

A Shot in the Arm or a Shot in the Foot? How to Think about Employee Vaccination Policies

Thursday, February 18, 2021

These materials and commentary are intended for educational purposes only. No portion may be construed as rendering legal advice for specific cases, or as creating an attorney-client relationship between the audience and the author(s). The opinions expressed herein are solely those of the author(s). ©2021 Troutman Pepper Hamilton Sanders LLP. All Rights Reserved.

1

Speakers & COVID-19 Resources



Richard Gerakitis
richard.gerakitis@troutman.com
 404.885.3328



Jessica X.Y. Rothenberg
jessica.rothenberg@troutman.com
 212.808.2731



Emily E. Schifter
emily.schifter@troutman.com
 404.885.2720

The Troutman Pepper Vaccine Task Force maintains a COVID-19 Vaccine Frequently Asked Questions site to help our clients. If you have questions specific to your business or COVID-19 vaccination policies, please feel free to contact us or visit the Troutman Pepper COVID-19 Resource Center.

FAQ Site - <https://www.troutman.com/insights/covid-19-vaccine-frequently-asked-questions.html>
 COVID-19 Resource Center - <https://covid19.troutman.com/>

©2021 Troutman Pepper Hamilton Sanders LLP. All Rights Reserved.

2

COVID-19 Vaccine Tracker

| DEVELOPER | TYPE | STAGE | OTHER INFORMATION |
|----------------------------|------------------------------|---|--|
| Moderna | mRNA | EUA | <ul style="list-style-type: none"> • 2 doses; 95% effective • Freezer/refrigerator |
| Pfizer/BioNtech | mRNA | EUA | <ul style="list-style-type: none"> • 2 doses; 95% effective • Ultra-cold storage |
| Johnson & Johnson, Janssen | Adenovirus Vector | Phase 3 Trials, EUA request submitted February 2021 | <ul style="list-style-type: none"> • Single dose; 72% effective • Refrigerator storage |
| AstraZeneca | Adenovirus Vector | Phase 3 Trials underway | <ul style="list-style-type: none"> • Single dose • Refrigerator storage |
| Sanofi | Recombinant protein/adjuvant | Phase 2 trials scheduled to start February 2021 | <ul style="list-style-type: none"> • 2 doses • Refrigerator storage |
| Novavax | Recombinant protein/adjuvant | Phase 3 trials underway | <ul style="list-style-type: none"> • 2 doses, 21 days apart • Refrigerator storage |

3

©2021 Troutman Pepper Hamilton Sanders LLP. All Rights Reserved.



3

Employer Considerations



ELIGIBILITY



**ESSENTIAL VS
NON-ESSENTIAL**



**LOGISTICS OF
DISTRIBUTION**



©2021 Troutman Pepper Hamilton Sanders LLP. All Rights Reserved.



4

COVID-19 Vaccination Recommendations

COVID-19 Vaccination Recommendations

- On Dec. 1, 2020, ACIP [recommended](#) that health care personnel and long-term care facility residents be offered COVID-19 vaccination first (Phase 1a).
- On Dec. 11, 2020, the FDA issued an [Emergency Use Authorization \(EUA\) for use of the Pfizer-BioNTech COVID-19 vaccine](#)  in persons aged 16 years and older and on Dec. 13, 2020, [ACIP issued recommendations for the use of Pfizer-BioNTech's COVID-19 vaccine](#) for the prevention of COVID-19.
- On Dec. 18, 2020, the FDA issued an [EUA for the use of the Moderna COVID-19 vaccine](#)  for use in individuals 18 years of age and older and on Dec. 20, 2020, [ACIP issued recommendations for the use of Moderna COVID-19 vaccine](#) for the prevention of COVID-19.
- On Dec. 20, 2020, ACIP updated interim vaccine allocation [recommendations](#). In Phase 1b, COVID-19 vaccine should be offered to people aged 75 years and older and non-health care frontline essential workers, and in Phase 1c, to people aged 65–74 years, people aged 16–64 years with high-risk medical conditions, and essential workers not included in Phase 1b.

Learn more about [ACIP and CDC recommendations for COVID-19 Vaccines](#).

