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# Employer Best Practices in the Creation and Management of Vaccination Mandate Programs

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The Partners Group & Jeff Nowak from Littler

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# WELCOME & INTRODUCTIONS



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# AGENDA

- Introductions
- Government Mandates
- Workplace COVID-19 Vaccination Policies
- Obtaining Proof of Vaccination Status
- Requests for Exemptions
- COVID-19 Testing
- Program Administration Resources

# — DISCLAIMERS

- **There is a lot of information to cover.**
- This webinar is intended for educational purposes only.
- This webinar is not intended to provide legal advice and does not substitute for advice of counsel.





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# GOVERNMENT MANDATES

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# Vaccination Mandates at the Federal Level

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## ON SEPTEMBER 9, PRESIDENT BIDEN ANNOUNCED A NEW ACTION PLAN: PATH OUT OF THE PANDEMIC

- Highlights of the plan include:
  - **Private Sector**—The plan directs OSHA to develop an Emergency Temporary Standard (ETS) that will require all employers with at least 100 employees to ensure their workforce is fully vaccinated or else subjected to weekly COVID-19 testing. The ETS will also require covered employers to provide employees paid time off to get vaccinated and recover from side effects. The details and timeline of the ETS are unknown.
  - **Federal Government**—The president signed two executive orders that mandate vaccination for all executive branch employees and for some employees of some federal contractors. The new orders supplement an earlier July 29 directive and eliminates the testing option for those who are not vaccinated unless they receive an approved exemption. The Safer Federal Workforce Task Force’s guidance on the Federal Government mandates can be found [here](#).
  - **Healthcare**—Building on an earlier announcement concerning nursing home staff, the plan provides that the Centers for Medicare and Medicaid Services will begin requiring vaccination for employees in most healthcare settings, including hospitals, dialysis facilities, ambulatory surgical settings, and home health agencies, as a condition for continued federal funding.

# Expect Legal Challenges to the Federal Mandate

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## WHAT CAN WE EXPECT FROM THE LEGAL CHALLENGES EXPECTED AMONG STATES AND PRIVATE EMPLOYERS?

- Precedent exists that supports the constitutionality of vaccine mandates.
- Precedent does not exist to use OSHA Emergency Temporary Standard to push through a mandate as far-reaching as this one.
- 24 state attorneys general have submitted a letter indicating their intent to take legal action if a private employer mandate is progressed.
- Employers, be prepared to comply.



# What About Vaccination Bans?

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## **MONTANA...**

- You cannot do anything if an employee refuses to get vaccinated.
- Some jurisdictions prohibit businesses from asking about customer vaccination status.







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# WORKPLACE COVID-19 VACCINATION POLICIES

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# Mandatory COVID-19 Vaccination Policy Options

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- Immediate Hard Mandate
- Phase-In Hard Mandate
- Soft Mandate
- Anything else?

\*Subject to reasonable accommodations for individuals with medical conditions or religious beliefs that prevent vaccination.





# Collective Bargaining Agreements

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Mandatory Subject of Bargaining?



- Do you have a unionized workforce?
- Scope of bargaining obligation?



# Policy Rollout Best Practices

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- Educate your workforce on the benefits of vaccination. Check out the CDC's employer toolkit [here](#).
- Create a centralized process.
- Limit access to proof of vaccination and testing records.
- Clearly communicate the exemption request process.
- Clearly communicate testing expectations and next steps/consequences of not meeting testing guidelines.
- Refrain from requiring visual identification of vaccination status.
- Check in regularly and adjust for updates with federal and state mandates.





