



 **WYVERN** Wednesday Webinar

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No Vaccine?.....No Job?

Everything Operators Need to Know About COVID-19

June 9, 2021

 **WYVERN**

ELEVATING SAFETY & SECURITY WORLDWIDE



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Welcome and thank you for joining us for today's Aviation Webinar Series. Our topic is **“2021: A Year of Change in Global Aviation”** We have just a few announcements before we get started.

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Mask Use in Transportation

- January 31, 2021, TSA issues a security directive on mask use until May 11, 2021
- On April 30, 2021, the TSA extended the directive until September 13
- The Directive contains a preemption provision indicating that state and local laws that are less restrictive are preempted. However, the Directive goes on to provide that state and local laws that are the same or more restrictive, are not preempted and must be complied with.
- May 13, the CDC issues new guidance clearing vaccinated persons to do away with masks in many circumstances
- May 14, FAA issues the following statement
 - The Centers for Disease Control and Prevention (CDC), the Transportation Security Administration (TSA), and the U.S. Department of Transportation (DOT) remind the traveling public that at this time if you travel, you are still required to wear a mask on planes, buses, trains, and other forms of public transportation traveling into, within, or out of the United States, and in U.S. transportation hubs such as airports and stations.
- If FAA loosens restrictions, under the TSA Directive states and localities will still have the option to keep mandates in place



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CDC Mask Guidance – Updated May 13, 2021

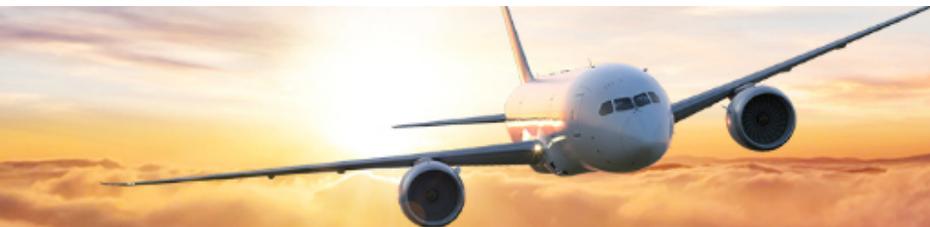
- Fully vaccinated people are not required to wear masks under most circumstances
- You can resume activities without wearing a mask or staying 6 feet apart, **except where required by federal, state, local, tribal, or territorial laws, rules, and regulations, including local business and workplace guidance.**
- If you travel in the United States, you do not need to get tested before or after travel or self-quarantine after travel.
- You need to pay close attention to the situation at your international destination before traveling outside the United States.
 - You do NOT need to get tested **before** leaving the United States unless your destination requires it.
 - You still need to show a negative test result or documentation of recovery from COVID-19 **before** boarding an international flight to the United States.
 - You should still get tested 3-5 days **after** international travel.
 - You do NOT need to self-quarantine **after** arriving in the United States.
- Mask Mandate applies to public charter flights, but not private Part 91 operations



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HIPPA and Vaccine Disclosure to Employers

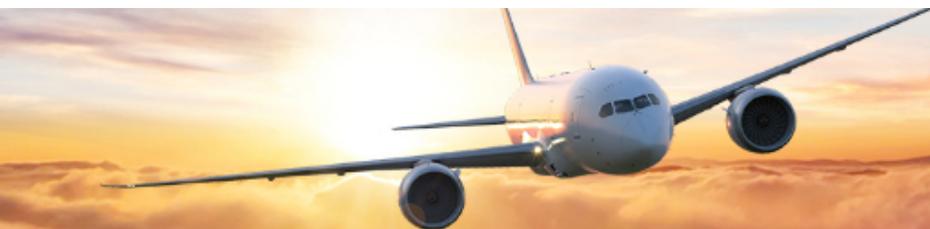
- The Health Insurance Portability and Accountability Act (“HIPAA”), contained a privacy rule regarding disclosure of “protected health information”
- Whether or not an individual has been vaccinated against COVID-19 comes within the “provision of care” classification of health information that should be protected when it can be combined with other personal details (i.e., name, social security number, etc.) that can identify the individual.
- However, HIPAA only applies to HIPAA-covered entities – healthcare providers, health plans, and healthcare clearinghouses – and their business associates.



