



UNCOMMONLY INDEPENDENT

The coronavirus disease 2019 questions and answers for U.S. employers: The Delta variant & the workplace

AUG. 26, 2021

Please note: For the most up-to-date information and resources, visit the Centers for Disease Control and Prevention's National Institute for Occupational Safety and Health (NIOSH). The CDC should be your primary source for emergency preparedness and response to the coronavirus. The below information is designed to guide businesses to known, credible online resources covering the coronavirus and does not constitute medical advice.

Employers with offices outside the U.S. should review their statutory obligations for reporting suspected cases and paid time off policies with employment counsel to ensure compliance with local and national legislation.

Sections

Section 1: Clinical aspects of the Delta variant

Section 2: Communicating with employees

Section 3: Employment law issues

Section 4: Vaccine incentives as wellness programs

Section 5: Employer liability

Section 6: View from Capitol Hill

Section 1: Clinical aspects of the Delta variant

DR. CHRISTINE HALE, VP – CLINICAL CONSULTING

If someone was vaccinated, then gets COVID-19 and gets tested, how would they know if it is the Delta variant vs. regular COVID-19?

Routine COVID-19 testing (even PCR) does not identify which variant is present. Depending on where the person is tested (state and local health departments, hospitals, etc.), a genetic sequencing test may be sent to determine the variant. Treatment and precautions to mitigate spread are the same regardless of variant, so most patients do not have a need to know which they have.

Is the vaccine needed if someone has already been infected with COVID-19?

Vaccination is still recommended in individuals who have had COVID-19, as we do not know how long natural immunity lasts after infection. Early data suggests that individuals who have had COVID-19 infection alone without vaccination are 2x more likely to get COVID-19 again versus those who have had the vaccine. Keep in mind, this is one small study, and more research is needed on this topic.

Check with the CDC and/or your personal physician for guidance on timing of receiving the vaccine after infection.

Can someone who has had a reaction to another immunization receive the COVID-19 vaccine/booster?

If the patient has had a true ALLERGIC reaction (hives, swelling, wheezing, respiratory distress) to a previous COVID-19 vaccine dose, subsequent doses are not recommended.

“COVID rash” and other known post-vaccination symptoms (fatigue, headache, swollen lymph nodes) do not disqualify a patient from a subsequent dose.

Patients with allergy to PEG (a component of some vaccines) should not receive either of the currently available COVID-19 mRNA vaccines (Pfizer, Moderna), but they may receive the Johnson & Johnson vaccine. Patients with an allergy to polysorbate should not receive the J&J vaccine, but may receive one of the other two.

Ultimately, a patient’s treating physician should be the one to advise on whether vaccination is safe, and which vaccination to receive based upon a review of the specific nature of the prior reaction.

Can the COVID-19 and influenza vaccines be received on the same day?

Yes. Typically, one would be given in each arm.

Section 2: Communicating with employees

JULIE GIBSON, EVP – DIRECTOR, MARKETING, COMMUNICATIONS & EXTERNAL AFFAIRS

Would you have a survey template that we could use to help us know the questions to be asked?

Each situation is unique. Your Lockton account team can help develop the solution that is right for your business.

Section 3: Employment law issues

PAULA DAY, J.D., VP – DIRECTOR, HR COMPLIANCE CONSULTING

Can we mandate the vaccine for remote employees?

You cannot mandate the vaccine for remote employees. The EEOC guidance is that under the ADA and Title VII, an employer may require all employees physically entering the workplace to be vaccinated for COVID-19.

Do we have to compensate employees for weekly COVID-19 testing if they don't want the vaccine?

At this time, the informal guidance from the Department of Labor is that employees should be compensated for the time spent being tested for COVID-19.

Can testing be a requirement for an employee who receives an exemption if the employer pays for testing?

Yes. Testing would be a reasonable accommodation.

Do private employers need to have an alternative testing program?

If a private employer is mandating the vaccination, they are not required to have an alternative testing program for unvaccinated persons. Regular COVID-19 testing would potentially be a reasonable accommodation under the ADA and/or Title VII for employees with a medical reason for not being vaccinated or a religious objection to the vaccine.

What are the quarantine guidelines for workplace exposure to COVID-19?

Quarantine if you have been in close contact (within 6 feet of someone for a cumulative total of 15 minutes or more over a 24-hour period) with someone who has COVID-19 unless you have been fully vaccinated. People who are fully vaccinated do NOT need to quarantine after contact with someone who had COVID-19 unless they have symptoms. However, fully vaccinated people should get tested three to five days after their exposure, even if they don't have symptoms, and wear a mask indoors in public for 14 days following exposure or until their test result is negative. Check [cdc.gov](https://www.cdc.gov) for the most updated guidance.

Can you give a day off PTO as both the paid time for vaccine and as an incentive?

Yes. Keep in mind some states/localities may require paid time off for employees to be vaccinated. OSHA and the CDC are encouraging employers to provide paid time off for purposes of the vaccine.

On religious declinations, how do you handle when you only receive blanket statements or Bible verses?

The accommodation process is an interactive process. The employee needs to explain how the religious belief is contrary to the vaccine mandate.

