



## Construction

# Vaccine Protocols and Liabilities in Construction: Your Questions Answered

Thank you for joining us for our webinar and Q&A on vaccines in the construction industry on March 23, 2021. While we were not able to answer all your questions live, we have compiled responses from our panelists on liability, workers' compensation, vaccine distribution and legal requirements. These responses are reflective of information available on March 23, 2021.

To watch the webinar again, please [click here](#).

Please note, the responses and counsel of the panelists do not necessarily reflect the opinions and counsel of Gallagher. This information is not meant to be or replace medical advice.

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### LIABILITY QUESTIONS

**Q: Is there any risk to encouraging/supporting access to the vaccine for an organization, as opposed to mandating?**

**Emily Cohen:** The best thing to do is to encourage vaccination and communicate fact-based information.

**Yvonne Waterman:** We have chosen to communicate fact-based information to our employee-owners and indicate it is an employee-owners decision on whether or not to get vaccinated.

**Stephanie Dinkel:** Yes. There are various employment law risks surrounding encouraging and/or mandating vaccines.

The following general articles, which do not address specific situations and are not to be construed as legal advice, highlight some of the concerns.

<https://www.employmentlawwatch.com/2021/02/articles/employment-us/managing-the-risks-of-incentivizing-covid-19-vaccines-for-employees/>

<https://www.jdsupra.com/legalnews/charting-the-risk-associated-with-3628935/>

<https://www.jonesday.com/en/insights/2020/12/legal-and-practical-considerations-for-employers-weighing-covid19-vaccination>

<https://www.natlawreview.com/article/vaccine-incentives-how-employers-can-encourage-employee-vaccination>

**Q: Isn't there more liability the employer is taking on by requiring employees to get the vaccine before they return to work?**

**Yvonne Waterman:** We have consulted with our counsel and feel there is risk/taking on risk by requiring the vaccination. Several areas of concern: Americans with Disabilities Act (ADA), Equal Employment Opportunity Commission (EEOC), OSHA and personal choice.

**Stephanie Dinkel:** Yes, there is risk associated with mandating vaccines prior to returning to work, some of which are highlighted by Yvonne above. There are also employee moral issues to consider.

**Q: Are we legally allowed, as employers, to require employees to get vaccinated as a condition of continued employment?**

**Stephanie Dinkel:** This question does not provide for a yes or no answer, as there are too many issues to consider. Some issues to consider are whether the employees are governed by a collective bargaining agreement (CBA) and the ramifications of that contractual relationship and compliance with various employment-related laws including but not limited to Title VII, ADA, etc.

**Q: What is the employer liability if there are adverse effects to an employee from the vaccination?**

**Yvonne Waterman:** We have our health plan set up to pay for any expenses related to COVID-19, conditions and adverse effects. I do know there can be workers' compensation there is a tie to the job. We do not require the vaccination, but we continue to learn.

**Q: Can an employer mandate employees be vaccinated? Especially if the person has concerns regarding safety, or moral or religious concerns?**

**Stephanie Dinkel:** This question does not provide for a yes or no answer, as there are too many issues to consider. Some issues to consider are whether the employees are governed by a CBA and the ramifications of that contractual relationship and compliance with various employment-related laws including but not limited to Title VII, ADA, etc.

**Q: Are employees required to be vaccinated? In the event they refuse to be vaccinated, what is the required protocol for employers?**

**Stephanie Dinkel:** Vaccinations are not generally required, unless, for example, it is a healthcare setting. If an employee does not want to be vaccinated, we would first need to determine whether there is a valid requirement. Assuming there is some sort of valid requirement, we would need to determine the basis for the employee's refusal. Before taking any action, however, you should consult employment counsel.

**Q: Can an employer legally require their employees to get vaccinated?**

**Stephanie Dinkel:** This question does not provide for a yes or no answer, as there are too many issues to consider. Some issues to consider are whether the employees are governed by a CBA and the ramifications of that contractual relationship and compliance with various employment-related laws including but not limited to Title VII, ADA, etc.