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Updated SAFO 20009 Guidance Updated May 25, 2021

- Crewmembers are encouraged to get a COVID-19 vaccine. Those who hold an FAA-issued airman medical certificate must comply with any applicable medical requirements following vaccination.
- Crewmembers are encouraged to share their vaccine status with their employer's occupational health program
- Crewmembers who are fully vaccinated against COVID-19 or who recovered from COVID-19 in the past 3 months do not need to quarantine, be tested, or be excluded from work following an exposure unless they have symptoms of COVID-19.
- However, they should still self-monitor for symptoms of COVID-19 until 14 days after their last known exposure. Those who develop symptoms should self-isolate and be tested, regardless of vaccination status or previous recovery from COVID-19.
- Vaccinated crewmembers are still required to wear a mask on aircraft and other conveyances and in U.S. transportation hubs.
- Vaccinated crewmembers may be excluded from their air carrier's routine testing programs for COVID-19, if feasible.



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EEOC Vaccine Guidance

- EEOC enforces workplace anti-discrimination laws, including the Americans with Disabilities Act (ADA) and the Rehabilitation Act (which include the requirement for reasonable accommodation and non-discrimination based on disability, and rules about employer medical examinations and inquiries)
- EEOC's position is that Employers and employees should follow CDC and State and Local Guidance on how best to slow the spread of this disease and protect workers. The ADA and the Rehabilitation Act do not interfere with employers following advice from these authorities.
- The provisions of the ADA apply to private employers with 15 or more employees.



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EEOC Vaccine Guidance

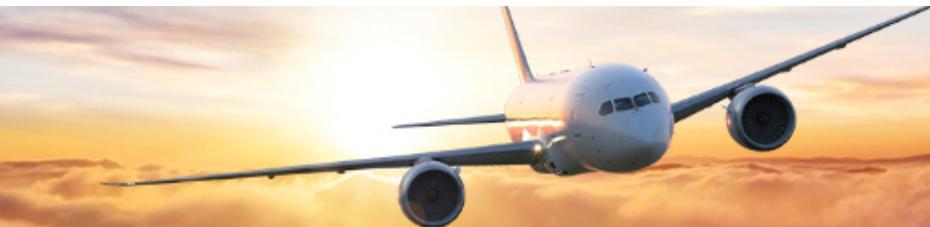
- EEOC updated COVID-19 Vaccination Guidance on May 28, 2021, but also says it is still considering the implications of the May 13, 2021 CDC guidance update
- EEOC states it takes no position on the legal implications of the FDA’s emergency use approval of the COVID-19 vaccines.
 - “The federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, subject to the reasonable accommodation provisions of Title VII and the ADA and other EEO considerations These principles apply if an employee gets the vaccine in the community or from the employer.”
 - “As with any employment policy, employers that have a vaccine requirement may need to respond to allegations that the requirement has a disparate impact on—or disproportionately excludes—employees based on their race, color, religion, sex, or national origin under Title VII (or age under the Age Discrimination in Employment Act (40+)). Employers should keep in mind that because some individuals or demographic groups may face greater barriers to receiving a COVID-19 vaccination than others, some employees may be more likely to be negatively impacted by a vaccination requirement.”