©2021 Troutman Pepper Hamilton Sanders LLP. All Rights Reserved.




5

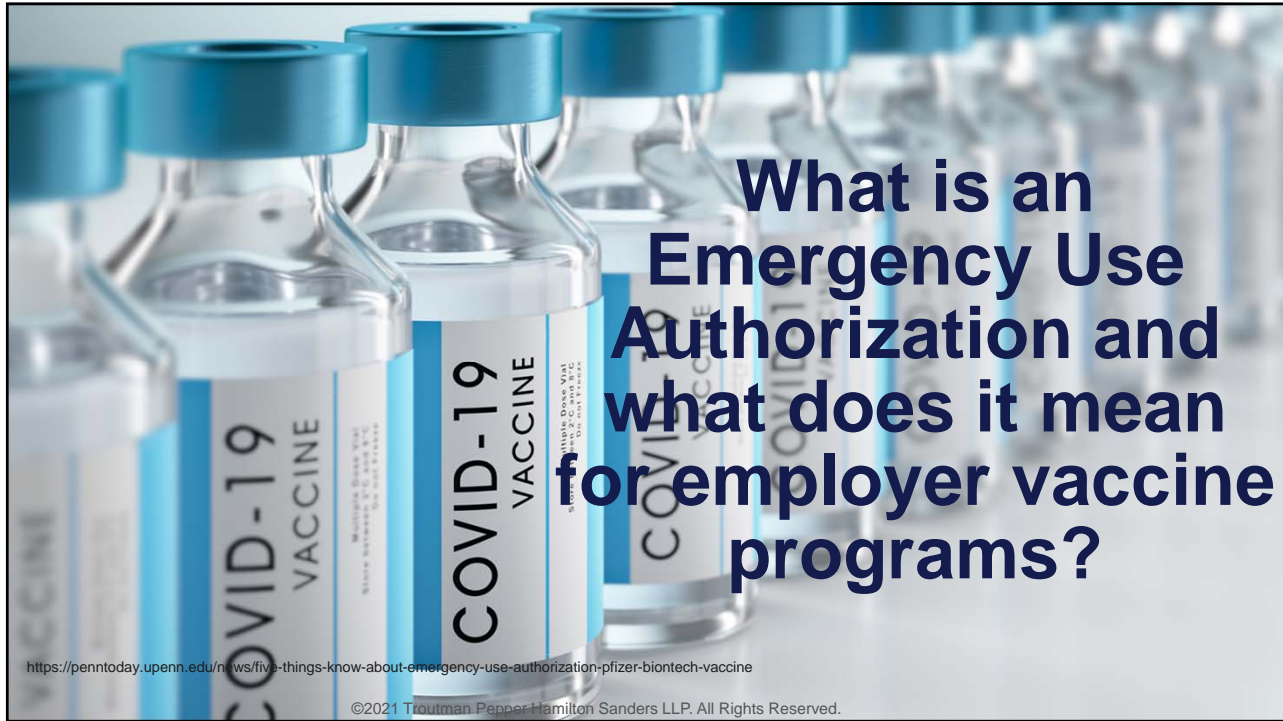
| Location | Phase 1a Prioritization | Phase 1b Prioritization | Phase 1c Prioritization | Congregate Settings Included? | Current Phase of Vaccine Distribution |
|---------------|--|---|--|--|---|
| United States | Follows ACIP Recommendations:33; Varies from ACIP Recommendations: 18 | Follows ACIP Recommendations:7; Varies from ACIP Recommendations: 41; Not updated: 3 | Follows ACIP Recommendations:10; Varies from ACIP Recommendations: 24; Not updated: 17 | Includes congregare settings: 26; Does not include congregare settings: 25 | Phase 1a: 17; Phase 1b: 28; Phase determined by counties: 6 |
| Alabama | Follows ACIP Recommendations | Follows ACIP Recommendations | Follows ACIP Recommendations | Phase 1b includes those living in congregare settings (homeless shelters, group homes, prisons, jails) | Phase 1b |
| Alaska | Follows ACIP Recommendations | Includes ACIP recommended groups plus: people ages 55-74; people ages 50-54 with 2 or more high-risk health conditions; people ages 16-54 in "unserved communities" | Not updated | Phase 1b includes residents in congregare settings (homeless shelters, group homes, etc) and correctional facilities | Phase 1b-administering to people ages 65+ only |
| Arizona | Follows ACIP Recommendations | Follows ACIP Recommendations | Follows ACIP Recommendations | Phase 1b includes adults with high-risk conditions living in congregare settings; Phase 1c includes | Most counties are in Phase 1b; one remains in Phase 1a |

