

# COVID-19 Vaccination and Schools: Questions & Answers from the National School Boards Association

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## 1. Which federal departments offer COVID-19 vaccine information?

Almost every federal department and agency offers guidance regarding COVID-19 practices, but not all discuss vaccines. Some of the most recent guidance of value to school districts includes the [usa.gov](https://www.usa.gov) website's COVID-19 webpage, which contains links to several federal resources, including the U.S. Department of Education's [COVID-19 Resources for Schools, Students, and Families](#).

In addition, the Centers for Disease Control and Prevention's COVID-19 website links to a number of COVID-19 resources, including its [Schools and Child Care Programs](#) page, offering guidance and resources on topics like [Operational Strategy for K-12 Schools through Phased Prevention](#), [Managing Daily Operations](#) and [Guidance for COVID-19 Prevention in Kindergarten \(K\)-12 Schools](#). It is important to check these websites frequently, as agencies are continuing to update and issue COVID-19 resources and guidance.

## 2. Has the federal government mandated COVID-19 vaccination for U.S. border travelers?

No, the federal government has not issued a mandate requiring everyone within U.S. borders to get the COVID-19 vaccine. But the Supreme Court ruled over one hundred years ago that state and local governments could require individuals within their jurisdictions to be vaccinated against preventable diseases, such as smallpox. And, although no specific court case or federal law has addressed it, the Court seemed to presume that the federal government has

3. Do a health care provider have the authority to mandate COVID-19 vaccination for all employees? Are there any exceptions?

*Jacobson* and its progeny suggest that states could mandate COVID-19 vaccination. Currently no state has imposed such a mandate.<sup>8</sup> States that might choose to mandate the COVID-19 vaccination for all their citizens would have to provide exemptions for people who have disabilities and those who have sincerely held religious objections to vaccinations. Those issues are discussed in more detail in FAQ 7.

4. Is there any federal law, state law, or local law that requires employers to mandate COVID-19 vaccination for employees? If so, what are the requirements?

There is no federal law specifically addressing this issue. It remains up to employers, or state and/or local laws to determine whether employees are required to get the COVID-19 vaccine. Recent U.S. Equal Employment Opportunity Commission (EEOC) guidance indicates that employers have the legal right to require as a condition of hire or continued employment that new hires and/or existing employees obtain the COVID-19 vaccine.<sup>9</sup>

If school districts update policies requiring the COVID-19 vaccine for employees, the policies must be consistent with state and local law. And school districts will still have to make exceptions for individuals with certain medical conditions or religious beliefs when imposing any requirements.

5. What are the first issues a school district should consider in determining whether to require all employees to be vaccinated against COVID-19? Are there any federal or state laws that would allow or prohibit a school district from mandating COVID-19 vaccination for employees?

The first issue a school district should consider in determining whether to require all employees to be vaccinated is whether there are any federal or state laws that would allow it to do so or prohibit it from doing so. Although the EEOC has provided guidance indicating that federal law does not prevent an employer from requiring all employees who enter the workplace to be vaccinated against COVID-19, school districts should look at the issue thoroughly before deciding to require employee vaccinations.<sup>10</sup>

To date, there is no federal law, rule, or regulation that requires COVID-19 vaccination, and we are unaware of any states that have mandated it. However, state laws and regulations are changing rapidly regarding the Coronavirus and COVID-19. You should work with your state school boards association or COSA attorney to determine whether state law requires or allows you to mandate vaccination.

Even if your state law does not specifically require residents or workers in certain fields to be vaccinated, you should find out whether state law supports an employer's requirement that all employees obtain the vaccination. For example, the state of Virginia, among other states, is an employment-at-will state. This means that employers have the authority to set working conditions and may discipline or dismiss employees for any reason or no reason as long as the basis for the discipline or dismissal is not in contravention of a public policy enabling the exercise of a statutorily created right. Such rights include freedoms and protections from discrimination provided by human rights statutes, civil rights statutes, and the Civil Rights Act of 1964.<sup>11</sup> Additionally, case law in many states has held that employers can generally require employees to be vaccinated.<sup>12</sup>

to determine the legal limits on your authority to discipline employees who refuse to comply with any mandate requiring them to get the COVID-19 vaccine.

The basis for a particular vaccine's FDA approval may be another issue school districts will want to consider before mandating employee vaccination. The COVID-19 vaccines currently in use have emergency authorization, as opposed to full FDA approval. That means that the vaccinations have been approved temporarily and for emergency use only.<sup>14</sup> For this reason, school districts should evaluate their potential liability should they mandate vaccination, and an employee becomes ill from one of the vaccines. They also should consider questions such as the following:

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is not a disability-related inquiry, subsequent questions could be, such as asking why an employee has not gotten vaccinated.<sup>20</sup> Employers may ask disability-related questions if they comply with the ADA standard of being “job-related and consistent with business necessity.”<sup>21</sup>

Generally, school districts may not tell parents whether a specific teacher has been vaccinated. State and local privacy laws typically prohibit employers from disclosing their employees’ medical information.

