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COVID Vaccines: Implications and Considerations for Employers

Presented by:

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Today's Presenters



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- Mandatory vaccination policies, EEOC guidance
- State statutory restrictions
- Accommodations – medical, religious
- Alternatives to mandating the vaccine – financial and other incentives
- Union considerations
- Q&A

EEOC Guidance

- **Absent contrary state law, employers can mandate vaccinations**
- December 16, 2020 EEOC guidance implies that employers can require COVID-19 vaccinations
- Vaccines are not “medical examinations” under the ADA
- But beware of vaccine-related questions
 - Pre-screening questions about the employee’s medical history
 - Questions about proof of vaccine receipt
- Employer provided vs. pharmacy?

State Statutory Restrictions

Oregon law: health care employers

- Health care employers must provide vaccines to employees if available and medically appropriate
- Immunization must be provided at no cost to employee
- Health care employer may not require employee to be immunized as a condition of employment, unless immunization is otherwise required by federal or state law, rule, or regulation

Health care facility defined to include drug and alcohol treatment facilities

Be on the lookout for new state legislation

POLL: Is your workplace considering mandating the COVID-19 vaccine once it becomes readily available to employees?

Mandatory Vaccination Policies: Should We Adopt One?

- When will the vaccine be available to our employees?
- How would a mandate be received by employees?
- How would a mandate be received by customers/clients/volunteers? Would mandate extend to them?
- How much time do employees have to get the vaccine once they become eligible?
- Accommodation protocol.
- System to track compliance.
- What to do with vaccination records, retention requirements.

ADA Accommodations

- The ADA requires employers to make reasonable accommodations to employees with a disability.
- What is the process?
 - Employee claims they have a disability that prevents them from getting the vaccination.
 - Employer engages in interactive process.
 - Request for medical documentation?
- Direct threat? EEOC recommends employers conduct an individualized assessment of four factors in determining whether a direct threat exists:
 - the duration of the risk;
 - the nature and severity of the potential harm;
 - the likelihood that the potential harm will occur;
 - and the imminence of the potential harm.

ADA Accommodations

- Remote work?
- Adjustments to working hours?
- Reassignment to a non-public-facing role?
- Restructure of non-essential job duties?
- Continued use of face masks and other PPE?
- Leave as a reasonable accommodation?

Pregnant Employees

- Oregon's new pregnancy accommodation law:
 - Need to make reasonable accommodations for conditions related to pregnancy
 - Can't require leave if can make a workplace accommodation instead
- Vaccine trials did not include pregnant women
- What about women trying to get pregnant?

Religious Accommodations

- Title VII of the Civil Rights Act requires employers to accommodate their employees' "religious beliefs"
- "Religious beliefs" defined to include non-religious beliefs about morality and ethics
- Must be "sincerely held"
 - Does not include mere personal objections to vaccines
 - But benefit of doubt given to employee
- Explore reasonable accommodations

Accommodation Scenario: Wendy

Dear Brenda, Caroline, and Dexter,

We operate a retirement community and have decided to mandate the vaccine to protect our residents. Wendy, an Activities Coordinator, is pregnant, and she brought in a note from a Certified Nurse Midwife that states, “Wendy declines to get the COVID-19 vaccine at this time.” What do we do?

Accommodation Scenario: Adrian

Dear Brenda, Caroline, and Dexter,

We operate a small non-profit and our entire workforce has been remote since March 2020. We want to start bringing employees back to the office once the vaccine is widely available, and we are considering mandating the vaccine because we think it is the right thing to do. One of our employees, Adrian, has stated that his religion prevents him from getting the vaccine and has requested to continue to work from home as an accommodation. What do we do?

Alternatives to Mandating the Vaccine

- Financial incentives
 - Cash payment, gift card, entry into raffle
 - Paid time off for time spent getting vaccinated
 - Accommodations for employees who are unable to get the vaccine
- Reverse incentives?
 - Continued mask mandate for employees who opt-out
- Education and outreach, be a trusted source of information
- Arranging for on-site or off-site vaccination

POLL: Is your workplace considering incentivizing employees to get the COVID-19 vaccine?

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What incentives are you considering or have you heard about? (Please provide suggestions in Q&A Function)

Conflict Amongst Coworkers

Dear Brenda, Caroline, and Dexter,

Our workplace has been remote since the start of the COVID-19 pandemic, and we have some employees who have indicated that they won't come to work until all their coworkers get the vaccine. What should we do?

Union Considerations

- Generally need to bargain about changes to terms and conditions of employment.
- May need to bargain and reach an agreement with union before adopting a mandatory vaccination policy.
- Would a sufficiently lucrative financial incentive also be a term and condition subject to bargaining?
- Most CBAs include a management rights provision – assess whether mandating or incentivizing vaccine could fall under management rights provision

Questions?



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