



COVID-19 Vaccinations and Your Workplace

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- We will email you the recording and slides within 24 hours
- Please participate in our polls
- We may get to a few questions submitted via Q&A, but due to audience size we will not be able to get to most

Agenda

- What We Know About The Vaccines
- Mandating Vaccinations
- Encouraging Vaccinations
- Dealing With Disgruntled Employees
- Ongoing COVID Safety Precautions

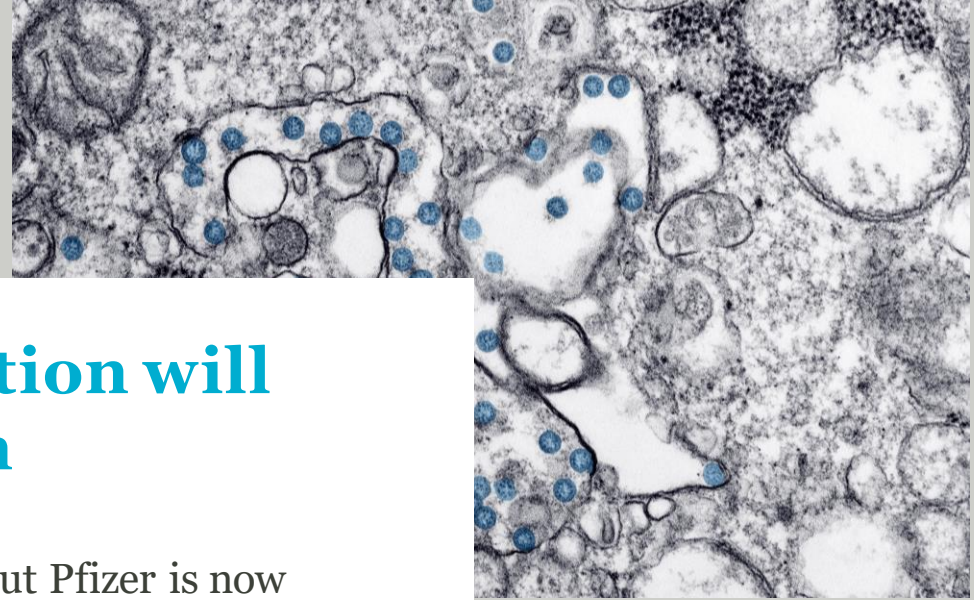
What We Do and Don't Know About the Vaccines

Known: They are—mostly—very effective

- Pfizer and Moderna – out now, takes two doses, ~95% effective in preventing symptoms, and 100% in preventing hospitalization and death for the *original* SARS-CoV-2
- Johnson and Johnson– Emergency Use Authorization will be discussed by the FDA on February 26, likely out soon, one dose, 66% effective in preventing moderate symptoms, 100% in preventing hospitalization and death
- None work as well against the new mutations – the formerly-promising AstraZeneca vaccine isn't even effective enough to get approved

Best Guess: Vaccination will reduce transmission

- No one was testing this at first, but Pfizer is now
- Generally, symptom severity and ability to transmit are correlated
- 1/3 of people don't get symptoms and they cause 1/4 of all infections



Unknown: When they'll be widely available and if they're effective against new mutations

- Distribution varies by state plan and availability of doses, space to administer them, health care providers, even refrigeration
- Plans for distribution will depend on whether current vaccines will stand up to the mutations
- Even when vaccines are widely available to low-risk individuals, there are a lot of people in this category

Bonus Unknown: Will enough people get the vaccine to create herd immunity?

Mandating Vaccines

Mandating: The issues

- Legislators in many states are trying to make it illegal for employers to require vaccines
- Mandates are low-hanging litigation fruit, even if claims are unlikely to be successful
- You will need to provide exemptions to certain employees - maybe many of them - and this will be time consuming and tricky
- People don't like being forced to do things (just call me Captain Obvious)



State laws in progress

Legislators in many states are trying to make it illegal for employers to take adverse action against employees who refuse to get a vaccine.

So far, we've seen bills in ID, MD, TN, KS, TX, MN, IA, AL, WI, AZ, SC, PA, VA, OK, CT, MT, MS, IN, OR, WA, KY, NJ



Risk of litigation

- SCOTUS has ruled repeatedly that mandatory vaccination does not violate a person's Constitutional rights (EUA is untested)
- HOWEVER, a state constitution or other state law could be interpreted differently
- AND the fact that something is generally accepted as legal or common sense has never stopped people from suing in the past
- ALSO, will employers be liable for adverse reactions if they mandate?