If you doubt the sincerity of the asserted religious belief or have objective facts for suspecting the request for religious accommodation is not genuinely related to a religious belief, you can request additional information that may help better assess the request. Note that the EEOC recommends that employers should presume that the request for a religious accommodation is sincere in the absence of an objective basis for questioning the religious nature or sincerity of the asserted religious belief, practice or tenet.

What constitutes an unsafe workplace? If we do not mandate vaccines, can an employee claim an 'unsafe workplace' and refuse to come into the office?

A private employer is not required to mandate the vaccine at this time. For workplaces governed by federal OSHA, see [osha.gov](https://www.osha.gov) for workplace safety guidance. The OSH Act's General Duty Clause, Section 5(a)(1), requires employers to provide their workers with a safe and healthful workplace free from recognized hazards that are causing or likely to cause death or serious physical harm. Specifically, with regard to COVID-19, OSHA has identified a number of steps employers can take to protect unvaccinated and otherwise at-risk workers.

OSHA suggests that employers mandate the vaccine or have employees undergo regular COVID-19 testing (in addition to mask-wearing and physical distancing) if they are unvaccinated.

Section 4: Vaccine incentives as wellness programs

EDWARD FENSHOLT, J.D., SVP – DIRECTOR, COMPLIANCE SERVICES

Can an employer refuse to cover someone on the medical plan if they are not vaccinated?

No. Using vaccination status as a condition of eligibility will violate the HIPAA nondiscrimination rules. Those rules prohibit discriminating against an employee in eligibility for coverage based on a health status factor. We think vaccination status is a health status factor. While *some* discrimination based on health status can go on under the wellness program rules, those rules don't contemplate denying someone eligibility outright.

Can we charge higher medical payroll deductions to those who do not get the vaccine?

Only within the boundaries of the HIPAA/ACA wellness program rules. Under those rules, we think a premium incentive or surcharge based on vaccination status is an "activities-based" wellness program,

meaning you need to offer a reasonable accommodation – some other, reasonable way to win the incentive or avoid the surcharge – for those who cannot or should not get vaccinated due to a health condition (e.g., a prior, severe reaction to vaccines). And the amount of the incentive or surcharge is limited, as described in the [handouts](#).

Section 5: Employer liability

MARIE-FRANCE GELOT, J.D., SVP – INSURANCE & CLAIMS COUNSEL

Why, for companies choosing to mandate the vaccine in the workplace, would the mandatory COVID-19 testing only be applicable to unvaccinated employees when vaccinated employees can carry and spread the virus?

Companies are free to implement whatever precautions they deem necessary to ensure the safety of their workforce and workplace in accordance with federal, state and local laws and guidance. The EEOC has stated that employers can lawfully test employees for COVID-19 before permitting them to enter the workplace. Employers are also allowed to mandate vaccinations. Mandating vaccinations may pose liability risks, particularly under the ADA (disability) and Title VII (religion). Additionally, it is important to keep in mind that any workplace policies or procedures that may have a discriminatory effect upon a protected class of employees (by race, religion, ethnicity, pregnancy, disability, age, etc.) could lead to liability under applicable anti-discrimination laws. Employers are encouraged to keep abreast of all applicable laws in their jurisdictions and to seek advice from Lockton and legal experts where necessary.

Section 6: View from Capitol Hill

SCOTT BEHRENS, J.D., SVP – DIRECTOR, GOVERNMENT RELATIONS

Do you expect any extensions for expired/expiring provisions in prior COVID-relief packages, for example, tax credits for paid leave, employee retention tax credit, COBRA premium assistance or enhanced unemployment?

Not without additional significant economic disruption. Congress has already spent unprecedented amounts of money on COVID-relief and have turned their focus to long-term spending programs. The nearly all-consuming focus is on making significant investments in both physical infrastructure and what the Biden administration has called family infrastructure. The physical infrastructure bill actually reallocates some previously approved COVID-19 relief to pay for infrastructure projects. Messaging on the family infrastructure proposal includes funds for future pandemic relief, but there is no indication it will include an extension of any expired/expiring COVID-19 relief. That one exception is making the enhanced child tax credit permanent, which was originally passed as part of prior COVID-19 relief package. Adding more COVID-19 relief extensions will increase the cost of the family infrastructure proposal to the exclusion of other long-term priorities.

We do note, memoranda from Senate Democratic leadership do indicate the family infrastructure plan will contain paid leave provisions. The specific requirements remain undefined, but reports indicate they will be broader than a mere extension of the COVID-relief leave tax credits.

Members of Congress are closely monitoring the public health and economic disruption of the Delta variant, and changing circumstances could force Congress to act.

Is Congress considering a permanent extension to the prior COVID-relief provision allowing group health plan sponsors to provide no-cost or low-cost pre-deductible telemedicine coverage without jeopardizing HSA eligibility?

Lockton has joined many employers, coalitions and trade associations to encourage Congress to extend this provision to plan years 2022 and beyond. An extension, permanent or otherwise, remains an uphill battle. The provision is not currently included in either infrastructure package and adding it jeopardizes other priorities in those packages. The best opportunity for an extension might come in late 2021. Interested employers and participants in high-deductible health plans are encouraged to contact their federal legislators to support an extension. If you would like help reaching out to your legislators or assistance with talking points, please contact Scott Behrens, Lockton's Director of Government Relations, at sbehrens@lockton.com.