

COVID-19 Vaccination FAQs for Employers

This member resource was authored by Nixon Peabody LLP in collaboration with Greater Rochester Chamber.

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Can employers mandate that employees get vaccinated or be subject to termination of employment?

Yes, mandatory vaccination policies have been held to be lawful since at least the Supreme Court's 1905 decision in *Jacobsen v. Massachusetts*. See 197 U.S. 11 (1905). More recently, and with respect to COVID-19 vaccines specifically, a district court in Texas upheld the terminations of over one hundred hospital employees who refused to be vaccinated, specifically noting that the employee who challenged the mandate was free to "choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work somewhere else." See *Bridges v. Houston Methodist Hosp.*, No. CV H-21-1774, 2021 WL 2399994, at *1 (S.D. Tex. June 12, 2021). Subsequently, a federal appeals court in Indiana upheld a vaccination mandate implemented for both employees and students at Indiana University, and the United States Supreme Court further denied a request to block this requirement. See *Klaassen v. Trustees of Indiana Univ.*, No. 21-2326, 2021 WL 3281209 (7th Cir. Aug. 2, 2021).

To be sure, both of the challenged policies provided that the employer would make reasonable accommodations for employees with medical conditions that contraindicated the vaccine and/or employees with sincerely-held religious beliefs that contradicted vaccination, as such policies must to comply with Title VII of the Civil Rights Act of 1964 (and, in our case, the New York Human Rights Law). Employees who simply have concerns about vaccine safety or who just do not want to be vaccinated, however, are not entitled to any legal protections.

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What about contractors/vendors/visitors entering their workplace: can the employer or property owner only allow entry to those who are vaccinated?

Yes. There is no prohibition on discrimination on the basis of vaccination status alone, as an individual may choose not to be vaccinated for any number of reasons unrelated to a protected category (such as a medical condition or religious belief). Absent a demonstration that an individual is entitled to some medical or religious accommodation, unvaccinated individuals may be denied entry, even if they are willing to wear a mask or take other precautions against spreading the virus.

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But doesn't it violate the Health Insurance Portability and Accountability Act ("HIPAA") to ask about an individual's or employee's vaccination status?

No. Generally speaking, HIPAA only protects patient health information from being **disclosed by healthcare providers or health insurers without the patient's knowledge**. The vast majority of employers and property owners are not even subject to HIPAA in any capacity, and, regardless, HIPAA does not prohibit **inquiries** about an individual's health or medical information under any circumstances (indeed, it would be impossible for any individual to receive adequate healthcare if they were prohibited from being asked about their medical information). Again here, an individual certainly has the right to choose not to disclose his or her vaccination status, but he or she must accept the consequences of that decision (which may include being denied entry into certain establishments or being terminated from employment).

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Can an employer require an employee to show and provide a copy of their COVID-19 vaccination card/documentation? If so, should employers keep a copy or just check them off on a list?

Yes, employees in New York can be required to show or provide proof of vaccination against COVID-19 (and, as explained above, such a requirement would not violate HIPAA). Whether employers elect to keep a copy or just maintain a list is up to the employer, understanding, however, that an employee's status as vaccinated is still considered employee medical information, which employers have an obligation to keep in a medical file separate from the employee's personnel file, and which employers are prohibited from disclosing to anyone absent a "need-to-know."

Additional questions on COVID-19 or other HR-related issues? Contact Kathy Richmond at Greater Rochester Chamber via the member HR Helpline at 585-256-4618 or via email at Kathy.Richmond@GreaterRochesterChamber.com. Please contact Kim Harding at Nixon Peabody (KHarding@NixonPeabody.com, 585-263-1037), or your attorney for legal guidance. More resources available at GreaterRochesterChamber.com and NixonPeabody.com.