Exemptions must be provided *and they will be a major time sink*

- Disabilities and pregnancy
- Sincerely held religious beliefs

These requests should be dealt with by HR, or someone who is familiar with the relevant laws and willing to follow a consistent process. *Don't leave managers in charge of this.*

Proof of the need for an exemption

For disability, you can ask for a doctor's note.

For religion, if you have "an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance" then you can ask for supporting information.

Exemption = reasonable accommodation

Assumption: an unvaccinated person in your workplace is a direct threat, otherwise you wouldn't mandate vaccines in the first place.

You need to engage in the *interactive process* to see if the employee can continue to work in a modified fashion.

- Continuing to work from home
- Working a different shift with fewer coworkers
- Moving their workstation
- Changing positions temporarily

What about undue hardship?

For disability accommodations, there is still an out for *undue hardship*, which means "significant difficulty or expense."

For religious accommodations, employers can apply a lower standard of "more than a de minimus cost."

If you can't find a suitable accommodation, you can exclude the employee from the workplace (according to federal law) but talk to an attorney before moving to indefinite leave or termination.



Morale will take a hit

- Those who think mask mandates are a violation of their rights will not take more kindly to mandatory vaccines
- In general, people don't like their employers reaching into their personal lives
- You cannot legally prevent employees from complaining or punish those who do

Encouraging or Incentivizing Vaccines



Running an incentive program

- You need to provide alternatives for those with disabilities or conflicting religious beliefs
- Have employees get the vaccine from an unaffiliated third party
- Make it easy and consider paid time off a necessary part of the package

Instead of exemptions, alternatives

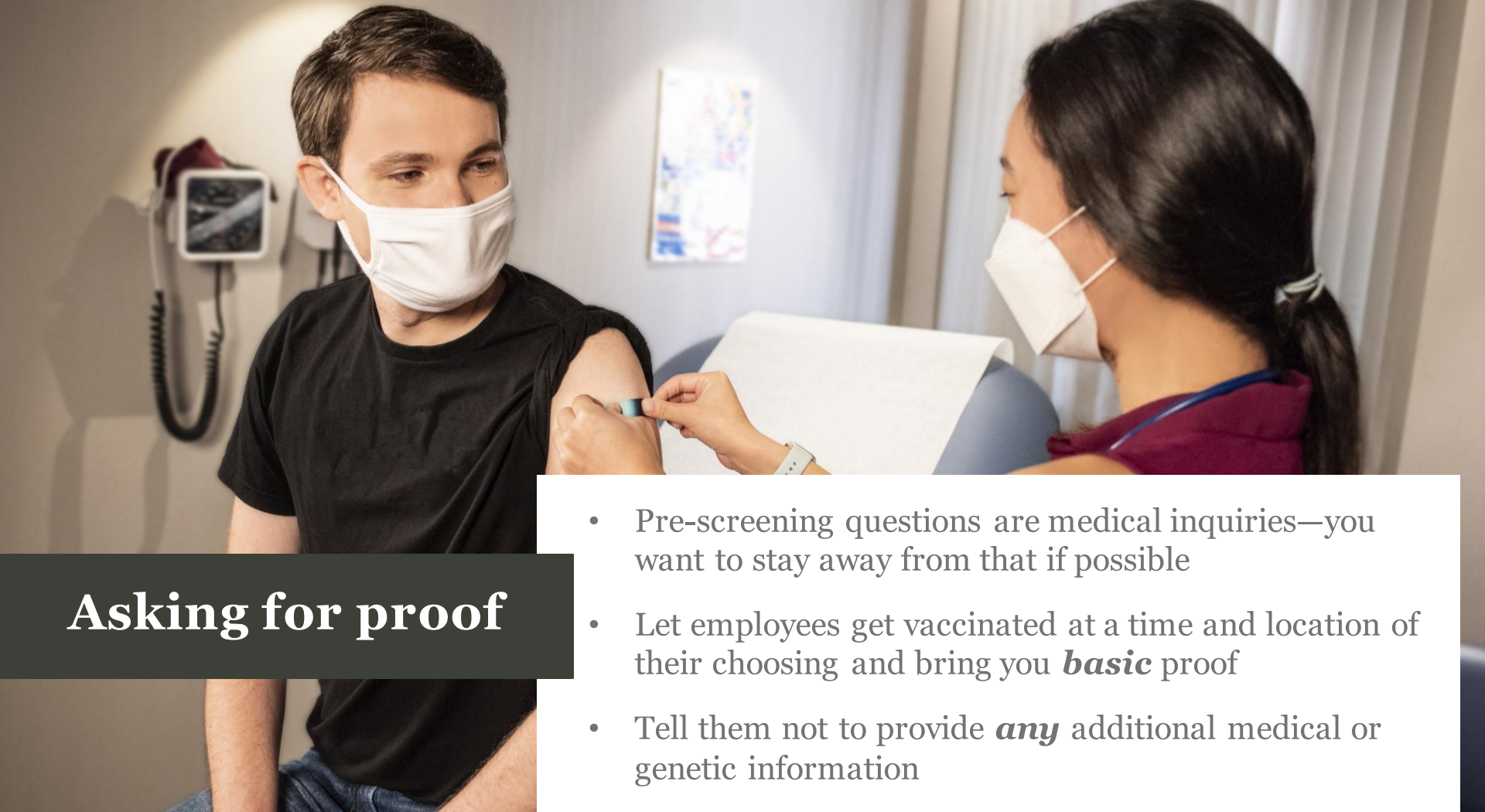
To avoid potential ADA (disability) and Title VII (religion/sex) claims, you need to offer employees something they can do instead of getting the vaccine that will earn them the incentive. For example:

