



VACCINE CONSIDERATIONS

This information sheet is intended as a tool to assist in clarification and decision making for Public Library Directors and Boards. It is not intended as legal advice. Library Boards and Directors should consult with their library attorneys when determining a plan or policy for their libraries.

February 12, 2021

Things Libraries Should Consider BEFORE Implementing a Vaccination Policy:

- **Get Help** - Contact the library's attorney- Mandatory vaccine policies are a complex and changing area of law. This type of issue is why you have an attorney.
- **Review** - The Equal Employment Opportunity Commission (EEOC) recently released a [COVID-19 Vaccination Guidance](#) that explains the ADA medical and disability issues, and the Title VII concerns about sincerely held Religious beliefs. A policy mandating vaccinations will require accommodations policies and procedures (including possible position changes for employees unable to take the virus for physical or religious reasons), as well as verification and enforcement policies and procedures, and confidential recordkeeping.
- **Consider ALL employees** - It is suggested that an employer develop a good policy preventing backlash or harassment of employees unable to receive the virus.
- **Explore possible consequences** - It is unclear whether incentives open the employer to liability if an employee has an adverse reaction.
- **Explore effect on existing policies** - Employers offering incentives may need to consider amending existing leave/sick leave policies to accommodate workers experiencing side effects or adverse reactions to the vaccine.
- **Investigate possible effects on staff** - Public employers will need to address possible US Constitutional [First](#) and [Fourteenth](#) Amendment Free Speech and Liberty issues. The US Supreme Court ruled in [Jacobson v Commonwealth of MA, 187 US 11 \(1904\)](#), that mandatory vaccinations for school children were not unconstitutional. This decision is often cited as a legal basis for permitting mandatory vaccinations. However, it has not yet been tested for this proposition with regards to COVID-19 vaccinations and the workplace.
- **Are you Unionized?** - Employers that are party to a Collective Bargaining Agreement will need to be prepared to bargain for the vaccination policies and procedures.
- **Workers Compensation?** - In addition, if mandated by the employer, vaccine related side effects and/or injuries would likely be considered workers compensation claims.
- **Understand all Exemptions** - Since the vaccine is currently only approved for distribution by the FDA under an "[Emergency Use Authorization](#)" (EUA), employers will also have to be aware of information surrounding the use of EAUs and mandatory vaccines, including the FDA requirement of dissemination of an [Information Sheet](#) on the vaccine administered, and the right of anyone to refuse the vaccine.

- **Consider a Targeted Approach** - One recommendation suggests that employers wishing to mandate conduct a thorough risk assessment and narrowly tailor mandates to apply to those **positions** (not individual employees) that could pose the most risk of spread if they become infected, or that could be at the highest risk of being exposed. Then, encourage/support vaccinations for remaining staff.
- **Investigate how policy affects OSHA/MiOSHA** - There may be a duty for employers to vaccinate employees as part of the OSHA (and MiOSHA) "[General Duty Clause](#)," that requires an employer to provide a safe workplace. This is a point of view that is speculative right now, but one that a library should discuss with their attorney as part of the determination on whether to mandate vaccinations.

Things Libraries Should Consider BEFORE Implementing an incentive program encouraging employees to receive vaccines:

- **Consult** your library's attorney.
- **Can Library Funds be used, and how?** - ALL funds managed by a public library are PUBLIC FUNDS. Expenditures of public funds may only occur for a "Public Purpose." Offering employees the opportunity to receive vaccinations during work hours or paying them for the time taken to obtain the vaccine is arguably "public purpose." However, it is currently unclear if incentives such as gift cards, cash payments, bonus leave days, etc., would qualify as "Public Purpose (currently the "public purpose" doctrine prohibits government employers from paying for employee parties, recognition, gifts, flowers, etc.). Any incentive plan should be thoroughly reviewed by the library's attorney.
- **Incentives must be neutrally applied** - Incentives cannot be offered only to those employees with vulnerable conditions (such as employees over a certain age). Incentives also cannot only be offered on an "invitation" basis. However, it is likely that an incentive program can target a group of employees based on the nature of their work (if the positions put the employee at a high risk of exposure, or because the nature of their work makes it more likely that they could be a "spread" risk to the community). However, libraries will want to consult their library attorneys on what is considered "High Risk."
- **Plan for exemptions & accommodations** - Employees covered by the incentive program who are unable to participate because of an ADA or title VII reason (a medical condition or a religious objection) will have to be accommodated and may be entitled to the same incentive without receiving the vaccine.
- **Understand workers compensation issues** - Libraries will want to discuss with their library attorneys the possibility of adverse reactions or side effects of the vaccine being considered Workers Compensation claims.
- **Investigate liability risk** - It is unclear whether incentives will open the employer to liability if an employee has an adverse reaction.
- **Consider effect on existing policies** - Employers offering incentives may need to consider amending existing leave/sick leave policies to accommodate workers experiencing side effects or adverse reactions to the vaccine.

Resources:

<https://milawyersweekly.com/news/2021/02/08/employers-face-covid-19-vaccine-questions/> Good Michigan Lawyers Weekly Article in Covid-19 vaccine questions- current and Michigan specific. However, not quite as comprehensive as some of those below.

<https://milawyersweekly.com/news/2020/12/31/covid-19-vaccine-advice-for-your-clients-and-your-office/> Good bullet-pointed discussion of primary issues for employers considering Vaccine policies.

<https://sclscal.org/legal-update-memo-no-03-2021-revised-mandating-vaccinations-for-employees-k-12/> Good discussion from the viewpoint of local government public employers - educational institutions.

<https://ccao.org/wp-content/uploads/County-Advisory-Bulletin-COVID-19-Vaccinations-for-Public-Employees-Frequently-Asked-Questions.pdf> Memo from attorneys for County in Ohio. A Municipal employer perspective. Includes Ohio legal perspective.

<https://canons.sog.unc.edu/may-a-public-employer-require-vaccination-against-covid-19/> Good explanation from public employer & State employer perspective. Looks at issue through the lens of North Carolina public employers.

<https://www.lcwlegal.com/news/permmissibility-of-requiring-that-public-employees-receive-a-covid-19-vaccination> Good law firm explanation of public employer issues.

<https://www.hklaw.com/en/insights/publications/2020/12/how-limiting-are-the-limitations-on-mandatory-employer-vaccination#:~:text=Public%20Employers&text=All%2050%20states%20have%20laws,19%20states%20offer%20philosophical%20exemptions> National Law Firm - thorough discussion of issues- including OSHA general duty clause considerations.

<https://www.kriegdevault.com/insights/mandating-covid-19-vaccinations-employers-wrestle-with-whether-they-can-and-should> Law Firm explanation-Includes some discussion of public employers.

<https://www.mlive.com/news/grand-rapids/2020/12/businesses-can-likely-mandate-coronavirus-vaccine-for-employees-attorney-says.html> MLive article on presentation by Kent County municipal officials and attorney on mandates.

<https://www.jdsupra.com/legalnews/employers-can-you-require-employee-49863/> Good general explanation of issues.

<https://www.natlawreview.com/article/vaccine-incentives-how-employers-can-encourage-employee-vaccination> Good discussion of incentive issues, does not discuss issues specific to public employers.

This information sheet is intended as a tool to assist in clarification and decision making for Public Library Directors and Boards. It is not intended as legal advice. Library Boards and Directors should consult with their library attorneys when determining a plan or policy for their libraries.

Clare D. Membiela
Library Law Consultant
Library of Michigan