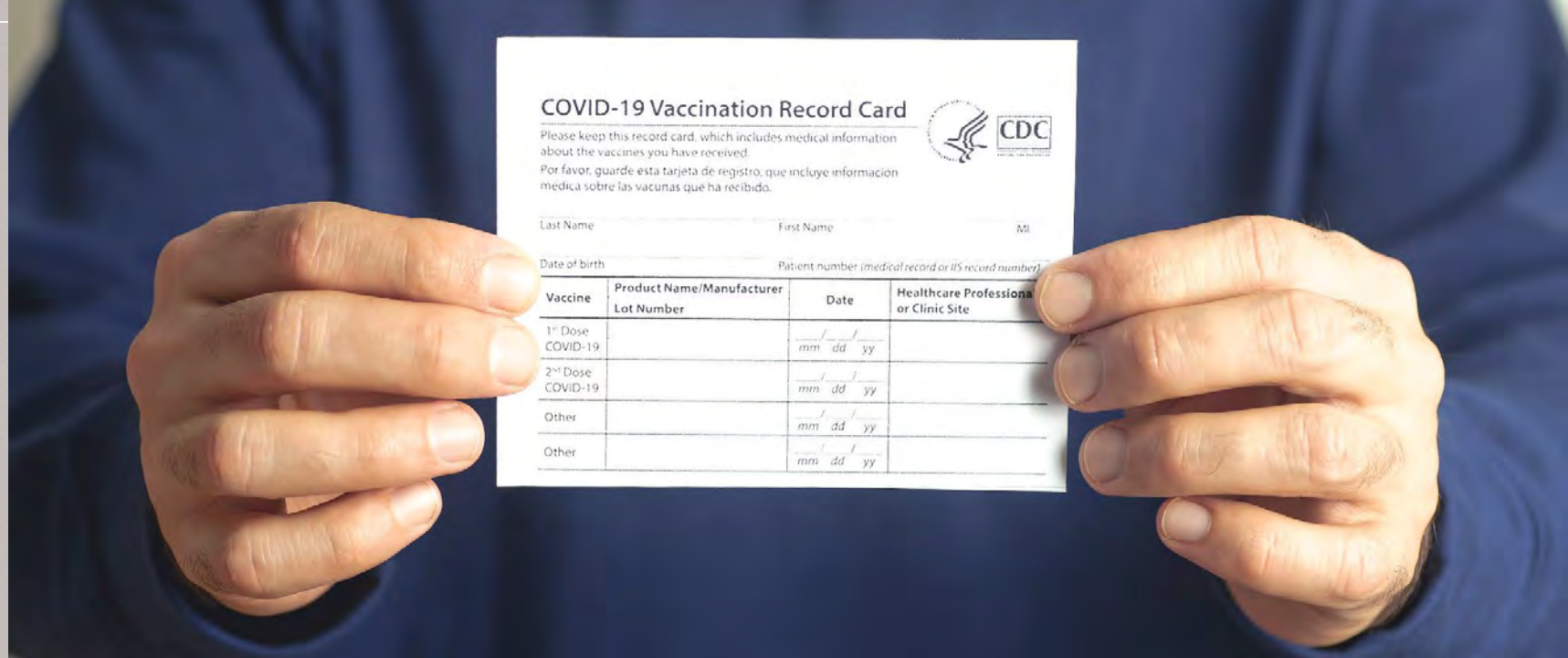
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# OBTAINING PROOF OF VACCINATION FROM EMPLOYEES

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# Proof of Vaccination

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- **HIPAA does NOT apply to employers' direct queries about workers' vaccinations.**
- **EEOC says it is OK to ask about vaccination status. Employers are well-advised to:**
  - treat written proof of vaccination itself (whether a CDC card, an employee attestation, or some other document) as confidential medical information;
  - store it separately from the employees' personnel file; and
  - limit formal access to such information on a need-to-know basis.





# Sharing Vaccination Status with Third Parties

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- Consent?
- Communicate to workers on expectations
- State law consent rules may vary



# Record Retention & Proofs of Vaccination

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- **Attestations** – as long as a pandemic exists and for ordinary employee retention periods.
- Will you collect copies of vaccination cards?
- **Third-party systems and data-breach issues** – do your due diligence.
- Guidance expected from OSHA when it publishes its ETS on mandatory vaccines.





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# REQUESTS FOR EXEMPTIONS FROM VACCINATION REQUIREMENTS

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# MEDICAL ACCOMMODATIONS



# ADA Accommodation Analysis

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## Medical Accommodation

**Three questions when faced with employee disability-related requests for exemptions from mandatory COVID-19 vaccination requirements under the ADA:**

1. Does the employee have a disability?
2. If so, is there a reasonable accommodation that will enable the employee to perform the essential functions of their job?
3. Would providing a reasonable accommodation impose an undue hardship on the employer?