<https://www.kff.org/policy-watch/the-covid-19-vaccine-priority-line-continues-to-change-as-states-make-further-updates/>

©2021 Troutman Pepper Hamilton Sanders LLP. All Rights Reserved.




6




7


Exceptions to an Employer Vaccine Mandate




SINCERELY HELD RELIGIOUS BELIEF OR PRACTICE



MEDICAL CONDITION

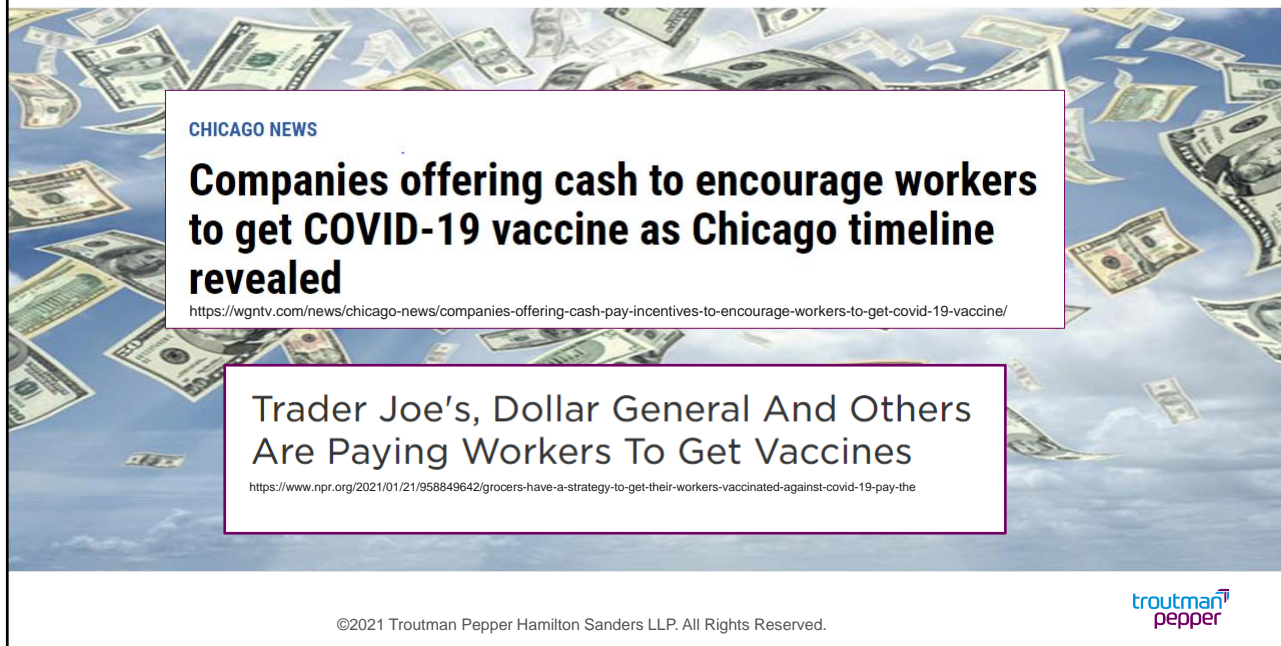


UNDUE HARDSHIP

©2021 Troutman Pepper Hamilton Sanders LLP. All Rights Reserved. 