**Q: For Stephanie, if an employee gets infected on the job and the employer follows precautionary measures, is there liability for the employer? If the employee infects a family member at home and the family member dies, is the employer liable?**

**Stephanie Dinkel:** There could be liability for example with regard to a workers' compensation claim or an OSHA citation. There may also be potential liability outside of the employment law area, depending on the circumstances.

**Q: If a fully vaccinated employee is exposed to a COVID-19-positive patient, should the employee quarantine even if asymptomatic? If so, for how long?**

**Dr. Raj Khanna:** The current recommendation is that a fully vaccinated employee exposed to a COVID-19 positive patient does not have to quarantine if the exposure occurs within 90 days after they are fully vaccinated.

**Q: If any employee experiences post-vaccine symptoms and misses work, how is that paid for? Sick leave? Emergency paid sick leave (EPSL)?**

**Emily Cohen:** Under SB95 in CA [California], symptoms from the vaccine would count for paid sick leave.

**Yvonne Waterman:** In Colorado, symptoms from the vaccination would count toward paid sick leave. Several other states are working on legislation regarding leaves. Stay tuned.

**Q: Can an owner require GC employee vaccination as criteria for awarding a bid?**

**Stephanie Dinkel:** Possibly, yes. However, that does not absolve the employer of potential liability from its employees.

**Q: Excellent presentations! Thank you all! Thoughts on a sticker on employee ID badges recognizing them as being vaccinated?**

**Stephanie Dinkel:** Thank you. I do not recommend this. This could run afoul of privacy concerns and could also cause potential concerns under the ADA and Title VII (discrimination issues). For example, this practice could effectively badge those who cannot get vaccinated for health reasons.

**Q: It seems there is liability regardless of whether the vaccine is required or not required. What benefit is there for an owner to require it vs. an owner to not require it?**

**Stephanie Dinkel:** We cannot speak to what the owner's interests may be and how they may be served by requiring or not.

## WORKERS' COMPENSATION QUESTIONS

**Q: If you mandate the vaccine and an employee gets sick for several days, can they file a workers' compensation claim since it was mandated?**

**Stephanie Dinkel:** Yes, they can, but coverage will be determined under the applicable state rules.

**Q: Is a COVID-19-related death OSHA recordable or reportable, or both?**

**Stephanie Dinkel:** Yes. Guidance on OSHA-recordable events related to COVID-19 can be found at [Revised Enforcement Guidance for Recording Cases of Coronavirus Disease 2019 \(COVID-19\) | Occupational Safety and Health Administration \(osha.gov\)](#).

**Q: How can it be proven that someone did get COVID-19 on the job? Seems like a tough prove.**

**Stephanie Dinkel:** It may be a tough prove, but the analysis will turn on the facts of the situation, including what precaution measures the employer took and were in place at the time.

**Q: Question likely for Raj, any thoughts for those employees who have long-term health concerns from what some view as an experimental injection?**

**Dr. Raj Khanna:** The clinical trials performed by the pharmaceutical companies are very detailed with stringent criteria. The vaccines have been determined to be safe for humans. I have absolutely no concerns that these are experimental.



## VACCINE DIFFERENCES AND DISTRIBUTION

**Q: Has there been enough testing done to see if the current vaccines being administered and if they are helpful with the new strains?**

**Dr. Raj Khanna:** Yes, each of the three vaccines currently available have been tested and the pharmaceutical manufacturers have reported that they are effective against the current virus strains.

**Q: Dr. Raj, can you please talk about any long-term concerns with the vaccines?**

**Dr. Raj Khanna:** Each of the manufacturers performed clinical trials with 30,000 human volunteers to check the efficacy of the vaccine as well as any side effects. In general, the medical community has tracked side effects and typically if a side effect occurs, it is usually within the first 42 days after the vaccine administration. The phase 3 clinical trials monitored these volunteers for 90 days. Other than the minor side effects discussed on our call, there were no reported long-term side effects.

**Q: Are there any long-term concerns with mRNA technology? Any concerns around autoimmune issues with future viruses?**

**Dr. Raj Khanna:** There are no reported concerns with the mRNA technology. This technology has been studied for at least seven years and has been determined to be safe. I am not aware of any autoimmune issues reported in the medical literature with mRNA technology.

