

An illustration of a diverse crowd of people, all wearing face masks. The people are rendered in various colors and styles, representing different ethnicities and ages. The background is a mix of warm and cool tones. The text is overlaid on a dark blue vertical bar on the left side of the image.

CRISIS MANAGEMENT FOR COVID-19

Phase 34: Updated Guidance, Legal Changes, and Legislation!

*Presented by:
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INTRODUCTIONS



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WHAT WE'LL COVER

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Vaccine Memo

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Updated Guidance,
Legal Changes, and
Legislation



1

Vaccine Memo



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1 Vaccine Memo Sample

Memo to Employees About Voluntary Vaccinations

In accordance with [ORGANIZATION's] duty to provide and maintain a workplace that is free of known hazards, we strongly encourage employees to receive the COVID 19 vaccination to minimize the risk of infectious disease in our workplace. In making this decision, the leadership team and HR have reviewed recommendations from the Centers for Disease Control and Prevention and local health officials.

Employees may obtain the vaccination wherever they choose; however, we realize that obtaining a vaccine could take much longer than anticipated. [ORGANIZATION] will pay for the time spent receiving the vaccination. Below are some potential options for you to pre-register and get on a waiting list for your vaccine. There will undoubtedly be other options that crop up as 2021 continues; we will continue to push out more vaccination information as things develop. Please note the sites below contain more information on how vaccines are being prioritized in KY based on personal health history and risk levels.

Should you have any questions, please contact [NAME].

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Vaccine Availability

SIGN UP HERE:

UK: <https://www.lexingtonky.gov/vaccines>

Kroger: <https://www.kroger.com/rx/guest/get-vaccinated>

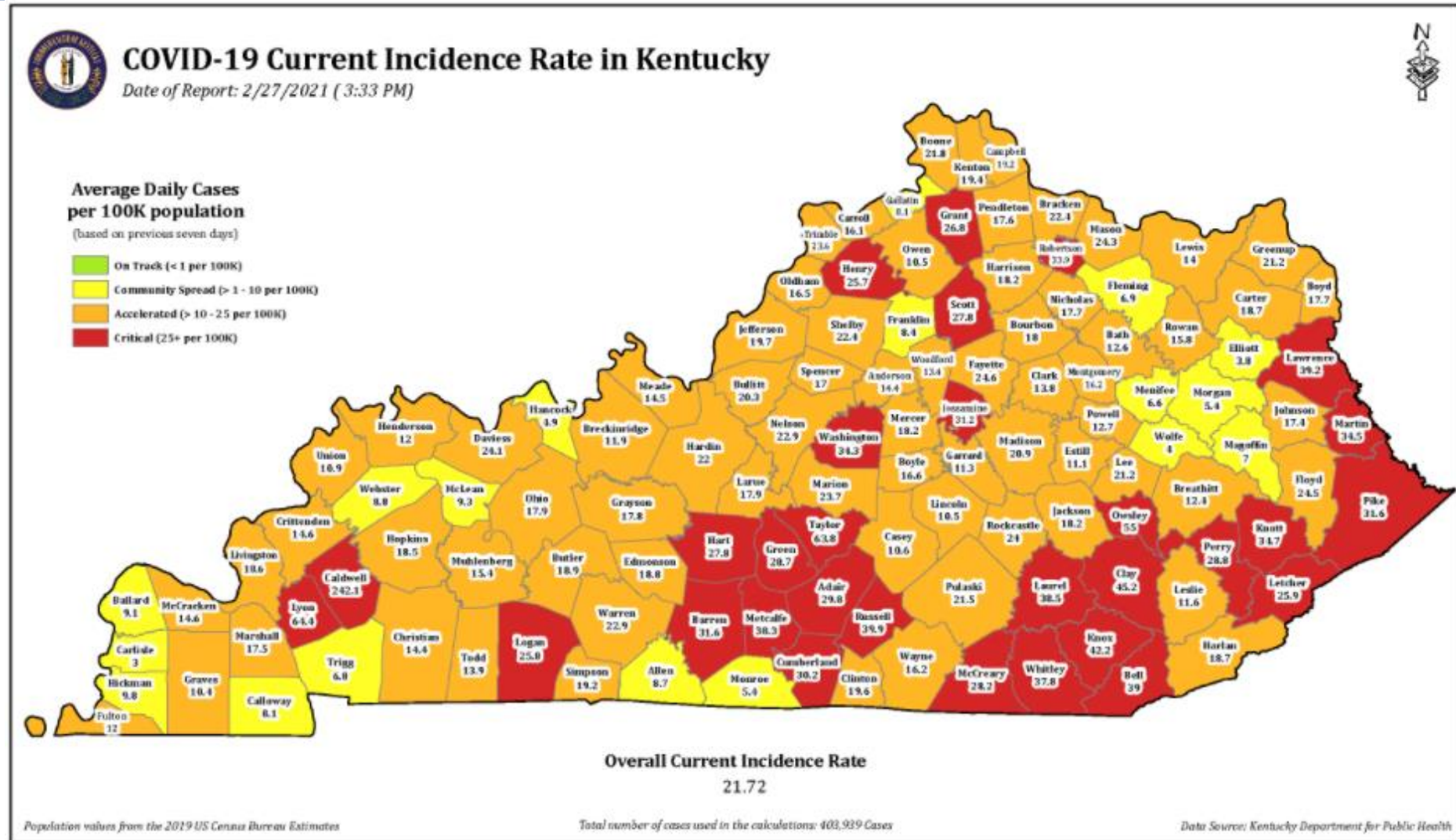
Walgreens: https://www.walgreens.com/findcare/vaccination/covid19?ban=covid_vaccine_landing_schedule

