

Employers Considering Differential Treatment Based

COVID-19 Response Resource Center: Timely Counsel for your Business

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There is no clear guidance on whether employers may treat vaccinated and unvaccinated employees differently. Employers considering changes to their policies that would treat employees differently based on vaccination status, should discuss their particular circumstances with legal counsel. Consulting legal counsel is also important because each work environment may have different factors and unique circumstances to consider when evaluating how to maintain a safe and healthy workplace for employees. Some of the issues to be considered in an employer's analysis include the following:

- Executive Order No. 215 expressly states that it is not “intended to prohibit or discourage private businesses [that are not subject to on-going mask mandates] from requiring face coverings for their employees.”
- Executive Order No. 215 allows local health departments to continue to impose greater restrictions and prohibitions, which may include requiring face coverings and social distancing to be maintained in a workplace, even for unvaccinated employees.
- Executive Order No. 215 still requires face coverings for those in schools, child care facilities, children's day or overnight camps, certain health care settings like long term care centers, public and private transportation, prisons, and shelters.
- Guidance (not a standard) from the Occupational Safety and Health Administration (OSHA) states the following: “**Not distinguishing between workers who are vaccinated and those who are not:** Workers who are vaccinated must continue to follow protective measures, such as wearing a face covering and remaining physically distant.” However, the basis for this guidance was this: “because, at this time, there is not evidence that COVID-19 vaccines prevent transmission of the virus from person-to-person.” The CDC now says, “Early data shows that vaccines help keep people with no symptoms from spreading COVID-19.” This data is one of the points North Carolina has relied on to explain why the decision was made to ease restrictions.
- Guidance from the Equal Employment Opportunity Commission (EEOC) on vaccination inquiries allows employers to require proof of vaccination from an employee, but it also requires that information to be maintained and used in a manner consistent with the Americans with Disabilities Act (ADA).

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- The ADA requires that employers provide reasonable accommodations to persons with disabilities. Often it is an underlying disability that prevents someone from being vaccinated. Employers must also keep the fact of and information about an employee's disability confidential.

If you have questions, please contact Natalie Sanders or Elizabeth Troutman.

Tags: Americans with Disabilities Act, Equal Employment Opportunity Commission (EEOC), Occupational Safety and Health Administration (OSHA), Vaccine