- Take a training on reducing the spread of infectious disease
- Periodic COVID testing
- Working from home
- Wearing (real) PPE, like an N95 mask

Don't ask why they are opting out of the vaccine—this may end up being a medical inquiry.

“If you are unable to get the vaccine and would like to discuss alternatives, please contact Human Resources.”

If no shot for you
Here's something else you can do
A swab up your nose



Asking for proof

- Pre-screening questions are medical inquiries—you want to stay away from that if possible
- Let employees get vaccinated at a time and location of their choosing and bring you *basic* proof
- Tell them not to provide *any* additional medical or genetic information

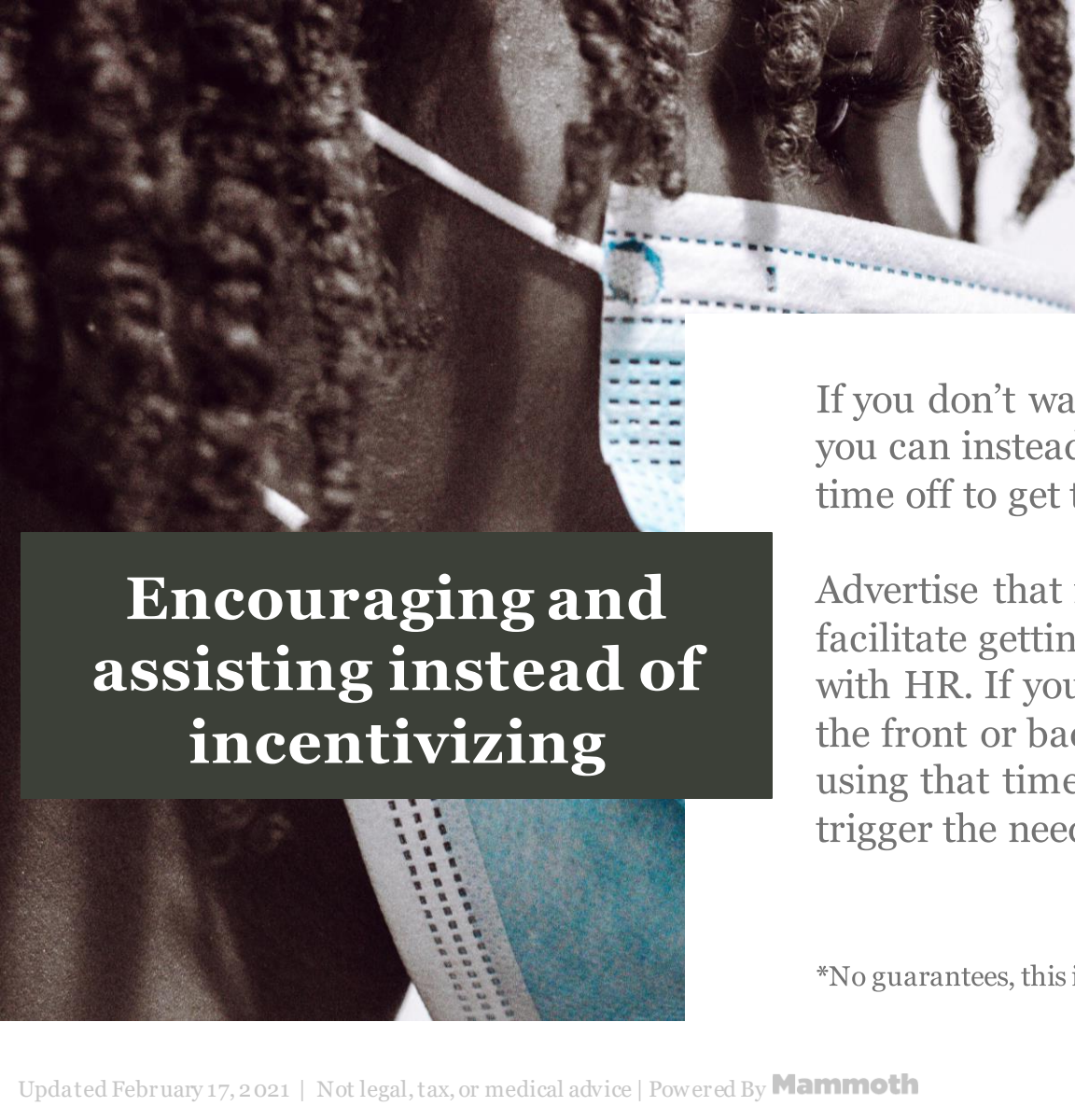
Make it as easy as possible

- Create a list of providers near where your employees live, with hours of operation
- Create a list of providers close to the workplace, with hours of operation
- *At least* provide unpaid time off
- Preferably provide paid time off



More considerations

- The benefit will be taxable, unless it's tiny. Gross up to account for that or make sure employees know this ahead of time
- Don't end your program before everyone has access to the vaccine (or prepare for serious backlash)
- **If your incentive isn't compelling, it won't make people do it any sooner or change any minds**



Encouraging and assisting instead of incentivizing

If you don't want to go down the incentive road, you can instead offer employees paid or unpaid time off to get the vaccine.

Advertise that if employees need time off to facilitate getting the vaccine, they should speak with HR. If you're just shaving a few hours off the front or back of their shift, and they will be using that time to get the vaccine, this shouldn't* trigger the need to offer alternatives.

*No guarantees, this is the Wild West



Let's get excited! (or not)

- Make sure your campaign aligns with your company culture
- If you're a big font, bright colors, large posters kind of workplace, show that level of energy for vaccination
- If you're serious, stay serious
- Leaders should be willing to get vaccinated as soon as allowed and should make that known
- Educate employees about vaccine safety

Disgruntled Employees: A Primer on Section 7 of the National Labor Relations Act



The NLRA is for everyone

At least parts of it.

Section 7 applies to all non-supervisory employees (this is broader than it sounds) and protects their right to engage in “concerted activities” for their “mutual aid and protection.”

Section 8 makes it unlawful to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.



Mutual aid and protection

This term applies to pretty much any term of condition of employment.

- Wages
- Hours
- Dangerous or unfavorable working conditions
- Treatment from managers