8

Incentives



CHICAGO NEWS


Companies offering cash to encourage workers to get COVID-19 vaccine as Chicago timeline revealed

<https://wgntv.com/news/chicago-news/companies-offering-cash-pay-incentives-to-encourage-workers-to-get-covid-19-vaccine/>

Trader Joe's, Dollar General And Others Are Paying Workers To Get Vaccines

<https://www.npr.org/2021/01/21/958849642/grocers-have-a-strategy-to-get-their-workers-vaccinated-against-covid-19-pay-the>

©2021 Troutman Pepper Hamilton Sanders LLP. All Rights Reserved.



9

Liability for Adverse Events



U.S. Department of Health & Human Services
Office of the Assistant Secretary for Preparedness and Response

Preparedness Emergency About ASPR

Public Health Emergency
Public Health and Medical Emergency Support for a Nation Prepared

PHE Home > Preparedness > Legal Authorities > Public Readiness and Emergency Preparedness (PREP) Act

Search...

Public Readiness and Emergency Preparedness Act

The Public Readiness and Emergency Preparedness Act (PREP Act) authorizes the Secretary of the Department of Health and Human Services (Secretary) to issue a PREP Act declaration. The declaration provides immunity from liability (except for willful misconduct) for claims:

- ▶ of loss caused, arising out of, relating to, or resulting from administration or use of countermeasures to diseases, threats and conditions
- ▶ determined by the Secretary to constitute a present, or credible risk of a future public health emergency
- ▶ to entities and individuals involved in the development, manufacture, testing, distribution, administration, and use of such countermeasures

A PREP Act declaration is specifically for the purpose of providing immunity from liability, and is different from, and not dependent on, other emergency declarations.

PREP Act

- ▶ Public Readiness and Emergency Preparedness (PREP) Act Overview
- ▶ PREP Act Glossary of Terms
- ▶ PREP Act Question and Answers


Legal Authorities

- ▶ Legal Authorities Overview
- ▶ Legal Authority of the Secretary




10

Cost




Do employers have to pay for vaccines?

©2021 Troutman Pepper Hamilton Sanders LLP. All Rights Reserved.




11

Employer Risk Assessment



- 1**
Purpose
- 2**
Rationale
- 3**
Safety Assessment
- 4**
Job-Relatedness & Business Necessity
- 5**
Mandatory vs Voluntary

©2021 Troutman Pepper Hamilton Sanders LLP. All Rights Reserved.



12



Privacy Considerations for Employee Vaccination Status

<https://abc7news.com/coronavirus-covid-19-what-is-a-vaccine-passport-vaccines/8695673/>

©2021 Troutman Pepper Hamilton Sanders LLP. All Rights Reserved.



13



How does a vaccine program impact an employer's other COVID-19 workplace safety measures?

14

©2021 Troutman Pepper Hamilton Sanders LLP. All Rights Reserved.



14

COVID-19 Resources

- Troutman Pepper FAQ Site - <https://www.troutman.com/insights/covid-19-vaccine-frequently-asked-questions.html>
- Troutman Pepper COVID-19 Resource Center - <https://covid19.troutman.com/>
- Department of Labor - <https://www.dol.gov/coronavirus>
- CDC (COVID-19 Vaccine Communication Toolkit) - <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/toolkits/essential-workers.html>
- CDC (COVID-19 Vaccine Recommendations) - <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/recommendations-process.html>
- CDC (Frequently Asked Questions about COVID-19 Vaccination) - <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html>
- Kaiser Family Foundation (State Health Policy Actions) - <https://www.kff.org/report-section/state-covid-19-data-and-policy-actions-policy-actions/#policyactions>

©2021 Troutman Pepper Hamilton Sanders LLP. All Rights Reserved.



15

Thank You & Questions



Richard Gerakitis
richard.gerakitis@troutman.com
 404.885.3328



Jessica X.Y. Rothenberg
jessica.rothenberg@troutman.com
 212.808.2731



Emily E. Schifter
emily.schifter@troutman.com
 404.885.2720

These materials and commentary are intended for educational purposes only. No portion may be construed as rendering legal advice for specific cases, or as creating an attorney-client relationship between the audience and the author(s). The opinions expressed herein are solely those of the author(s). ©2021 Troutman Pepper Hamilton Sanders LLP. All Rights Reserved.



16