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EEOC Vaccine Guidance

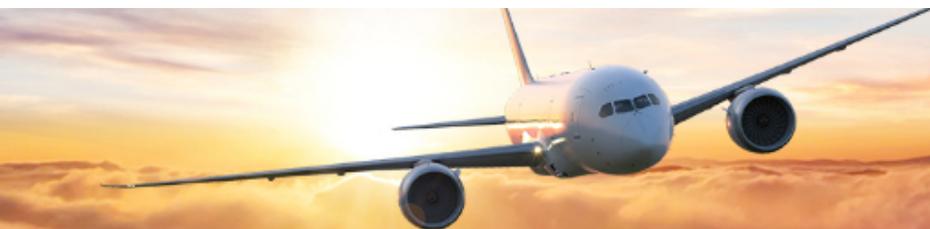
- Is information about an employee's COVID-19 vaccination confidential medical information under the ADA?
 - Yes. The ADA requires an employer to maintain the confidentiality of employee medical information, such as documentation or other confirmation of COVID-19 vaccination. This ADA confidentiality requirement applies regardless of where the employee gets the vaccination. Although the EEO laws themselves do not prevent employers from requiring employees to bring in documentation or other confirmation of vaccination, this information, like all medical information, must be kept confidential and stored separately from the employee's personnel files under the ADA.
- Under the ADA, may an employer require a COVID-19 vaccination for all employees entering the workplace, even though it knows that some employees may not get a vaccine because of a disability?
 - Yes, provided certain requirements are met. Under the ADA, an employer may require all employees to meet a qualification standard that is job-related and consistent with business necessity, such as a safety-related standard requiring COVID-19 vaccination. However, if a particular employee cannot meet such a safety-related qualification standard because of a disability, the employer may not require compliance for that employee unless it can demonstrate that the individual would pose a "direct threat" to the health or safety of the employee or others in the workplace.
 - As a best practice, an employer introducing a COVID-19 vaccination policy and requiring documentation or other confirmation of vaccination should notify all employees that the employer will consider requests for reasonable accommodation based on disability on an individualized basis.



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EEOC Guidance – Confirmation and Accommodation

- Is it a “disability-related inquiry” for an employer to inquire about or request documentation or other confirmation that an employee obtained the COVID-19 vaccine from a third party, such as a pharmacy?
 - No. When an employer asks employees whether they obtained a COVID-19 vaccine from a third party in the community, such as a pharmacy, personal health care provider, or public clinic, the employer is not asking a question that is likely to disclose the existence of a disability; there are many reasons an employee may not show documentation or other confirmation of vaccination in the community besides having a disability. Therefore, requesting documentation or other confirmation of vaccination by a third party in the community is not a disability-related inquiry under the ADA, and the ADA’s rules about such inquiries do not apply.
 - However, documentation or other confirmation of vaccination provided by the employee to the employer is medical information about the employee and must be kept confidential.
- What about requests for an accommodation based on Title VII?
 - Once an employer is on notice that an employee’s sincerely held religious belief, practice, or observance prevents the employee from getting a COVID-19 vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship. Employers also may receive religious accommodation requests from individuals who wish to wait until an alternative version or specific brand of COVID-19 vaccine is available to the employee. Such requests should be processed according to the same standards that apply to other accommodation requests.



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EEOC Guidance - Incentives

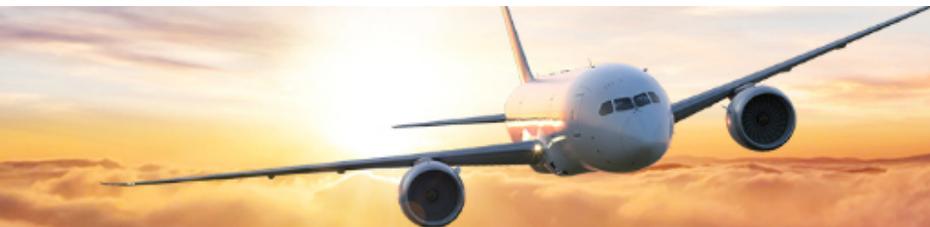
- Can an employer offer an incentive to employees to voluntarily provide confirmation that they received a vaccination?
 - Yes. Requesting documentation or other confirmation showing that an employee received a COVID-19 vaccination in the community is not a disability-related inquiry covered by the ADA. Therefore, an employer may offer an incentive to employees to voluntarily provide documentation or other confirmation of a vaccination received in the community. As noted elsewhere, the employer is required to keep vaccination information confidential pursuant to the ADA.
- Can an employer offer an incentive to employees for voluntarily receiving a vaccination administered by the employer or its agent?
 - Yes, if any incentive (which includes both rewards and penalties) **is not so substantial as to be coercive**. Because vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information. **This incentive limitation does not apply if an employer offers an incentive to employees to voluntarily provide documentation or other confirmation that they received a COVID-19 vaccination on their own from a third-party provider that is not their employer or an agent of their employer.**
- Example - United Airlines will not require its pilots to get the COVID-19 vaccine, though it will give them an incentive to be vaccinated. United pilots who provide proof they received the vaccine will get up to 13 hours' added pay.