- Workplace policies, like mandatory vaccines

Concerted activity

This means acting “in concert.” If two or more employees are acting together (even without meaning to), you’ve got concerted activity. For instance:

- If one employee complains about your vaccine program on Facebook and then another employee “likes” the post, or comments, concerted activity is afoot.
- If an employee wants to gather conscientious objectors during unpaid break time, they can.





How can you stop it?

You can't.

You can take limited action to prevent wasted work time—if it's the same kind of action you'd take if employees were wasting work time talking about their kids—but if you are going to get in the vaccine game, you should brace for some potential morale, PR, and organizing issues.

Poll Question

What level of involvement do you anticipate your organization will undertake with respect to vaccination?

Poll Question

With respect to vaccination policies, which issue do you think would be most challenging?

Ongoing COVID-19 Safety Guidance

Follow new OSHA guidance

OSHA released “Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace”

Key Points:

- Wear face coverings
- Maintain social distance
- Conduct a hazard assessment
- Identify measures to limit spread
- Have a system for identifying and sending home sick employees
- Protect employees from retaliation for raising COVID-19 concerns

A close-up photograph of a person's eyes, looking directly at the camera. The person is wearing a white surgical mask that covers the lower half of their face. The background is a plain, light gray color.

Keep your masks and distance

- Remember that many people will probably not be vaccinated for another 6+ months, and that's assuming our current vaccines hold up against the new variants
- Vaccinated people can catch and probably spread COVID, and you will not be able to keep all non-vaccinated people out of your workplace indefinitely, whether employees or customers



**Keep sick
employees home**

If you don't have a paid sick leave policy yet, make one.

If you really can't pay for it, at least make it available unpaid.



Keep accommodating

Don't try to be an epidemiologist or a doctor. If an employee asks for an accommodation, even when most of the workforce is vaccinated, grant it or re-engage in the interactive process.

Continue to refine your WFH processes

This ~~may not be~~ won't be our last pandemic.

Making WFH viable is a great way to not lose productivity when employees need to stay home with sick kids, or to meet the cable guy, or because the air quality is so bad it's dangerous to be outside without an N95 mask.

If employees can WFH effectively while they are sick (but feel well enough to work), they get the benefit of continued income while you get the benefit of them not coming in and infecting the rest of your workforce.



Q & A