

Verifying Vaccination Status: What Employers Need To Know

By **Vin Gurrieri**

Law360 (May 21, 2021, 10:21 PM EDT) -- Employers recently got some leeway from the Centers for Disease Control and Prevention to consider relaxing safety rules for fully vaccinated workers, but experts say the nuts and bolts of validating who is inoculated are rife with potentially costly missteps.

An increase in employers tracking workers' vaccination status is an outgrowth of guidance issued last week by the CDC recommending looser restrictions on people two weeks removed from their final COVID-19 vaccine dose so long as no laws dictate otherwise.

Since most companies have thus far eschewed vaccine mandates, the guidance opens the door for employers to consider adopting different sets of rules for vaccinated workers that allow those people to enjoy certain workplace benefits, like relaxed safety protocols, that their unvaccinated peers don't get.

But figuring out exactly which workers are vaccinated is a process that management-side lawyers say is filled with legal and logistical hurdles, with employers having sparse legal precedent and murky guidance to inform their policies.

"People really need to think these things through carefully — it's not a matter of everybody whipping their masks off and going back to business as usual," said Jennifer Rubin of Mintz Levin Cohn Ferris Glovsky and Popeo PC. "And I think employers need to be very cautious and think through not just the [vaccine] verification piece, which is almost easy to solve, but the policy piece, which is what happens when you have two different populations of people in your workplace and you're treating them differently."

Here, experts discuss what employers should know about trying to manage partially vaccinated workforces.

Asking About Vaccine Status Isn't for the Untrained

In December, the U.S. Equal Employment Opportunity Commission issued updated guidance that discusses the interplay between COVID-19 vaccines and federal anti-discrimination laws. A portion of that guidance said businesses can make workers submit proof that they received the vaccine since asking them to do so by itself isn't an inquiry related to a person's disability and isn't likely to elicit disability-related information.

But the commission warned that certain follow-up questions by employers — like asking why an employee hasn't gotten the shot — could run afoul of the Americans with Disabilities Act, which places limits on employers' ability to make workers take medical tests or otherwise seek out medical information about them.

"Employers have to be really careful not to ask those follow-up questions unless they really are implementing some sort of mandatory policy or taking a position that vaccination status is job-related and consistent with business necessity," said Michelle Strowhiro, co-leader of McDermott Will & Emery LLP's COVID-19 employment task force.

To ensure the inquiry process runs smoothly, company leaders, if possible, should designate a point person for asking about and collecting proof of vaccination from workers, Rubin said, suggesting that individual be someone who's undergone training in HR practices and procedures.

"It can't be kind of the employee-of-the-day or whoever happens to be on a shift as the question-asker. It needs to be somebody who is actually trained," Rubin said. "It needs to be done in a way that demonstrates the employer is committed to having someone the employer can trust with this information and to ensure that individual is trained as to how to have those conversations."

Handle Documentation with Care

Besides placing limits on disability-related inquiries, the ADA also includes a confidentiality provision that requires sensitive medical information about workers to be kept private and stored separately from their personnel files.

While attorneys noted that the EEOC hasn't directly addressed whether workers' proof of vaccination is protected by that confidentiality provision, employers would be well-served to treat it as if it is.

If an employer is asking workers about vaccination status with the goal in mind to implement a different set of rules for workers in each bucket, a best practice is to have HR ask them "in a confidential way and maintain that information confidentially as well," according to Strowhiro.

"Because at the end of the day, vaccination status itself may be perceived by employees to be sensitive confidential information [and] you want employees to feel comfortable disclosing that data if they choose to do so," Strowhiro said.

Moreover, instead of worrying about maintaining vaccine status documentation, Strowhiro suggested employers consider not storing it at all, saying it is best to "maintain as little information as needed" to meet any legal or practical requirements.

"So, if the employer doesn't have an actual business need to maintain a copy of the [worker's vaccination] card, then the employer should consider destroying the card after they verify that ... they're fully vaccinated," Strowhiro said. "If there is a reason that the employer chooses to keep a copy of the card on file, they should do so in a confidential way separate from the employee's regular personnel file, similar to how you would maintain any other doctor's note or other medical information on an employee."

CDC Cards Aren't the Only Proof

While the most straightforward way for employers to confirm a worker's vaccination status is to ask for a copy of the now-ubiquitous CDC vaccination cards that many people receive when they get the job, employers should also plan for situations in which workers lose the card or when a document submitted by an employee looks different.

"The CDC card absolutely is something that would be a reasonable thing to request [since] it is not a medical record in and of itself," said Mintz's Rubin. In lieu of submitting a CDC card, employers can also ask workers to sign a certification attesting that they were vaccinated and agree to abide by the rules for vaccinated workers.

While such an attestation isn't quite as direct a form of proof as a vaccine card, Rubin noted that it is a step above an honor system since it at least carries with it the potential for workers to be reprimanded if they are dishonest.