**Q: Dr. Raj, will these be required or encouraged annually, similar to the flu shot?**

**Dr. Raj Khanna:** It is too early to determine the long-term immunity from the COVID-19 vaccine. If new variants develop or the immunity begins to wane after a certain period of time, the researchers will track this to determine if a booster or annual vaccine is necessary in the future. That is why it is critical that we get vaccinated as quickly as possible to prevent the virus from continuing to circulate or mutate in our communities.

**Q: How long is the vaccination good for? 3 months, 6 months, a year? When should you be revaccinated?**

**Dr. Raj Khanna:** This has yet to be determined.

**Q: Employees who already got COVID-19: Do they need a vaccine?**

**Dr. Raj Khanna:** Employees who have had COVID-19 are deemed to have natural immunity for at least 90 days. But they should still get the COVID-19 vaccine approximately 90 days after their infection so that they will develop acquired immunity. It is unclear as to how long natural or acquired immunity lasts.



**Q: Are these vaccines effective against prevention of all the different variations of COVID-19? Will annual COVID-19 vaccinations be the norm like a flu vaccine?**

**Dr. Raj Khanna:** The manufacturers have stated that their current vaccines do provide protection against some of the variants currently detected. Please see the answer above also.

**Q: Are owners or upper-tier contractors expected to establish site-specific vaccination requirements so that we will only be able to send vaccinated workers to those sites?**

**Stephanie Dinkel:** It is possible, but how each situation is addressed will vary.

**Q: Emily: What are best strategies for contractors to use to engage and encourage employees to get vaccinated?**

**Emily Cohen:** Educate and communicate with your employees. Some examples include:

- Utilize the resources found at [VaccinateConstruction.com](https://www.vaccinateconstruction.com) to communicate with your teams.
- Tailgate topics, newsletters and CEO/HR letters to employees.
- Offer scheduling flexibility.
- Help them preregister for the vaccine if that's an option in your state. Focus on why they want the vaccine and use language like, "we are all in this together," "we value safety," and "we value safety", and "the vaccine is a safe and effective tool to help stop the pandemic and get back to normal." Check out [VaccinateConstruction.com](https://www.vaccinateconstruction.com) for guidance.
- Lead by example and share photos and stories of the executive team and others getting vaccinated.

## LEGAL AND REQUIREMENT UPDATES

**Q: Do you have information on CA SB 95?**

**Emily Cohen:** You can find information about CA SB95 at <https://www.unitedcontractors.org/members/access-resource/615/document>.

**Q: Lots of resources for union contractors—any guidance geared towards nonunion environments?**

**Emily Cohen:** Much of the info at [www.vaccinateconstruction.com](https://www.vaccinateconstruction.com) can be used for union and nonunion companies.

**Stephanie Dinkel:** In a nonunion environment, the same restrictions apply, except for you do not have to address a collective bargaining agreement. All covered employers are still governed by applicable federal employment-related laws, including but not limited to the ACA, ADA and Title VII of the Civil Rights Act. Additionally, your state may have particular rules addressing these issues.

**Q: Our company is currently not planning on requiring our employees to get vaccinated, but we are anticipating that some of our clients, particularly industrial plant owners, may require proof of vaccination before allowing our employees on their site, similar to how they require drug testing and criminal background checks. Has anyone seen clients make such a request? Can one of the panelists comment on the alternative responses to such a request and what issues it may present? Will those companies who manage drug testing and background checks add this to their administrative services?**

**Yvonne Waterman:** We are anticipating in the federal, state and local municipality work will have some requirement around the vaccination. In speaking with our counsel, we will only release a letter of certification of information and will not release any medical records/immunization cards. This is an uncomfortable space for us and would require ongoing discussing with the owner/client with our counsel.

**Stephanie Dinkel:** It is possible that a client may require this, but that requirement does not absolve employers from liability based on the employee-employer relationship.

**Q: Voluntary Families First Coronavirus Response Act (FFCRA) will cover vaccination time beginning April 1. Correct me if I'm wrong.**

**Yvonne Waterman:** We are not subject to FFCRA, however our counsel said it would.

**Stephanie Dinkel:** Under the American Rescue Plan Act of 2021 (ARPA), if an employer seeks the FFCRA tax credit, the employer must provide a new bank of emergency sick leave of 10 days (80 hours) for employees beginning April 1, 2021 and ending on September 30, 2021.