Walmart: <https://www.walmart.com/cp/1228302>

Regional Vaccination Locations: <https://govstatus.egov.com/kentucky-vaccine-map>

CDC VACCINE FAQ: <https://www.cdc.gov/coronavirus/2019-ncov/vaccines/faq.html>

KY COVID VACCINE INFO: <https://govstatus.egov.com/ky-covid-vaccine>





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Kentucky Legal Update



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We discussed, previously, concerns regarding Vaccination Policies and “Mandates.” Unfortunately, the complications regarding these issues continue to be fleshed out:

Employee Retirement Income Security Act of 1974 (ERISA)

- If an employer provides or pays for employees’ medical care, the employer has likely created a group health plan under ERISA.
- A vaccination is medical care under ERISA and employers must comply with all ERISA obligations
- Employers should wrap vaccine incentive program into existing ERISA medical plans for compliance

GINA

- GINA prohibits employers from requesting genetic information from employees
- GINA can apply unexpectedly to wellness programs
- Employers that administer the vaccine or contract with a third party to do so may want to ensure that the screening questions asked prior to administering the vaccine do not elicit genetic information.
- EEOC advises employers to warn employees not to provide genetic information as part of proof of vaccinations

Americans with Disabilities Act

- ADA applies when employers make disability-related inquiries or request medical examinations
- EEOC has held that a vaccination is not a medical examination, but screening questions are
- Any vaccination program must comply with the ADA's voluntary wellness program rules
- Requiring proof of vaccine is not ADA, but inquiring as to why an employee did not receive is
- Any incentive provided to employees must comply with the ADA's voluntary wellness program rules

ADA Wellness Program Rules

- EEOC Withdrew Proposed Wellness Incentive Rules – Increasing Employer Vaccine Uncertainty
- No regulatory guidance regarding how large an incentive is too large to meet the ADA and GINA voluntariness requirements with respect to health-contingent wellness programs incentives.
- EEOC said, on 2/17/21, employers should “stay tuned” for more guidance.... Final clarification could take months, after review, public comment, and adoption
- Employers need to carefully consider the nature and value of any incentives if they could be deemed a part of a health-contingent employee wellness program or otherwise subject to ADA and GINA

Health Insurance Portability and Accountability Act (HIPAA)

- If an employer uses incentivizing, the program must comply with HIPAA's wellness program rules
 - DOL/HHS indicated that diagnosis wellness would not be HIPAA; didn't address **vaccines**
- 2 main consequences to a wellness program being considered a HIPAA health-contingent program
 - The program must comply with HIPAA's limits on incentives (typically equals the cost of the plan)
 - Employees who cannot receive the vaccine due to adverse health status factors must be provided a reasonable alternative method for earning the incentive.

Health-Contingent Issues for Incentive Programs

- Any Vaccination Incentive Program must address a health status factor or "health-contingent" issue in any incentive program
 - A health status factor could include an allergy, or other condition making vaccination inadvisable
 - Raises questions regarding legitimate religious exceptions to Vaccinations based upon EEOC
 - A vaccination program with an incentive might be considered a health-contingent wellness program because certain employees would be unable to receive the vaccine due adverse health status issues

Employer's Concerns Related to Vaccinations Caused by Federal Indecision

So, where does all of this leave confused, concerned, employers? Just because an employer can legally require its employees to get the COVID vaccine, does that mean it should? Here are some thoughts:

