

## COVID-19 VACCINATION PLANNING TOOL FOR NC BUSINESS

This tool does not provide details on individual state laws. Some states may prohibit mandatory vaccinations altogether or place limits on them.

### VACCINATION PROGRAMS – Voluntary versus Mandatory

Catapult recommends a voluntary vaccine approach: educating employees to encourage vaccinations. If you are considering other options, review concerns/issues listed below carefully, as well as all additional information in this tool.

#### Voluntary Option Review:

1. If you are considering incentivizing the vaccine, do you have a good understanding of why/if your employees are opposed to vaccination?
  - YES – Go on to the next question.
  - NO – Without more information, it is hard to determine whether incentives make sense. Consider an employee opinion survey.
  
2. If you are considering incentivizing the vaccine, why are your employees likely to miss out on the vaccine if it is not incentivized?
  - Just “on the fence” – Incentives/paid time may be helpful.
  - Time constraints outside of work – Incentives/paid time may be helpful.
  - Adamantly opposed – Incentives unlikely to be helpful.
  - Educated, but still concerned of health risks – Incentives unlikely to be helpful.
  
3. Is your company in one of the following industries: Direct healthcare; Manufacturing with workers in close proximity; Retail or others where employees are working with the public closely; Working with at-risk populations or in congregate living settings.
  - NO – Continue to the next question.
  - YES – Consider the wellness incentive, but also continue to monitor whether a safety program might eventually become an approved alternative.
 

*The safety program option has not been discussed extensively yet in the legal community; however, if your industry puts certain workers/consumers at a high risk of COVID-19, it might merit consideration should it more widely be accepted as a legal alternative.*
  
4. Is your vaccine part of an ACA compliant health insurance program, or a part of a wellness program that is covered under PPACA rules about wellness incentives?

- UNSURE – Talk with your benefits broker about your wellness program and whether it is covered under PPACA.
- NO – Currently EEOC guidance is on hold and there is no specific limit on wellness incentives. The original guidance was that a “water bottle” or other small gift would meet the requirement. Discuss this with your benefits broker to ensure you are in compliance.
- YES – Discuss your overall wellness incentives with your benefits broker, to include any proposed incentives for vaccination. If the program falls under PPACA rules, certain incentive limits apply: <https://www.eeoc.gov/regulations/small-business-fact-sheet-final-rule-employer-wellness-programs-and-title-i-americans>

5. Are you willing to provide COVID-19 leave at some level (not specific to the vaccine)?

- NO – If you are seeking to offer time off solely for vaccinations, this may be viewed as a direct vaccine incentive. Any incentive that exceeds limits as in question above would not be permitted. Ensure your program adheres to standards in question above, and discuss with your broker as a part of a wellness program or safety program.
- YES – Providing additional “COVID-19” paid time off is an option which allows you to provide support for people taking the vaccine, recovering from side effects of the vaccine OR under quarantine/caring for someone under quarantine. As long as you are collecting only basic information (name, date and HCP recommendation to quarantine or vaccine confirmation), and the program is open to anyone – not just vaccine recipients - you would likely not have ADA or GINA considerations.

6. Are you confident your managers, other employees and executive team understand how to have conversations surrounding the vaccine?

- NO – If you are not able to devote time to training/preparing managers and staff in interacting surrounding this topic, you may be putting yourself at risk of liability.

As an example, consider a department with a safety incentive where a certain percentage of employees being vaccinated would contribute to a potential incentive.

Will managers/other staff begin to question teammates about if they are being vaccinated and if not, why not? If so, any adverse employment action after that time might be attributed to an ADA condition or religious belief.

- YES – Great. As long as staff and managers are not pressuring others or asking questions like “Why aren’t you going to be vaccinated?” you should be protected from employees feeling harassed or discriminated/retaliated against.

### If You Choose a Voluntary Program...

- Survey your staff:** What percentage of staff is committed to not being vaccinated and why? What might help them get interested in vaccinations?