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OSHA Vaccine Guidance

- OSHA has changed its guidance several times recently. On April 21, 2021 they indicated in several FAQs that:
 - Adverse reactions to the COVID-19 vaccine were recordable on the OSHA recordkeeping log if it was work-related
 - If the employer requires employees to take the COVID-19 vaccine as a condition of their employment, adverse reactions to the vaccine were recordable
 - If the employer recommended, but did not require vaccination, then OSHA was exercising its discretion to make reactions not recordable.
- On May 25, 2021, OSHA reversed the guidance after receiving public comments, and now states:
 - DOL and OSHA, as well as other federal agencies, are working diligently to encourage COVID-19 vaccinations. OSHA does not wish to have any appearance of discouraging workers from receiving COVID-19 vaccination, and also does not wish to disincentivize employers' vaccination efforts. As a result, OSHA will not enforce 29 CFR 1904's recording requirements to require any employers to record worker side effects from COVID-19 vaccination **through May 2022**. We will reevaluate the agency's position at that time to determine the best course of action moving forward.



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Employee Vaccine Lawsuits

- **Lagretta v. Doña Ana County Detention Center**: First of its kind lawsuit filed in March. Suit sought a TRO alleging that the Detention Center had indicated that if the employee did not get the vaccine, he would be terminated. Court denied TRO on the grounds he did not present evidence that his termination from employment was imminent.
- **Bridges v. Methodist Hospital**: 177 employees suing for wrongful discharge and alleged violation of federal law. The suit claims the Hospital cannot make the vaccine mandatory because it has not received full FDA approval and has only been given the Emergency Use Authorization.
- **Neve v. Birkhead**: North Carolina Sheriff has brought suit for reinstatement claiming that he was wrongfully terminated for refusing to get the COVID-19 vaccine
- **California Educators For Medical Freedom v. Los Angeles Unified School District**: Suit argues that without full approval the vaccine is experimental, and that forcing persons to take the vaccine under these circumstances violates the Nuremberg Code and Helsinki Declaration. Suit also alleges that under 21 U.S.C. § 360bbb-3(a)(2), one of the conditions for all emergency use authorizations is that “individuals to whom the product is administered are informed . . . of the option to accept or refuse administration of the product. . . .”



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Providing Employee Vaccination Information to Customers

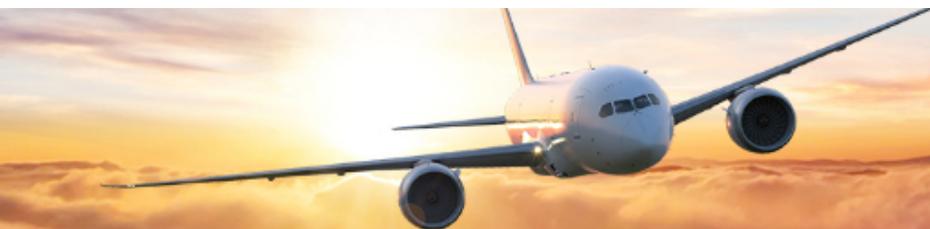
- ADA (Americans with Disabilities Act) prohibits employers from disclosing an employee's medical information to a customer, visitor, or the public
- Making employee/crewmember vaccine status could lead to issues
 - For example, an unvaccinated pilot might allege unequal treatment on the basis of their unvaccinated status, which could be because of, for example:
 - Disability/medical condition
 - Religious objection
- Statistical information about those who have been vaccinated, without any employee-specific information, is not confidential, and may be disclosed.
 - “Although we can't disclose the vaccination status of any particular pilot, 80% of our pilots are fully vaccinated” or “all of our pilots and crew members have been vaccinated” would probably be okay.