1. COVID vaccines are new, and they were fast-tracked. That doesn't mean they aren't good, but it does mean that we haven't had much of a chance to see effectiveness or long-term side effects.
 - Given those unknowns, some employers may elect against requiring/encouraging vaccination
2. If an employer requires employees to be vaccinated and something very bad happens to the employee, is the employer going to be liable because it mandated the vaccine?
 - This is a real possibility. Would vaccination-related issues be workers' compensation? Liability?
3. GINA/HIPAA incentives and encouragement could be interpreted as a "mandate"
 - The better the incentive the more likely it is a mandate; could stigmatize those not vaccinated
4. A potential employee relations nightmare?
 - Many good employees are afraid to get the vaccine; some employees may be able to avoid vaccine
5. CDC "recommendation" does not equate to immunity
 - Plaintiff's attorneys, and courts, could rule against employers, increasing potential financial liability

Judge Extends Injunction for ten days (3/3/2021)

- On February 2, 2021, Beshear filed suit seeking declaratory judgment and Injunction
- On February 3, 2021, Franklin Circuit Judge issued an Injunction
- At a February 23, 2021 Hearing the Injunction was extended for a period of 10 days
- A list of affected Executive Orders was submitted for consideration
- On February 26, 2021, an Order directed a new hearing for today, at 11 a.m.
- It is expected that a new Injunction/Order will issue at any time

2 Kentucky Legislation Updates

New Bills That are Destined for Veto-Override That Impact Kentucky Businesses

HB 4: Allows the General Assembly to eliminate adjournment dates; allows extensions, etc. (3/1/21)

HB 10: Limitation of COVID-19 liability so long as “in good faith” operating a business; protecting public school officials

HB 190: Authorizes the sale of grocery items by food service establishments; eliminates any local or state limitations

HB 210: Amending KRS 337.015 to require adoption leave by all employers the same as birth parents

HB 278: Amends tax code to allow deductions paid with proceeds from PPP to be treated the same as federal purposes

HB 413: Unemployment Insurance; Establishes state-sponsored pool during states of emergency; Applies retroactively

SB 7: Establishes fraud prevention efforts and investigation team; waives accidental overpayment for Unemployment Benefits

SB 8: Exceptions for mandatory immunization; prohibits mandatory vaccinations

SB 73: Extends deadlines for Human Rights Commission actions

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New Administration Directives Affecting Employers

NLRB Revokes 12 Employer-Friendly Memos, some with far-reaching implications

Handbook rules. Previous Memo addressed handbook policies and when they did and didn't interfere with employees' rights under the NLRA. With revocation, the following "hot topic" may be illegal:

1. Mandatory "civility rules"
2. Precluding photography or recording devices
3. Banning insubordination and non-cooperation
4. Banning disruptive behavior
5. Bans of disclosure of confidential/proprietary information, and customer information
6. Bans on defamation or misrepresentation
7. Bans on unauthorized use of company logo or intellectual property
8. Requiring authorization to speak for the employer
9. Bans on disloyalty, nepotism, or self-enrichment

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New Administration Directives Affecting Employers

NLRB Revocation and DOL Freeze of Wage & Hour

Rights of Non-Union Employees to Object to Use of Union Dues for Political Purposes

- Acting GC Ohr rescinded two memoranda about the rights of non-union members in agency shops
 - The first memo required unions to provide adequate notice to non-members about their rights to not be charged for fees related to political and other activities
 - The second required unions to provide detailed information in response to a fee objection case

Department of Labor Freezes Implementation of Wage & Hour Regulations

- Regulations related to independent contractors and tip-pooling have been frozen
- Effective dates delayed for a period of 60 days
- Neither set of regulations is likely to see the light of day

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Welcome to the new normal: The new realm of Cancel Culture

Cancel Culture Affecting Employers and Employees

With all of the tweets, blogs, posts, Facebook, Instagram, Myspace (really), and other posts, both public and private, employers have been asking, "what can we do in response to public outcry, embarrassment, or other concerns?"

1. Yes, you probably can fire an employee for tweeting/posting inappropriately, even if the post occurred before employment, so long as the employment is "at will" and if the content was not legally protected
2. This was, precisely, why I requested my children to not post "drunk posts," inappropriate content, personal commentary, etc. I have repeatedly cautioned both employees and employers, equally, on avoiding such posts. Cancel Culture is here, and will result in many, many, employees losing positions.
3. In today's culture, I highly recommend employers/supervisors avoid political, controversial, or "hot topic" conversation
4. Finally, if you are able, go through and delete, remove, and avoid posting about issues that are, or may become, controversial.... (good luck, if you post often!)

Employees, for your own protection, limit your contacts to genuine, "non-virtual" friends and family members. Do not post personal opinions. The scrutiny of posts, tweets, and comments is only going to get worse

Questions & Answers



HRCI (Strategic/Business): 552949
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