- Educate your staff:** Education is the best way to ensure that employees feel comfortable with the vaccine and understand the need to get vaccinated. It is best to start the education process early in your plan.
- Vaccine deadline:** *Talk to your county health department if necessary.*
  - You will need to provide time for employees to receive BOTH shots within the assigned time frame and will need to plan for potential slowdowns in vaccine distribution. (You can always extend deadline if necessary, but best to identify a specific date up front or staff may delay.)
- Consider whether those who try to get vaccinated, but whose provider does not recommend, will be counted for any incentive.** You may have to develop a form in order to collect this information without additional medical information being collected.
- Considering onsite/contracted vaccines (or do you have a company provider)?**
  - Consider set-up of clinic. Make sure you have spacing tape, cubicle or barriers, etc. to ensure all medical information is private and cannot be overheard/seen.
  - Ensure that you work with a vetted provider who understands ADA and HIPAA requirements.
  - Ensure employees are signing HIPAA release forms so that providers may release information to you (and ensure they are only providing “yes” or “not recommended” plus name and date) – Avoid additional medical information. You may also choose to have employees provide you with evidence (such as vaccine card) – see next bullet point.
- Considering letting employees use self-selected provider?**
  - Consider how you are going to have employees verify their vaccination – if possible, managers should not be involved. Direct to HR is best.
  - Ensure that you are communicating to employees that you do not need additional medical information – just name, date and that they have completed both shots.
- Determine your protocol for handling religious objections and ADA concerns if incentives are available.**
  - Ensure employees are not questioned by others outside of the HR representative who is managing the accommodation process.
  - Ensure forms are created for employee to self-certify or provide ADA information in the form of reasonable accommodation paperwork from their doctors. Catapult has templates.
- How will you handle employees who are made ill by the vaccine (side effects)?**

- Will you permit leave? If leave is in addition to the normal paid time off, review whether this will be a part of a broader COVID leave program and if not, whether it might be seen as an incentive.

**□ Create a policy.**

- Create a policy, ensuring that you integrate the process for accommodation into the policy if necessary. Catapult has policy templates.

**□ Communicate your policy.**

- Provide robust communication around the reasoning behind your decision, the safety of the vaccine, the supportive stance you take for those who need accommodations and the benefits that vaccination will bring to society.

**□ Promote Vaccination through Education:**

Many tools are available to promote acceptance and encourage vaccination.

- NC DHHS Flyer: <https://files.nc.gov/covid/documents/vaccines/NCDHHS-Vaccines-Flyer.pdf>
- CDC Social Media Toolkit: <https://www.cdc.gov/coronavirus/2019-ncov/communication/vaccination-toolkit.html>
- CDC posters, fact sheets and other information: <https://www.cdc.gov/coronavirus/2019-ncov/communication/toolkits/business-workplaces.html> .

Select a message from one of these tools and share it with staff weekly.

Use the tools to craft posters and meeting communications explaining the vaccines' safety and efficacy and how herd immunity works.

You might also choose to highlight (willing) members of your team who have gotten the vaccine to make others feel more comfortable doing so.

Remember that less is more in terms of length of your message, but more is better in terms of frequency.

## **Considerations Related to Mandating the Vaccine**

No health agency or federal agency has recommended mandating the vaccine. The vaccine is under Emergency Authorization, an accelerated approval under the FDA. The majority of employers – even those in healthcare -are choosing NOT to mandate the vaccine, and Catapult recommends against the mandatory option, as do a number of legal sources. Nevertheless, if you are adamant about mandating the vaccine, you should attempt to do so in the best way.

### **Businesses more likely to have justification for a mandatory program:**

The EEOC's provides guidance that medical exams/inquiries must be job-related and in response to a safety risk. If all employees are completely separated from the public (barriers, etc.) then the safety risk may not rise to the level needed; however, the following businesses may have a level of risk that would make meeting this standard this more likely. (See details in ADA section.)

- Direct patient care or works with individuals who are at a high risk from COVID (Long-Term Care/Congregant Living)
- Direct services to the public. (Retail, Restaurant)
- Many workers close together, potentially taking off masks to eat in group settings, and/or ventilation is questionable – for example manufacturing staff.

