

# Frequently Asked Questions: COVID-19 Vaccines and Mitigation Measures

By Karli Lubin, Esq.

Since the start of the pandemic, landlords and property managers have been working with tenants to create a safe and healthy environment for building occupants. As more and more people have access to the vaccine, more employees are returning to office buildings. While COVID-19 vaccines are encouraging for employers currently struggling to balance worker safety with a desire to return to the workplace, their slow rollout has prompted a number of complex concerns. Below are some of the most pressing questions landlords, property managers and tenants face on how to handle vaccinations in the workplace.

## What can landlords and property managers do to address COVID-19 concerns within the building?

Landlords and property managers can take a number of steps to enhance building safety in connection with COVID-19, including requiring masks, restricting elevator capacity and providing additional cleaning and sanitizing of common areas. The landlord-tenant relationship is governed by the terms of the lease, and the lease will inform the extent to which the landlord is permitted or required to adopt building-wide COVID-19 protocols, and it will also address how related expenses are to be allocated. Office leases typically have broad provisions that permit the landlord to adopt and modify building rules and regulation, but these provisions may prohibit any such rules and regulations that limit the tenant's rights or increase its costs. Such restrictions could arguably prevent a landlord from requiring its tenants to test all employees on a daily basis. However, a landlord may be able to require anyone entering the building to answer basic questions related to COVID-19 risk. Additional cleaning and sanitizing services provided by the landlord can likely be passed through to the tenant, but that may not be the case for capital improvements aimed at improving air circulation, for instance, if such improvements are not required by law. Before adopting COVID-19 protocols, landlords should understand to extent to which existing lease terms impact such protocols.



## Can employers mandate vaccination?

Generally, yes, employers may require vaccination. However, employers must be mindful of federal laws that could require the employers to provide accommodations for individuals whose disability or religious beliefs prohibits vaccination. Additional limitations may apply if a workforce is unionized and if employees oppose a mandatory vaccine policy. State and local laws may further limit an employer's ability to require vaccination.

## Can landlords require building occupants to be vaccinated?

Probably not. In most office leases, tenants have 24/7 access to their premises during the term, subject to specific rights of landlords to restrict building access. On a purely contractual level, such a landlord requirement could run afoul of a covenant of quiet enjoyment or otherwise constitute a landlord default, especially if the tenant does not require vaccination of its employees. Furthermore, such a requirement could have a discriminatory impact when coupled with the phased vaccine roll-out.

## Can employers and landlords incentivize vaccination?

Employers who choose not to mandate vaccination may nonetheless wish to encourage vaccination by offering incentives, such as paid time off, a gift or even a cash payment. Depending on the structure of the incentive program, employers may need to consider whether it should be treated as an

employee wellness program, which may be subject to non-discrimination requirements. Recently, the Equal Employment Opportunity Commission (EEOC) withdrew proposed rules on wellness incentives, leaving employers unclear on how the EEOC views vaccine incentives. The U.S. Chamber of Commerce has asked the EEOC to provide employers with guidance on this important question. In addition, employers will need to think through potential wage and hour implications of an incentive program and, for unionized workforces, consider whether such a program must be bargained with the union.

Landlord incentives can flow to tenants as a way to encourage employers to incentivize or require their employees to get vaccinated. In addition, office buildings with a small number of tenants may band together to create a uniform approach for the building and the property manager can play a key role in facilitating this process.

## **What are the practical considerations?**

The slow and staggered vaccination rollout will affect when employees can access the vaccine. While some employees may already be fully vaccinated, others may be eligible but unable to access the vaccine. Still others might be wondering when they will become eligible—whether in weeks or months from now. Additionally, many employees may be reluctant to get the vaccine. When employees can get vaccinated and whether they will want to play an important role in determining the most appropriate policy for a given workforce. Employers should develop a comprehensive communication policy to ensure that employees receive accurate and timely information regarding their expectation with respect to vaccinations and overall commitment to worker safety.

As more people get vaccinated, more employees will be comfortable returning to the office on a regular basis. Property teams play key roles in fostering a healthy and safe work environment and this may require some creativity. The structure, size, tenant composition and location of a given office building will inform the appropriate action plans.

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