COVID-19 Vaccinations in the Workplace: Considerations & Best Practices for Employers

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Can Employers Require COVID-19 Vaccination?
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- Generally, yes. But it's complicated.
- The EEOC and BOLI say yes, with exceptions.

Administration of COVID-19 Vaccine is Not a Medical Examination.

- “Medical examination”
  - Must be job-related and consistent with business necessity
  - Information treated as confidential medical records
- Be careful with pre-screening vaccination questions
  - Disability-related inquiry must be job-related and consistent with business necessity
  - Does not apply to disability-related questions that are asked by either (1) an employer who offers the vaccine on a voluntary basis, or (2) an administering third party (that does not have a contract with the employer), such as a pharmacy or other healthcare provider.

Asking for Proof of Vaccination is Not a Disability-Related Inquiry

- Employers may ask for proof of receipt of a COVID-19 vaccination
- Not likely to elicit information about disability
- Tell employees not to provide medical information as part of their proof
- Yes or No
  - Don’t ask follow-up questions
Employers May Require COVID-19 Vaccination, with Exceptions

- Employers may require vaccination
- Exceptions:
  - Disability accommodations
  - Religious accommodations
  - Healthcare workers in Oregon

Disability Exemptions - ADA

- Employers must provide reasonable accommodations for employees with an ADA-covered disability that prevents them from receiving COVID-19 vaccine, unless it would impose undue hardship
- Undue hardship
  - An action requiring significant difficulty or expense

Religious Exemptions – Title VII

- Employers must provide reasonable accommodations for employees with a sincerely held religious belief, practice, or observance that prevents them from receiving a COVID-19 vaccine, unless it would cause undue hardship
- Undue hardship
  - More than a “de minimis” cost or burden on the employer
**Sincerely Held Religious Belief**

- Employee must notify employer and show that the COVID-19 vaccination conflicts with their “sincerely held religious belief”

  - “Sincerely held religious belief”
    - “Religion” is construed broadly
      - Employee’s religion may not be traditionally recognized
      - Includes firmly and sincerely held moral or ethical beliefs
      - Does not include social, political, or economic philosophies, or personal preferences

- Employer should ordinarily assume employee’s request is based on a sincerely held religious belief
  - Justified in requesting supporting information if ER has an objective basis for questioning either the religious nature or sincerity of belief

**“Direct Threat”**

- Employers can require that employees not pose “a direct threat to the health or safety of individuals in the workplace”

  - Direct threat:
    - “significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation”

**“Direct Threat”**

- Does the employee pose a direct threat?
  - Individualized assessment of four factors:
    1. Duration of the risk;
    2. Nature and severity of the potential harm;
    3. Likelihood that the potential harm will occur;
    4. Inevitability of the potential harm
  - Finding of direct threat includes determination that unvaccinated individual will expose others to the virus at work

- Can direct threat be eliminated or reduced?
  - Engage in interactive process and attempt reasonable accommodation
  - Can employee work from home?
  - Determine if employee is entitled to leave before terminating
Additional Considerations

- Oregon Law Restrictions on Mandatory Vaccination
- FDA Emergency Use Authorization (EUA)
- Wrongful Discharge
- Workers’ Compensation
- Unionized Workplaces
- Incentive Programs
- Employee Relations

Oregon Law Restricts Certain Employers

- ORS 433.416
- 1989 law forbids healthcare and public safety employers from requiring vaccinations
  - Unless immunization is otherwise required by federal or state law, rule, or regulation
- “Worker”
  - A person who is licensed or certified to provide healthcare, an employee of a healthcare facility, of a licensed healthcare provider or of a clinical laboratory, a firefighter, a law enforcement officer, a corrections officer or a parole and probation officer

Emergency Use Authorization (EUA)

- COVID-19 vaccines approved by FDA under its Emergency Use Authorization (EUA) protocols
- Requirement that any recipient of EUA vaccine is notified that they have the option to accept or refuse the vaccine.
- Not yet clear how this public right-to-refuse might limit employer’s ability to require vaccine.
Wrongful Discharge

- Wrongful discharge in violation of public policy
  - Employer terminates an employee for pursuing statutory rights directly related to employment
  - Public policy exception to at-will employment
- Public policy wrongful termination theory might be asserted by an employee who refuses to be vaccinated based on EUA “right-to-refuse”

Workers’ Compensation Claims

- An employee who has a negative reaction to mandatory vaccine may have a compensable injury resulting in WC claim
- Consideration when deciding whether to offer vaccination through third party not within the employer's control.

Unionized Workplaces

- Vaccine policies are typically mandatory subjects of bargaining under the National Labor Relations Act (NLRA)
- Check your collective bargaining agreement
  - Managements rights clause
  - Zipper provision
  - Effects bargaining
- Watch out for protected concerted activity under NLRA
  - Applies to unionized and nonunionized employers
  - EEs who collectively discuss, object to, or protest vaccine policy
Wage & Hour Considerations

- Do employers have to pay employees for time spent getting vaccinated?
  - Employee receives mandatory vaccine on-site or off-site when they would otherwise be working—treat time as hours worked.
  - Employee receives mandatory vaccine off-site and outside working hours—employer not required to pay.

*Pending OR OSHA standards may require employers cover cost of vaccination, including travel.

What about Incentive Programs?

- Limits on type of incentive
  - Could violate pay equity laws
    - Even as a one-time bonus
    - Retaliation for disability or religion
  - Incentive programs that don't result in a pay differential
  - Wellness programs – ADA, HIPAA, or GINA.
    - EEOC proposed guidance on wellness programs – offer no more than “de minimis incentives”

Employee Relations Considerations

- Weigh employee relations concerns
- Vaccine mandate may negatively affect employee relations or morale
- Administrative burden associated with tracking compliance
- EEOC generally advises encouraging vaccinations rather than requiring it
OR OSHA New Temporary Rules

- General Requirements
  - Physical Distancing, Masks, Face Shields, and Face Coverings
  - COVID-19 Infection Notification Process and
  - Medical Removal of Employees
  - Workplace Cleaning Requirements
  - Poster Requirement

- Deadline Specific Requirements
  - COVID-19 Exposure Risk Assessment – 12/7/2020
  - Infection Control Plan – 12/7/2020
  - Ventilation Requirements – 1/6/2021
  - Employee Information and Training – 12/21/2021

Permanent OSHA Rules on the Horizon

- Temporary rules expire May 4
- Proposed permanent rules
  - Maintains requirements from temporary rule
  - Added measures
    - Limit transporting multiple people in a single vehicle
    - Employees with more than 10 employees must certify in writing that they are running their systems in
      line with current requirements
    - Provide written notice of right to return to work when employee must quarantine
    - Require employers to cooperate with public health authorities that ask to arrange for vaccination in
      the workplace
    - Require health care employers provide respirators to employees working with known or suspected
      COVID-19 positive patients
    - Strengthen the language discouraging the use of face shields