### **Review your risks before considering in the following areas:**

If you decide to mandate the vaccine, make sure you maintain your business justification for doing so by documenting your risks in the following areas, as well as any special to your industry:

- Number of workers/customers
- Nature of space (outside/inside), private office versus group setting, well-ventilated/not.
- Potential that masks will not be worn 100% of the time (ex. group lunch areas)
- Mitigating factors (barriers, etc.)
- Social distancing at 6 feet 100% of the time

### **Review the following questions before considering a mandatory program:**

1. Does your organization feel comfortable with a negative impact on morale and the potential for some employees to leave your organization?
2. Does your organization have the administrative capability to put create a mandatory vaccine policy, arrange for ADA and Religious accommodations and track and reimburse all costs associated with receiving the vaccine including time to travel?
3. Is your organization willing to risk the potential for Workers Comp or liability claims which may be likelier for the small number of companies willing to mandate vaccines?

### **Mandatory Program Alternatives:**

**OPTION 1:** Mandate - Employees work with their own medical providers.

This option avoids the need to demonstrate that medical questions pre-vaccination are job-related and in response to a safety risk.

**OPTION 2:** Mandate - Contract with a provider OR deliver through an internal health service.

This option presents additional ADA and HIPAA challenges.

**Discuss BEFORE considering either OPTION 1 or OPTION 2:**

- EEOC permits mandating FDA approved vaccines **but does not discuss vaccines approved under emergency authorization (as all are currently).**
- **Morale issues** – a large percentage of the population feels employers should not mandate the vaccine. A smaller percentage is willing to lose their jobs instead.
- **Vaccines do not change social distancing/masking rules.**
- **ADA/Religious Accommodations** will be necessary for those who do not wish to be vaccinated for these reasons, and this process should be clear and avoid unnecessary interaction with manager/supervisors. For example, manager/supervisors should be trained to never ask “why” someone does not want to be vaccinated. Managers should not discuss potential accommodations. This conversation should be with HR.
- **Consider processes for non-ADA requests** for employees who DO NOT fall under an ADA accommodation process... for example pregnant women (on whom the vaccine has not been tested thoroughly). How will you be consistent?
- **FLSA issues arise**, particularly in [OPTION 1](#) when you mandate the vaccine – You must pay for the travel and time to take the vaccine, as well as for the vaccine itself. This can be difficult to track when you are not administering the vaccine yourself.
- **Administrative time/cost** – This can be more significant in [OPTION 1](#). Always consider the time your staff will spend tracking vaccination, identifying payment for time and tests, and the lengthy process of ADA and other accommodations. Would their time not be better spent on another task which increases employee engagement, instead of potentially decreasing it?
- **Liability:** If an employee is made ill or dies due to an allergic reaction, Workers Compensation will normally be the recourse.
- **[OPTION 2: ADA Pre-Screening Question Considerations:](#)** The vaccine is not considered a medical examination under the ADA, but pre-screening questions if administered by a contractor or your company are, therefore you must prove the questions are “job-related and consistent with business necessity.” (See ADA information later in this tool.)
- **[OPTION 2: HIPAA/ADA Privacy Issues:](#)** If you are contracting with or conducting the vaccines, it is in part your responsibility to ensure that the program is set up in a way that fellow employees/staff are not overhearing/able to see employee responses to medical questions, and that all of that information is kept private and secure.

**If You Choose to Mandate...**

- Survey your staff:** What percentage of staff is committed to leaving employment? Do not announce that you plan to mandate the vaccine until you have assessed your workforce.
- Educate your staff:** Education is the best way to ensure that employees feel comfortable with the vaccine and understand the need to get vaccinated. It is best to start the education process before

announcing that vaccines will be a requirement. See education section of voluntary vaccination program

**Vaccine deadline:** *Talk to your county health department if necessary.*

- Mandating “as available” will require you to monitor which “Group” staff are in. As you likely do not want to track or manage that information, you will need to wait until your industry’s assigned group OR wait until the general population is eligible.
- You will need to provide time for employees to receive BOTH shots within the assigned time frame and will need to plan for potential slowdowns in vaccine distribution. (You can always extend deadline if necessary, but best to identify a specific date up front or staff may delay.)

