



# Key Reopening Issues & Considerations for MA Employers

May 27, 2021

In our recent [webinar](#), *Moving Forward: Key Reopening Issues & Considerations*, Goulston & Storrs attorneys explored the new set of challenges employers face as Massachusetts lifts the remaining COVID-19 restrictions. The following Q&A is intended to provide general information around the possible solutions, potential liability, and complexity of making decisions on this topic. Prior to taking or refraining from any actions, please consult your own legal counsel.

## Can I require vaccines of employees / patrons?

Yes. An employer can require both employees (including both new hires and existing employees) and visitors / guests / customers to be vaccinated before entering or returning to the employer's space. Employers that already have employees working on-site may also shift their current policy to require vaccination as of a specific date. The answer becomes more nuanced in regards to employees with disabilities or religious beliefs that may interfere with their ability to get vaccinated. Such employees may be entitled to reasonable accommodation in connection with the employer's vaccination policy.

## Can I ask for proof of vaccination? How do I handle record-keeping?

The Equal Employment Opportunity Commission (EEOC) has been very clear that an employer can inquire about vaccination status. An employer can also ask for proof of vaccination (e.g. requesting a copy of an employee's vaccination card, asking to see a copy of the vaccination card, asking about vaccination status on a daily health certification form, etc.). If an employer is going to collect proof of vaccination, such proof will likely need to be treated and stored like any other medical record. However, unless an employer is a health care plan or health care provider, it is not subject to HIPAA. That said, private employers are subject to privacy considerations arising from common law, the Americans with Disabilities Act, and other types of privacy protections.

## Can I provide incentives to employees to get vaccinated?

While this area is a bit gray, the EEOC has generally approved employer wellness programs, and vaccination incentives would fall into a similar category. To the extent an employer wishes to adopt an employer wellness program to incentivize employees to engage in healthy behavior (e.g. quit smoking, join a gym, take 10,000 steps a day, etc.), it can incentivize this behavior with de minimis incentives. For instance, small gift cards, additional paid time off to get and recover from the vaccine, and alike. More significant incentives (e.g. significant bonus payments) are best avoided because they can be viewed as coercive and unfair to employees that are legitimately unable to be vaccinated or engage in another incentivized behavior for religious or medical reasons.

## What can I do about employees who do not \*want\* to get vaccinated?

There is a distinction between employees who cannot or should not get vaccinated (due to medical issues or sincerely held religious beliefs) and employees who do not want to be vaccinated. When an employee indicates they are not vaccinated and do not intend to get vaccinated, the important question becomes "Why?". If an employee is not vaccinated simply because they don't wish to be, an employer has a range of employment options. In short, an employer can accept the employee's refusal, require the unvaccinated employee to wear a mask and engage in other best pandemic practices, suspend the employee until they get vaccinated, or terminate them (assuming the employer has a policy requiring employees to be vaccinated).

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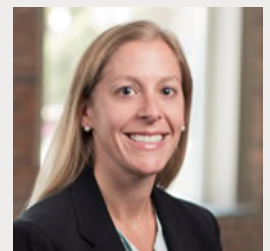
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### **Can I disclose to staff who is or isn't vaccinated?**

This information should be limited to people within the organization that have legitimate need for it. For instance, if an employer plans to require unvaccinated employees to wear masks, it would be appropriate to identify unvaccinated employees to the supervisor(s) responsible for enforcing the mask policy.

### **Can I mandate masks for unvaccinated employees / patrons?**

Yes, unvaccinated employees and patrons can be required to wear masks and engage in other COVID best practices (e.g. social distancing) even if vaccinated employees and patrons are not subject to similar requirements. This is true even though the Massachusetts mask mandate ended on May 29, 2021. Current OSHA guidance, which is based on current CDC guidance, suggests that unvaccinated people in indoor settings should wear masks and engage in social distancing and adhere to other COVID best practices.

### **For More Information**

Have additional questions regarding COVID-19-related guidance?

Please contact your **Goulston & Storrs** [attorney contact](#).

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