"If you learn that somebody has been untruthful in that type of statement, you as the employer are free to take whatever action is appropriate under the circumstances, i.e. you can discipline somebody [or] you can fire them," Rubin said, noting that employers are routinely able to discipline workers and job applicants for making false or inaccurate statements in other contexts.

Moreover, McDonald Carano LLP partner Kristen Gallagher said that some vaccination sites may have other ways of confirming that someone got a vaccine besides the CDC-branded card and that employers shouldn't be surprised to see those types of records.

They may include records from a state or local health authority's database, documents or emails from a pharmacy chain that administers vaccines or vaccination records from a doctor. And if employees inadvertently turn over too much documentation, like medical information that employers shouldn't have, it behooves employers to return it or ask workers for a new copy.

"As long as an employer has been express about, 'We don't want that information,' I think you simply notify the employee of the information and perhaps either return it or ask for a redacted version so that you have what you need, but you don't have more than what you asked for," Gallagher said.

High Risk of Workplace Bullying

No matter how confidentially vaccine documentation is treated, employers that adopt separate rules for those who are vaccinated will likely confront situations in which people will know or make assumptions about their colleagues just by seeing whether they're wearing a mask.

That could raise all sorts of legal problems for employers, including the prospect of workplace bullying toward people perceived to not have gotten the shot or bullying from workers with fervent anti-vaccination ideologies toward people who have gotten the vaccine.

Rubin noted that any workplaces where it's easy to tell vaccinated and unvaccinated workers apart is one where employers are "going to have to understand how to deal with" employees discussing their vaccine status, because "things may get out of control very quickly if you allow employees to engage in that type of discourse without making it abundantly clear to them that it is not permitted."

She offered a hypothetical: Five employees are working in an enclosed space and four have been issued a green badge that indicates they submitted proof of vaccination, but no one knows why the fifth

doesn't have that badge.

"It could be for a whole host of reasons — couldn't find a place to get vaccinated, religious objections, just doesn't believe in vaccines, political views or medical conditions," Rubin said. "I could see a situation happening in many workplaces where the employees say to the unbadged employee, 'What's going on? Why aren't you vaccinated? We don't want you sitting in here with us [so] get out.'"

"First of all, you don't want to have a situation where the employees are now trying to determine employment policies. That's not going to end well for employers," Rubin added. "But you absolutely don't want to have a situation where some poor employee is being picked on, or bullied, or harassed, or anything that could potentially relate to a protected class such as religious beliefs or medical disabilities."

From a practical point of view, Strowhiro noted the legal risk for employers increases alongside the number of people who know about workers' vaccination status because it "may give insight into that person's disabilities" or their religious beliefs. She said employers that do adopt policies that allow vaccinated people certain benefits "will want to be particularly mindful of reinforcing any discrimination and harassment policies and perhaps even conduct additional training, particularly for managers."

State Vaccine Passport Laws Vary Wildly

Another complicating factor for employers in crafting vaccination policies is the potential for extreme differences in what states allow them to do.

New York, for example, has unveiled what it calls an "Excelsior Pass" — the state's version of a vaccine passport that will be used for vaccine verification purposes.

And Santa Clara, California, which covers the area around Silicon Valley, imposed a mandate May 18 giving employers until June 1 to track whether their workers have received a vaccine. They must also check back in every two weeks thereafter with workers who are unvaccinated or those who don't respond. Any worker who opts not to respond must be treated as unvaccinated under the policy.

On the opposite side of the ledger, Florida recently banned requiring proof of vaccination to take part in everyday activities and other states like Texas have pursued similar measures.

As more states take positions one way or the other on vaccine verification and passports, that could create an increasingly messy hodgepodge of requirements for employers, particularly those that operate in multiple jurisdictions.

"That's always a complication when you have workplaces and work sites in various areas — you have to have information about what's OK in what state or another," said Gallagher of McDonald Carano. "I think it's just a matter of really being eyes-open to the fact that this is a jurisdictional development, and even at a local basis that they need to have people helping them in those locations to make sure that they're being consistent and not running afoul of any local or state law."

Wendy Lazerson, co-chair of Sidley Austin LLP's labor and employment international practice group and a member of the firm's COVID-19 task force, similarly said that there are a lot of rules that employers have to piece together and that they've grown used to having little legal precedent to rely on as they've made decisions over the past year on virus-related policies.

Some state laws and executive orders "carry a hefty penalty" and legal challenges may await, Lazerson noted. But however any litigation turns out, employers remain "in very uncharted territory" as has been the case throughout the ongoing pandemic.

"This is an area that every single day there seems to be some kind of change or some development, and I just would emphasize that you have to really stay on top of this because things are changing daily," Lazerson said. "The states and the federal government and the counties all react to the developments in a way that is very fluid so what's true today might not be true tomorrow. The challenge for employers ... is to make sure you're really keeping up because it's a very swiftly moving area."

--Editing by Abbie Sarfo.