**Considering onsite/contracted vaccines (or do you have a company provider)?**

- Consider set-up of clinic. Make sure you have spacing tape, cubicle or barriers, etc. to ensure all medical information is private and cannot be overheard/seen.
- Ensure that you work with a vetted provider who understands ADA and HIPAA requirements.
- Ensure employees are signing HIPAA release forms so that providers may release information to you (and ensure they are only providing “yes” or “not recommended” plus name and date) – Avoid additional medical information. You may also choose to have employees provide you with evidence (such as vaccine card) – see next bullet point.
- Ensure all time (travel and test) is paid, as well as cost of vaccine.

**Considering letting employees use self-selected provider?**

- Consider how you are going to have employees verify their vaccination – if possible, managers should not be involved. Direct to HR is best.
- Ensure that you are communicating to employees that you do not need additional medical information – just name, date and that they have completed both shots.
- Ensure all time (travel and test) is paid, as well as cost of vaccine, and set up a protocol for how to track this time and whether employees should get vaccinated during the day or outside of work hours.

**Determine your protocol for handling religious objections and ADA concerns.**

- Ensure employees are not questioned by others outside of the HR representative who is managing the accommodation process.
- Ensure forms are created for employee to self-certify or provide ADA information in the form of reasonable accommodation paperwork from their doctors. Catapult has templates.

**How will you handle employees who are made ill by the vaccine (side effects)?**

- Will you permit leave? If leave is in addition to the normal paid time off, review the voluntary incentive portion of this document to determine if this could be seen as an incentive which would require limitations under PPACA and the EEOC.

**□ Create a policy.**

- Create a policy, ensuring that you integrate the process for accommodation into the policy. Catapult has policy templates.
- Develop consistent procedures for people who feel the vaccine is unsafe which avoid being seen as retaliatory under OSHA requirements for reporting valid safety concerns. Be consistent – Will you try to accommodate even in a risk situation? If not are you willing to be consistent with everyone? What is the alternative – leave, with ongoing review, then potential termination?

**□ Communicate your policy.**

- Provide robust communication around the reasoning behind your decision, the supportive stance you take for those who need accommodations and the openness your organization has to discuss concerns. Continue providing facts and education.

## ADDITIONAL LEGAL/COMPLIANCE INFORMATION

### ADA/GINA and Privacy:

If you collect medical information from an employee for some valid business purpose (such as to verify vaccination), make sure you are:

- a. Limiting the people who see the information to the person in HR coordinating the program.
- b. Maintain all records in the separate medical file.
- c. Ask employees to include the most limited amount of information possible (in the case of vaccines: date of vaccination and employee name)
- d. If testing onsite or through a contractor, it is in part your responsibility to ensure that the program is set up in a way that fellow employees/staff are not overhearing/able to see employee responses to medical questions, and that all of that information is kept private and secure.

### HIPAA and Privacy:

If you are administering the vaccine through your own onsite health clinic, or if the information is coming through your self-insured health plan, HIPAA privacy requirements generally will apply. Talk to your benefits broker about any specific steps you may need to take, such as providing release forms to employees.

### ADA/GINA and Job-Related/Consistent with Business Necessity:



Anytime you require a medical exam/inquiry, the ADA requires it be job related and consistent with business necessity. While the EEOC does not see vaccines as exams, pre-screening questions would be seen as such. Therefore, for a contracted vaccine provider or onsite healthcare provider, the following information is important in determining whether such a program is valid for ALL or just SOME employees:

According to the EEOC, “to meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, does not receive a vaccination, will pose a direct threat to the health or safety of her or himself or others...”

Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists: the duration of the risk; the nature and severity of the potential harm; the likelihood that the potential harm will occur; and the imminence of the potential harm.”

### **ADA Vaccine Accommodation:**

Whether your vaccine is conducted in-house, by a contractor or with the employee’s selected provider, if you are mandating a vaccine, you must offer accommodation if someone has an ADA covered disability which prevents them from being vaccinated.

If your organization is currently complying with social distancing rules and the employee is masked at all times, the accommodation may be simply to not require the vaccine for that individual.

