

COVID-19: What We Know and Common Questions for Employers

September 15, 2021

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Housekeeping...

- Please submit questions electronically via chat—we will try to answer some at the end.
- A recording and PDF of presentation will be available.
- Feel free to follow up with any questions at:
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Agenda

- Vaccination Mandates
 - Federal/state
- Leave for COVID-19-related illnesses
- Updated OSHA standards/guidance

Federal Employee COVID-19 Vaccine Mandate

- Executive Order mandating Covid vaccine for nearly all federal employees
 - Eliminated weekly testing option from prior E.O.
 - Postal Service employees exempted

Federal Contractor COVID-19 Vaccine Mandate

- Executive Order mandating Covid vaccine for employees of most federal contractors
- Impacts wide range of companies that do business with the federal government; e.g. information technology, banking, legal services, construction, and manufacturing
- Covers new and renewed federal contracts on or after October 15, 2021
- Exemptions:
 - Contracts less than \$250,000
 - Grants
 - Subcontractors providing only products

Covid Vaccine Mandate for Employers with 100+ Employees

- President Biden directive to OSHA to issue an Emergency Temporary Standard for employers with 100+ employees to require:
 - Covid vaccine **or** weekly testing
 - Paid time off to get vaccine or recover from side effects
- No public comment to be taken
- Rule effective for up to 6 months
- Up to \$14,000 penalty per violation

Questions regarding Federal COVID-19 Vaccine Mandates

- Who gets counted toward 100 employees?
- Who will pay for the Covid-19 testing?
- Will non-exempt employees need to be paid for the time to get tested?
- How will employers verify workers' vaccination status?

Questions regarding Federal COVID-19 Vaccine Mandates

- Will employees with natural immunity from prior infection be treated like vaccinated employees?
- Will boosters be required?
- What about medical and religious exemptions?
- Will vaccine mandates covert employer vaccine and incentive/penalties into ERISA plans

Will the Federal Mandates Survive a Legal Challenge?

- Legal challenges to the OSHA rule almost certain to be filed
- Authority under OSHA: emergency temporary standards are limited to those new hazards posing a “grave danger” to workers
- Several states allege OSHA rule would be federal overreach:
 - Constitution reserves police power to address public health and safety to the States

State Vaccine Mandates

- State and local governments have relatively broad discretion to mandate vaccines based on Jacobson v. Massachusetts
- Status of current mandates
- Legal challenges in progress
- Numerous laws enacted regarding vaccination status and access; many bills pending to prohibit discrimination because of vaccinated status; not just for employees

Voluntary Vaccine Mandates

- ***Can private employers mandate employees to get the vaccine?***

Answer: Yes (maybe)

- EEOC guidelines suggest employers can mandate COVID-19 vaccines for their employees without violating the Americans with Disabilities Act if the employers make accommodations for religious objections under Title VII of the Civil Rights Act and disability-related objections under the ADA
- Employers may only require compliance with the “safety-related qualification” if it can demonstrate that the individual would pose a direct threat to the health or safety of others
 - Consider most recent statistics and information regarding infection, transmission, and severity of cases

Can employers mandate employees get a COVID-19 vaccine? (cont.)

- BUT, if vaccine is administered by the employer or its contractor, the employer must show that any disability-related screening inquiries are “**job-related and consistent with business necessity**”
- To meet this standard, an employer would need to have a reasonable belief, **based on objective evidence**, that an employee who does not answer the questions and, therefore, does not receive a vaccination, **will pose a direct threat to the health or safety of her or himself or others**

Reasonable Accommodations

- Can an employer exclude an employee from the workplace if they are not vaccinated?
 - Maybe.
 - Must observe non-discrimination laws, including protections for pregnant employees.
- What is a reasonable accommodation?
 - The EEOC provides the following examples of what may be a reasonable accommodation: “an unvaccinated employee entering the workplace might wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, be given the opportunity to telework, or finally, accept a reassignment.”

Reasonable Accommodations (cont.)

- How can I verify the need for an accommodation to a vaccine requirement (or other safety-related policy)?
 - For disability-related accommodations, employers may ask questions and request medical documentation.
 - For religious accommodations:
 - Extends not just to organized religions but extends to “others who have sincerely held religious, ethical, or moral beliefs”

Additional Issues With COVID-19 Vaccine Mandate

- Unionized employers –vaccination would likely be a mandatory subject of bargaining
- Possible negative impact on morale, including risk of collective activity protected by the NLRA
- OSHA retaliation issues
- Vaccine injuries- workers' compensation or tort liability

Employer Vaccination Programs

- Incentives
 - Permissible if benefits are not so substantial
- Penalties
 - Delta Airlines: imposed \$200 monthly penalty for employees who decline to get vaccinated
 - Applying a surcharge to employees who do not get vaccinated may implicate four sets of employee benefits rules:
 - HIPAA wellness program rules, ADA wellness program rules, ACA employer mandate rules, Cafeteria Plan Rules (Section 125 of the Internal Revenue Code).
 - Wage and hour implications

COVID-19 and Short-Term Leave

Q: Must employees be paid for time missed from work to get the vaccine?

Q: Must employees be paid for time missed from work due to vaccine side effects?

Q: Must employees be paid for time missed from work to get tested for COVID 19?

Q: Must employees be paid for time missed from work to either quarantine for or recover from COVID 19?

Other COVID-19-Related Leave

- FFCRA: Extended FMLA and PSL tax credits end on September 30, 2021
- What do your policies and state and federal leave laws require?
 - State sick leave/paid time off
 - ADA: “Long COVID”
 - FMLA
 - Workers’ compensation

Workers' Compensation Leave

- Are benefits available for vaccine side effects?
 - Maybe yes, if the vaccine was mandated by the employer
- Up and coming issue as side effects are reported in VAERS and mandates continue
- Possible impact on workers' compensation insurers

Keeping Your Workplace Safe: The Latest from OSHA

- OSHA guidance suggests the following to protect workers:
 - Facilitate employees getting vaccinated
 - Instruct workers who are infected, unvaccinated workers with close contact, and all workers with symptoms to stay home
 - Implement physical distancing in communal areas for unvaccinated and at-risk workers
 - Provide workers with face coverings/appropriate PPE
 - Educate and train workers on COVID-19 policies and procedures

Keeping Your Workplace Safe: The Latest from OSHA

- OSHA guidance suggests the following to protect workers:
 - Suggest customers/visitors/guests wear face coverings
 - Unvaccinated in public facing areas
 - All in indoor settings
 - Maintain ventilations systems
 - Perform routine cleaning and disinfection
 - Record and report COVID-19 infections and deaths
 - Implement protections from retaliation
 - Follow other applicable OSHA standards

Questions?

Thank You!

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