## 8. What are the legal implications of a school district’s decision to make COVID-19 vaccination completely voluntary?

Before deciding to make employee COVID-19 vaccination completely voluntary, school districts should know the potential legal implications of that decision. There are many people who object to the vaccination even though they are not entitled to protections under the ADA or the religious accommodation provisions of Title VII. How would a school district protect other employees, students, and visitors if these employees decided not to get the vaccination? How would it manage the risk of an employee catching Coronavirus from someone who refused to be vaccinated at work? Could employees who have been vaccinated or who cannot get the vaccination for health or religious reasons sue districts because they failed to provide a safe and healthy work environment as required by the Occupational Safety and Health Administration (OSHA)?<sup>22</sup>

Will school districts be required to enhance cleaning protocols to provide for employees who choose not to be vaccinated? Will that change in protocols be expensive? What would a district’s liability exposure be if a board member contracted COVID-19 after visiting its offices if it has a significant number of employees who refuse to be vaccinated? Could employees who refuse to be vaccinated legally be required to work at home full-time? The picture for liability is not clear at this time, but since the potential for it remains vast, school districts should work with their state school boards associations and their COSA attorneys to consider legal liability as well as business expenditures in making the decision to make vaccination optional for employees.

Providing incentives to employees who volunteer to take vaccinations sounds like a good strategy on its face. Offering incentives can be a good thing if the incentives do not send a message that employees have something to fear by taking the vaccine, they are attractive enough to warrant employee participation, and they are not too expensive.

Keep in mind that incentives that are too generous could make the incentive program look involuntary. Under the ADA, participation in an employee wellness program that involves disability-related inquiries must be voluntary. The EEOC has not taken a position on whether vaccination incentive programs constitute wellness programs sufficient for scrutiny by it. In January 2021, however, it developed a proposed rule indicating that wellness programs that include disability-related questions and/or medical examinations may only offer *de minimis* (minimal) incentives to encourage employees to participate. Such *de minimis* incentives were described as “a water bottle or gift card of modest value.”<sup>23</sup> It subsequently withdrew the proposed regulation, however, leaving employers with no clear idea of how they should interpret this provision.

On May 28, 2021, the EEOC did provide additional guidance indicating that an employer may offer an incentive as long as it is not so substantial as to appear coercive.<sup>24</sup> In providing incentives, schools need to make certain that they do not discriminate against those who are excepted from a vaccination requirement because of a disability or a sincerely held religious beliefs. Finally, most state laws prohibit school districts from using public funds to pay for gifts or the kind of incentives most school districts would contemplate to encourage their employees to get the COVID-19 vaccine.<sup>25</sup> Schools should work with their state school boards associations or COSA attorneys to develop incentive programs that comply with their state laws.



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- <sup>1</sup> *Jacobson v. Commonwealth of Massachusetts*, 197 U.S. 11 (1905).
- <sup>2</sup> *Zucht v. King*, 260 U.S. 174 (1922)(finding that the city ordinances did not confer “arbitrary power, but only that broad discretion required for the protection of the public health”).
- <sup>3</sup> National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa- 1 to 300aa-34.
- <sup>4</sup> Joanne Rosen, *Can COVID-19 Vaccines Be Mandatory in the U.S. and Who Decides?* Johns Hopkins Bloomberg School of Public Health (Nov. 17, 2020), [Can COVID-19 Vaccines Be Mandatory in the U.S. and Who Decides? - COVID-19 - Johns Hopkins Bloomberg School of Public Health \(jhsph.edu\)](https://www.blsph.edu/news/can-covid-19-vaccines-be-mandatory-in-the-u-s-and-who-decides/).
- <sup>5</sup> *Id.*
- <sup>6</sup> *Id.*
- <sup>7</sup> The Centers for Disease Control and Prevention, *Myths and Facts about COVID-19 Vaccines* (Last Updated June 3, 2021), [Myths and Facts about COVID-19 Vaccines | CDC](https://www.cdc.gov/vaccines/imz/managing/news/myths-facts-covid-19-vaccines.html).
- <sup>8</sup> Immunization Action Coalition, *State Laws and Mandates By Vaccine* (Last Updated May 24, 2021), [State Mandates on Immunization and Vaccine-Preventable Diseases \(immunize.org\)](https://immunize.org/state-laws/).
- <sup>9</sup> Equal Employment Opportunity Commission, *What you should know about COVID-19 and the ADA, the Rehabilitation Act & Other EEOC Law*,(Last Updated May 28, 2021), <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws#D>.
- <sup>10</sup> *Id.*
- <sup>11</sup> The Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq (1964) (Title VII); *Bowman v. State Bank of Keysville*, 331 S.E. 2d 797 (1985); *Johnston v. William E. Woods and Associates*, 787 S.E. 2d 103,105 (2016).
- <sup>12</sup> *Head v. Adams Farm Living, Inc.*,

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<sup>23</sup> Amy Karloff Halevy & Amber K Dodds, *Vaccine Incentives: How Employers Can Encourage Employee Vaccination* The National Law Review (Feb. 1, 2021), \_\_\_\_\_

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