Otherwise, if the nature of the risk due to not being vaccinated is so high (based on the employer’s reasonable belief, based on objective evidence) that it would pose a direct threat to the health or safety of the employee or others, the employer could review other accommodations that do not reach the level of undue hardship and eliminate or mitigate the risk to a reasonable level. If there is none available, the employer could choose to place the employee on leave or take other actions.

It is important that you discuss any concerns about accommodation with Catapult or legal counsel before rejecting an option.

### **Religious Vaccine Accommodation:**

Whether your vaccine is conducted in-house, by a contractor or with the employee’s selected provider, if you are mandating a vaccine, you must offer accommodation if someone has religious objection which prevents them from being vaccinated.

If your organization is currently complying with social distancing rules and the employee is masked at all times, the accommodation may be simply to not require the vaccine for that individual.

Otherwise, if the nature of the risk due to not being vaccinated is so high (based on the employer’s reasonable belief, based on objective evidence) that it would pose a direct threat to the health or safety of the employee or others, the employer could review other accommodations that eliminate or mitigate the risk to a

reasonable level. If there is none available, the employer could choose to place the employee on leave or take other actions.

The religious accommodation process does not require that an accommodation rise to quite as high a level of an undue hardship as applies under the ADA to decline the accommodation; however, it is important that you discuss any concerns about accommodation with Catapult or legal counsel.

### Considerations Surrounding Discipline/Termination Related to Vaccine:

Before taking disciplinary action, be sure to consider whether you are comfortable taking the same action for all other similar positions so as not to violate Title VII and other federal anti-discrimination laws.

In addition, make sure you have considered accommodating any ADA or religious needs. For example, if an employee does not want the vaccine because of severe allergies to certain ingredients, you might send them to a doctor with a reasonable accommodation form asking for alternative options. Perhaps another vaccine would be better tolerated, or perhaps you could shift to a different work area where direct patient contact was not required, as an example.

If you ever feel that you cannot accommodate, contact Catapult or your own legal counsel before taking corrective action or deciding to terminate.

Finally, if the employee feels the vaccine is unsafe, it would be better to provide them with some educational resources and give them some time to think it over. You do not have to place them on leave forever, but you do not want to be seen as retaliating based on their reporting a safety concern (an OSHA protected activity).

Since face coverings and social distancing are generally highly protective, you could also simply require continued use of those, particularly since the vaccine is not proven to prevent transmission of the virus by the vaccinated individual.

### MORE ABOUT VACCINE ELIGIBILITY/SCHEDULING IN NC

The vaccine is being rolled out in phases. For full details on each group, visit the NC DHHS website:

<https://covid19.ncdhhs.gov/vaccines/find-your-spot-take-your-shot>

**Group 1:** Health care workers & Long-Term Care staff and residents – in progress

**Group 2:** Older adults (65+) – in progress

**Group 3:** Frontline essential workers - School and childcare – in progress; Others early March

<https://covid19.ncdhhs.gov/vaccines/find-your-spot-take-your-shot/deeper-dive-group-3>

Workers who are in sectors essential to the functioning of society and who are at substantially higher risk for exposure to COVID-19 (firefighters, k-12 teachers, childcare, grocery store workers, manufacturing workers, public transit workers, postal service, police officers, and corrections workers).

**Group 4:** Those 16+ at high risk for exposure or increased risk of severe illness (high risk medical conditions, congregate living settings (prisons), and essential workers not yet vaccinated

<https://covid19.ncdhhs.gov/vaccines/find-your-spot-take-your-shot/deeper-dive-group-4>

**Group 5:** “Everyone who wants a safe and effective COVID-19 vaccination”

## Scheduling Vaccines in North Carolina

Each county is different, and each company may have different needs. Some options are:

- Visit your county DHHS website or dial the **COVID-19 Vaccine Help Center 1-888-675-4567**.
- Search providers by county: <https://covid19.ncdhhs.gov/findyourspot>
- **If you are considering scheduling onsite clinics, contact your county DHHS if you are an essential industry. You might try Walmart, Walgreens or CVS if you are not essential.**
- **The NC DHHS is working on a scheduling software available to employers (currently only for providers):** <https://covid19.ncdhhs.gov/vaccines/providers/covid-19-vaccine-management-system-cvms>