Additionally, ARPA also expanded the scope of E-FMLA leave to include the time to obtain a COVID-19 vaccine and any recovery from the vaccine side effects (and for other reasons).



If an employer offers an employee voluntary leave, either emergency sick leave or E-FMLA, the employee would receive their regular rate of pay, capped at \$511 a day the following three reasons: (1) federal, state or local quarantine; (2) employee advised by a health professional to self-quarantine or (3) employee seeking a medical diagnosis or vaccine (including recovery for vaccine side effects). An employee would receive two-thirds of their regular rate of pay for all other reasons, including caring for another individual or their child's school or day care is shut down due to COVID-19. Finally, the ARPA increased the total cap for E-FMLA leave from \$10,000 to \$12,000.

**Q: Does anyone review the data on VAERS for the safety of these vaccines?**

**Dr. Raj Khanna:** Yes, there are government bodies that review this data.

**Q: Mark and Yvonne: How do you handle when subs don't show up to the job site?**

**Yvonne Waterman:** We lean into our contract with them and engage our counsel. We have had some minor issues in this area.



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## EXPERT PANELISTS



**Stephanie Dinkel**  
Partner  
Koehler Dinkel LLC

Stephanie represents employers in various labor and employment law matters, from general human resources matters through trial. Stephanie successfully defends employers in discrimination and harassment claims, wage and hour claims, non-compete cases, breach of contract, and unemployment matters. She has experience in representing employers in state and federal court, and before various administrative agencies including the EEOC, Illinois Department of Human Rights, Illinois Department of Labor and the Illinois Department of Employment Security.

Stephanie earned her Juris Doctor cum laude from DePaul University College of Law, where she was an editorial board member for the *DePaul Law Review*. Stephanie is licensed to practice in Illinois and is admitted to practice before the Seventh Circuit, U.S. District Court for the Northern District of Illinois (Trial Bar), Western District of Wisconsin and Southern District of Indiana. She is also a member of the West Suburban Bar Association Board of Governors.



**Emily Cohen**  
Executive Vice President  
United Contractors

Emily oversees organizational development, political advocacy and public relations for the organization. Since 2014, Emily has helped secure more than \$90 billion in infrastructure investment throughout California through state and local ballot initiatives. She has helped craft and lead some of the most successful legislative policy wins in the industry's history.

Emily has successfully worked to pass legislation for California union contractors related to improving the business climate; securing the union market share; improving payment procedures for public works contractors; streamlining regulations, increasing industry safety standards; expanding agency accountability; and advancing contractor, labor, and agency business relations at the state and local level.



**Yvonne Waterman**  
Director of Human Resources  
Garney Construction

Yvonne is the director of human resources at Garney Construction. She oversees and manages benefits, payroll, employee development, content development, recruiting, training and event planning. Garney Construction is a leader in advancing water and water/wastewater treatment plants currently operating in 21 states across the United States.

Yvonne's background includes consulting in benefits and human resources, evaluating and bringing acquisitions into the Garney Construction culture, and leading employee and professional development of employee-owners to allow them to reach their highest potential. Yvonne's career includes over 25 years of benefits and human resources experience.



**Raj Khanna, M.D.**  
Medical Director for Elmhurst  
College

Raj is a sports medicine specialist who has more than 25 years of experience in occupational health. He was featured as one of the top two doctors in sports medicine in *Chicago* magazine in January 2001. Raj was the medical director and owner of Advanced Occupational Medicine Specialists. He operated three medical clinics in the Chicagoland area that provided medical services to approximately 700 companies such as UPS, the city of Chicago and FedEx. He also served as the chief medical officer (CMO) for Metra Rail from 2004-2014. Dr. Khanna served as team physician for 15 professional, collegiate and high school sports teams.

Raj is also the co-founder and medical director of CompCorePro, a software service that assists companies in digitally managing their workers' compensation claims in a more cost-effective manner.