# Disability Analysis

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## Medical Accommodation

**Making an accurate disability status determination is important. There are essentially three possible outcomes in a disability status determination:**

1. a finding of a disability;
2. a finding of a possible disability, but further investigation is needed; or
3. a determination that there is no disability.

**If further investigation is needed, employers may want to consider:**

1. requesting additional medical information from the worker, such as documentation regarding the worker's impairment and work restrictions;
2. seeking clarification of doctor's notes and work restrictions; or
3. arranging a medical examination.

Note: Several states require accommodations of individuals with pregnancy-related medical conditions, regardless of whether the individual has a "disability" related to the pregnancy. Review applicable laws!



# ADA Direct Threat Analysis

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Medical Accommodation

**An individual who cannot be vaccinated due to a disability can only be excluded from the workplace if they pose a “direct threat” under the ADA.**

**Four factors to consider:**

1. the duration of the risk;
2. the nature and severity of the potential harm;
3. the likelihood that the potential harm will occur; and
4. the imminence of the potential harm.

# Reasonable Accommodation

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## Medical Accommodation

**Even where the presence of an unvaccinated employee would pose a direct threat, an employer must make efforts to reasonably accommodate a worker who cannot obtain a vaccination due to a disability, where such an accommodation does not present an undue hardship.**

**EEOC provided the following examples of such accommodations:**

- requiring an employee to continue to wear a mask and social distance while in the workplace,
- limiting contact with other employees and non-employees, providing a modified shift,
- permitting continued telework if feasible, conducting periodic COVID-19 testing
- reassigning the employee to a vacant position in a different workplace.



# Undue Hardship Analysis

## Medical Accommodation

- Undue hardship under the ADA — “significant difficulty or expense.”
- Standard to show undue hardship under the ADA is a much higher standard than under Title VII’s provisions relating to religious accommodations.
- If an employee’s proposed accommodation would pose an undue hardship, exploring alternative accommodations is an important part of the interactive process.
- In the context of a COVID-19 vaccine mandate, this might include requiring the unvaccinated employee wear a face mask in the workplace (and PPE as appropriate for certain roles), work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, and/or be given the opportunity to telework.

Note: EEOC has said that excluding the individual as an accommodation should be a “last resort.”

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# RELIGIOUS ACCOMMODATIONS



# Key Issues to Consider

## Religious Accommodation



- Is the belief **religious**?
- Is the belief **sincerely held**?
- Would providing a reasonable accommodation impose an **undue hardship** on the employer?



# Is the Belief Religious?

## Religious Accommodation

- **“Religion” is identified by evaluating three factors:**
  1. it concerns fundamental and ultimate questions having to do with deep and imponderable matters;
  2. it is comprehensive, and not simply an isolated teaching; and
  3. it often can be recognized by the presence of certain formal and external signs.
- Personal, political, and other non-religious beliefs or views are not required to be accommodated. For example, “Bill Gates is trying to put a tracker chip in me,” or “COVID is a hoax,” or “This is a violation of my rights” would not amount to a religious belief.



# Is the Belief Religious?

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## Religious Accommodation

- Sincere and meaningful as a traditional belief in God.
- Does not have to be based on a formal religious organization.
- If an employee claims that religion makes him or her unable to perform a job function or duty, the employer should ordinarily assume that the employee's request for religious accommodation is based on a sincerely held religious belief.
- But if there is an objective basis for questioning the religious nature of an accommodation request, employers may seek additional supporting information, including asking respectful questions about the practice and the beliefs underlying it, to understand whether the employee's belief is truly religious in nature.

# Is the Belief Sincerely Held?

EEOC Four Factor Test  
Religious Accommodation



The EEOC lists four factors to consider in determining whether a belief is **sincerely held**:

1. Whether the employee has behaved in a manner markedly inconsistent with the professed belief;
2. Whether the accommodation sought is a particularly desirable benefit that is likely to be sought for secular reasons;
3. Whether the timing of the request renders it suspect (e.g., it follows an earlier request by the employee for the same benefit for secular reasons);
4. Whether the employer otherwise has reason to believe the accommodation is not sought for religious reasons.





