [the EEOC revised its March 17, 2020 initial COVID-19 technical assistance guidance to include new FAQs](#) on the circumstances under which an employer elects to require a COVID-19 vaccination as a condition of employment.

With respect to the AwDA, any vaccine requirement must be job-related, consistent with business necessity, and no more intrusive than necessary. Healthcare providers typically meet this standard with respect to COVID-19 as it is generally understood that an individual with COVID-19 might pose a direct threat to the health of the employee and others. Nevertheless, practices must reasonably accommodate staff members with disabilities unless the practice can demonstrate that doing so would pose an undue hardship (significant difficulty or expense) and no viable alternative exists. (See also, FAQs 2 and 3, below.) The parties must engage in an interactive process to determine whether and in what form a reasonable accommodation may be appropriate.

Under Title VII, when a practice is on notice that an employee's religious belief, practice or observance prevents the employee from receiving a vaccine, the employer must provide a reasonable accommodation unless doing so would cause more than a *de minimus* cost or burden. The requirement to accommodate does not require accommodation of personal beliefs that do not rise to the level of sincerely held *religious* beliefs (e.g., vaccine-aversion for other, non-medical personal reasons, personal doubt as to the existence or severity of COVID-19 infection, etc.).

State or local law may also inform the circumstances in which a healthcare employee may be required to receive a vaccination. Health departments may themselves require vaccinations for certain healthcare staff or essential workers. These laws – and the definition of which workers are included -- may vary between states and possibly even localities within a state.

In addition to legal requirements, practical considerations of who may be required to receive a vaccine – and when – will also come into play, at least in the early stages of the vaccine rollout. Presently, vaccine availability is scarce and the timeline for future vaccine delivery remains in flux. If you do require vaccines in your practice, you may wish to consider differentiating between staff members with direct patient contact versus office staff who have little. Finally, public support for vaccination is not universal at this stage, so a blanket policy may cause morale issues in the practice.

Given the current lack of a definitive roadmap for future vaccine availability (or a clear mandate for its universal use), practices may best be served by following health department requirements and encouraging staff vaccinations when and as available. (Updated 1/4/21)

*The anti-discrimination laws do not apply to *properly-classified* independent contractors, so some of the legal concerns addressed in this FAQ may not apply. Nevertheless, practice owners may wish to factor in some of the other practical considerations before deciding to require vaccines in this cohort.

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2. What kind of disability/pregnancy-related accommodations should my practice consider in evaluating whether a reasonable accommodation is possible?

Answer: It is generally assumed that COVID-19 in the healthcare setting might pose a significant risk of substantial harm to the health or safety of the individual or others, at least with respect to staff members who have direct contact with patients in the operatory setting. For those staff members with such close patient contact, the critical question may come down to whether measures taken before the vaccine became available (i.e., masks, gloves, gowns, shields, protective barriers, social distancing, etc.) would constitute a reasonable accommodation to continue with respect to a staff member with a disability or pregnancy-related condition that could be harmed by a vaccine. The same question would also apply to non-operatory adjustments made before a vaccine became available.

If prior measures are deemed insufficient, no longer effective or outdated, the practice should be prepared to document why and how circumstances have changed since the introduction of vaccines such that continuing with those practices would constitute an undue hardship to the practice. The practice must also consider whether other accommodations might be reasonable under the circumstances, including job-adjustment or reassignment, working from home if possible, or providing unpaid leave if the medical or pregnancy-related complication is resolvable over a reasonable time period. (Updated 1/4/21)

3. What kind of religious accommodations must I consider?

Answer: In the context of COVID-19, the same types of accommodation available for staff members with disabilities must generally be considered. See FAQ 2, above. (Updated 1/4/21)

4. If I require staff members to be vaccinated, what proof can I request them to provide?

Answer: Practices should take care not to request any verification that reveals any medical condition of the employee aside from vaccination status, as further inquiries may run afoul of federal or state disability laws. You may wish to advise your staff prior to testing the employee not to submit such information. All the practice needs to know is the employee's name and whether a vaccine has been administered (completely in the case of multi-dose vaccines). (Updated 1/4/21)

5. If I require my staff to be vaccinated, must I pay for the vaccine and/or provide paid time off for them to receive the shot(s) (or pay for time off in the case of side effects)?

Answer: Yes, as appropriate under the circumstances. While the vaccine itself is provided by the federal government through 2021, there may nevertheless be costs associated with administering the vaccine. If staff members are not permitted to opt out of the vaccine requirement, the practice would be responsible for paying the cost of administration as well as any time the employee is required to spend off-duty hours under federal and state wage and hour laws. Some practices may opt to engage a third-party vendor to provide vaccines on-site during regular working hours to defray costs. Some staff members may experience side effects that may keep them out of work for a day or so afterwards. Practices should consider providing paid time off in such a circumstance, if possible, if only for morale reasons. (Updated 1/4/21)

6. What should I do if a staff member refuses to be vaccinated? Can I terminate their employment or re-assign them to another position?

Answer: If an employee refuses a required vaccination, you should gather information about and document why the staff member is refusing. If the reason for the refusal is a claimed disability or religious belief (and your practice has 15 or more employees), you will need to discuss and document efforts to determine whether a reasonable accommodation is possible. See FAQs 2 and 3, above. You cannot retaliate against a staff member who exercises

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their legal right to a reasonable accommodation, nor can you treat similarly-situated classes of employees differently because of their race, gender, etc. If the staff member resists vaccination for non-disability-related or non-religious, personal reasons, the practice may still wish to consider accommodation should the practice wish to retain the staff member rather than terminating their employment. (Updated 1/4/21)

7. What if I require a vaccination and a staff member suffers an adverse reaction?

Answer: If a practice requires vaccination as a condition of continued employment, adverse consequences would be compensable to staff under state workers' compensation laws. Properly-classified independent contractors are not generally entitled to workers' compensation, in which case the practice may be liable if the vaccine was administered recklessly or negligently. (Updated 1/4/21)

8. May staff members who have been vaccinated refuse to wear a mask and socially distance?

Answer: Not for a while. The reality is, it may take weeks for the vaccine to take full effect, particularly in the case of a multi-dose vaccine. If a person is vaccinated while already infected by COVID-19, the vaccine may not prevent the spread of the virus to others. The data also suggests that while the vaccines are seemingly highly effective, none of them have been shown to be 100% effective, meaning there still is a chance of contracting COVID-19. Moreover, we do not yet know how effective or long-lasting the vaccine will prove in the long term, or whether someone who receives the vaccine may nevertheless spread the infection to others. (Updated 1/4/21)

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