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International Travel and COVID-19 Passports

- On February 5, 2021, the WHO came out against requiring vaccine passports for travel. That position was unchanged at the last meeting on April 19, 2021. WHO also seeks to distinguish vaccination passports with immunity passports
- Last month, the head of the European Commission indicated it would soon be widening opportunities for non-essential air travel
- European Union is in talks on what vaccine certificates it can accept from the United States and to set up a process
- Potential issues to the extent there are any vaccines used in other parts of the world that are not approved by the EU. All three US vaccines, however, have been approved by the European Medicines Agency
- Lack of a standard certificate in the US or other countries will cause problems and may result in additional steps to providing the EU with proof of vaccinations
- It seems likely this pressure will lead to some form of US standardized vaccine passport for international travel



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European COVID-19 Passport

- The EU announced it will be implementing the Digital Green Certificate
 - A Digital Green Certificate will be a proof that a person has been vaccinated against COVID-19, has received a negative test result or has recovered from COVID-19 that can be used across all EU Member States. It can also be introduced in Iceland, Liechtenstein, Norway as well as Switzerland.
- The certificate can be used by any EU citizen or non-citizen who has a right to travel in the EU
- Being vaccinated will **not be a pre-condition to travel**
- It will provide a basis for a member state to waive restrictions to free movement, such as testing or quarantine requirements
- Data on the certificate will include:
 - For a vaccination certificate: vaccine product and manufacturer, number of doses, date of vaccination
 - For a test certificate: type of test, date and time of test, test center and result
 - For a recovery certificate: date of positive test result, issuer of certificate, date of issuance, validity date
- The Digital Green Certificate system will be suspended once the World Health Organization (WHO) declares the end of the international public health emergency caused by COVID-19



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State Laws – Vaccines and Immunity Passports

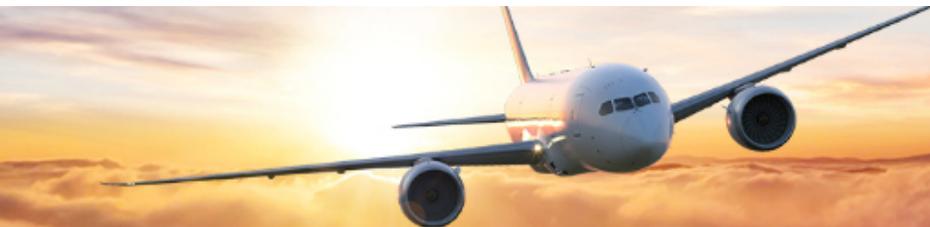
- April 2, 2021 Congressional Research Service Report noted that traditionally, vaccine issues and the power to mandate vaccines are handled at the state rather than federal level.
- New York announced its “Excelsior Pass” which is advertised:
 - Attend sporting events, arts performances and more! Excelsior Pass supports a safe reopening of New York by providing a free, fast and secure way to present digital proof of COVID-19 vaccination or negative test results. Think of it as a mobile airline boarding pass, but for proving you received a COVID-19 vaccination or negative test.
- Last week, Wyoming joined Alabama, Minnesota, South Carolina, Arkansas, Arizona, Florida, Idaho, Montana, Texas and South Dakota as states that have either passed legislation or issued orders to prevent mandatory vaccinations or COVID passport schemes
- For example, the Florida law blocks any business or government entity from requiring proof of COVID-19 vaccination



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State Laws - Arkansas

- Prohibits the use of coercion to force someone to be vaccinated. Coercion includes
 - Threats, intimidation or force
 - Making conditional a private or public benefit, including without limitation employment, promotion, or another employment benefit, with the purpose of causing a reasonable individual of ordinary susceptibilities to acquiesce when the individual otherwise would not.
 - Positive benefits are not coercion
- Prohibits use of Vaccine Passports
 - “Vaccine passport” means documentation that an individual has been vaccinated against coronavirus 2019 (COVID-19).
 - The state, a state agency or entity, a political subdivision of the state, or a state or local official shall not require an individual to use a vaccine passport in this state for any purpose.
 - The use of a vaccine passport shall not be a condition for entry, travel, education, or services.



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February 1-3, 2022



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Thank You

If you have any questions, please contact us:

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