# Is the Belief Sincerely Held?

EEOC Four Factor Test  
Religious Accommodation

- Heavily fact-specific analysis.
- Courts have recognized that an individual's beliefs can change over time, so an employee's changing beliefs may not impact the employee's sincerity under the EEOC's definition.
- If "objective basis" to question the sincerity of the belief, one can ask for supporting documentation.

# Undue Hardship Analysis

## Religious Accommodation

- If an employee's proposed accommodation would pose an undue hardship, the employer should explore alternative/additional accommodations that do not cause more than a *de minimis* burden to the employer.
- No obligation to provide the particular accommodation requested, as long as the accommodation provided eliminates the conflict.
- **This might include requiring that the unvaccinated employee:**
  - wear a face mask in the workplace,
  - work at a social distance from coworkers or non-employees,
  - work a modified shift,
  - get periodic tests for COVID-19, and/or
  - be given the opportunity to work remotely



# Accommodations & Undue Hardship

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- **ADA:**
  - Employer must show “substantial cost” to prove undue hardship.
- **Title VII Religion:**
  - Employer must only show “more than a de minimis burden” to prove undue hardship.
- **Burden on the employer is lower when showing undue hardship for a proposed accommodation for religious discrimination.**
- **But don’t forget about state law!**
  - In certain states, state law applies the more rigorous definition under the ADA to religious exemptions as well.

# Interactive Process Considerations

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- Must engage in the interactive process to see whether there's a reasonable accommodation.
- No set formula – one size does not fit all.
- Good and consistent documentation is critical.
- Conversation – back and forth – exchange of ideas.
- Attempt to discover and provide reasonable accommodation.





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# EXEMPTION REVIEW BEST PRACTICES


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# Employer Best Practices

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- Meet with organizational leadership in advance.
- Engage in the interactive process every time.
- Create a centralized process to manage exemption requests:
  - Use centralized HR email box or webforms.
  - Centralized tracking.
  - Consider support from your ADA service provider or SaaS technology.
  - Consider establishing “review committees” to address the volume of requests.
  - Limit supervisor's role in the review of medical and religious exemption requests.





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# COVID-19 TESTING

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# Test Costs?

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- Testing for “screening” vs. federal exposure testing
- State business expenses statutes
- State statutes on paying for medical tests
- “Mandatory” vs. “voluntary”
- What if the test is required by law?



# Time Spent Testing



- Is time spent taking an employer-required COVID-19 screening/monitoring test compensable work time?
- Check your jurisdiction's law on what sorts of activities are treated as compensable work time.
- Is the employee being tested as an accommodation of a medical condition or religious objection?





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# PROGRAM ADMINISTRATION RESOURCES

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# Program Management Technology

## Market Capabilities

- Wide variances in capabilities
  - Vaccination Status
    - Survey tools to collect attestations for vaccination status
    - Survey tools and vaccination card uploading
    - Organizational dashboards on vaccination status
  - Management of Testing
    - Testing reminders to employee and manager
    - Test results attestation
    - Organizational dashboards on testing status
  - Medical and Religious Exemption Process
    - Centralized tracking of requests
    - Documentation management
- Pricing Spectrum
  - Implementation fee
  - PEPM
  - Per transaction



# Program Management Technology

Emerging Solutions

- Technology emerging in the following spaces
  - HRIS/HCM vendors and platforms
  - Surveying services
  - Onboarding technology
  - CRM solutions
  - Benefits administration vendors and platforms
  - Stand-alone applications
- Best practices in sourcing a technology solution
  - Start with a search of your current HR technology and administration vendors
  - Know your organizational requirements and data constraints
  - Understand solution capabilities and pricing
  - Understand implementation requirements

# TPG Vaccine Resource Bundle

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Available to all TPG clients at no cost.

- What's included?
  - Weekly updates on federal/state/local vaccination mandate legislation
  - Model mandatory vaccination policy
  - Model medical accommodation request form
  - Model religious accommodation request form
  - Medical certification form for medical exemption (to be completed by physician)
  - Employee accommodation denial notice due to invalid or insufficient information
  - Employee accommodation denial notice because request cannot be accommodated
  - Employee accommodation approval letter with conditions (i.e., testing, extra PPE, etc.)
- How do you get it?
  - Current client can request [here](#).
  - Interested in becoming a TPG client? Find more information [here](#).





**THANK YOU**

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THE  
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