

COVID-19 VACCINE WEBINAR: Understanding Vaccines and Implications in Employment Law

Starts at 12:00 p.m.

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Welcome

Scott S. Moore

Introduction Into Vaccines

Scott S. Moore

Vaccine Distribution Strategy

- Initial COVID-19 vaccination to critical healthcare workforce and those at highest risk of developing complications from COVID-19
- Two doses of COVID-19 vaccine, separated by > 21 or > 28 days
- Both doses will need to be with the same product
- <http://dhhs.ne.gov/Documents/COVID-19-Vaccination-Plan.pdf>

Vaccine Distribution Strategy

Phase 1 B

- First responders
- Education sector
- Food/Agricultural
- Utilities Transportation

Phase 1 C

- 65 years of age
- Vulnerable populations (disabled, homeless, etc.)
- Congregate settings (incarcerated, colleges/universities)

Storage and Handling Requirements:

- (Pfizer Inc. and Moderna Inc.)
 - Refrigerated (2-8°C): 1-4 vaccine(s)
 - Frozen (-20°C): 1-2 vaccine(s)
 - Ultracold (-80°C): 1 vaccine(s)

Willingness to Get Vaccine

- 58% of Americans say they would get a COVID-19 vaccine
- Younger, less educated, minorities - less willing to get vaccine
- Speed of development most commonly cited reason to not vaccinate
- <https://news.gallup.com/poll/325208/americans-willing-covid-vaccine.aspx>

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Employer Liability Issues

- Employer management versus distribution
- Federal and State Liability Protections related to COVID/Vaccines
- Nebraska Bill Pending
- https://www.uslaw.org/files/Compendiums2020/COVID19_General_Liability_QuickGuide/Nebraska_USLAW_Compndium_COVID19_General_Liability_2020.pdf

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Vaccination – Mandatory or Voluntary under the EEOC, ADA and OSHA

R.J. (Randy) Stevenson

Mandating the Vaccine

- With some exceptions, employers who want to mandate the vaccine may do so
- But "be careful what you wish for"
- Consider *need* to vaccinate versus *desire*
- "Carrot" versus "stick" approach?
- Passage of just a few weeks or a month may make a big difference

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New EEOC Guidance

- Technical guidance regarding the application of equal opportunity laws in light of the COVID-19 vaccine's availability
- Although the EEOC did not explicitly state that employers may mandate vaccinations, it did so implicitly by providing guidance about "mandatory" vaccination programs and how employers should respond to employees who refuse mandatory vaccination

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Title VII Considerations

- The concern here is religious discrimination
- Title VII requires employers to reasonably accommodate an employee's sincerely held religious belief, practice, or observance that prevents the employee from being vaccinated
- Reasonable accommodation is not required if it would cause the employer "undue hardship" – defined under Title VII as more than a *de minimis* cost to, or burden on, the employer

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ADA Considerations

- Administering the vaccine is not a medical examination
- Asking or requiring an employee to show proof of receipt of a COVID-19 vaccination is not a disability-related inquiry
- Employers must attempt to reasonably accommodate employees who cannot receive the COVID-19 vaccine due to the employee's qualified disability
- Unlike Title VII, to deny a requested accommodation an employer must demonstrate "undue hardship" (i.e., significant difficulty or expense)

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ADA Considerations (cont.)

- A better approach is that the unvaccinated employee will pose a direct threat to the health or safety of others, and such risk cannot be reduced or eliminated by an alternative accommodation
 - EEOC's "four-factor" individualized assessment
- Employers may rely on CDC recommendations about effective alternative accommodations
- The particular job duties/workplace will be relevant

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OSHA Considerations

- No specific OSHA regulation applies
- Previous OSHA guidance has taken the position that employers can require vaccinations
- OSHA noted an exception based on its Section 11(c) whistleblower provision for any employee subjected to retaliation for refusing a vaccine because of a *reasonable* belief that he or she has a medical condition that creates a real danger of serious illness or death (such as serious reaction to the vaccine)

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Other Employment Law Considerations

Kelli P. Lieurance

Wage and Hour

- Do employers have to pay employees for the time spent getting vaccinated?
 - Employers are obligated to pay an employee for time spent seeking medical attention that is required by the employer and occurs during work hours
- Do employers have to reimburse employees for costs associated with the vaccine?
 - FLSA requires employers to cover work-related expenses if cost would drop employee below the minimum wage

National Labor Relations Act

- Mandatory Subject of Bargaining?
 - Duty to bargain over a vaccine requirement, and the effects of such a requirement
- "Section 7" Rights
 - Right to engage in "concerted activity" for the purpose of "mutual aid and protection"

Workers' Compensation

- If vaccine mandatory...
 - Likely compensable time
- If vaccine completely optional...
 - Arguably not compensable
- If vaccine "strongly encouraged" ...
 - Fact dependent

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State Laws

- Two General Categories
 - Laws requiring employers to mandate vaccine
 - Laws prohibiting mandatory vaccinations

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FMLA

- Would a side effect of the vaccine be considered a "serious health condition" for purposes of FMLA?
 - Unlikely, unless the side effects are serious enough to meet the FMLA's definition
 - Bonus: Telemedicine considered an "in-person visit"

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Employee Benefits Considerations

Jeremy T. Christensen

Affordable Care Act

- If "medical care," employer-provided vaccinations must comply with the ACA's market reform requirements
- If offered to only employees covered by the employer's group health plan, ACA obligations may be met by adding the COVID-19 vaccine as covered benefit
- If offered as standalone benefit, considered a separate group health plan subject to the ACA
- Noncompliant plan could be subject to penalties of \$100 per employee, per day of noncompliance

ERISA, COBRA, and HIPAA

- If "medical care," employer-provided vaccinations must comply with ERISA, COBRA, and HIPAA
- Compliance may be possible through the employer's ERISA "wrap plan" or on-site health clinic

Incentives/Rewards

- Exception to HIPAA's nondiscrimination requirements for programs of health promotion or disease prevention, if requirements met:
 - Incentive not greater than 30% of cost of coverage
 - Employees offered the opportunity to qualify for the reward at least once per year
 - Program designed to promote health or prevent disease
 - Reasonable alternative standard available
 - Program terms disclosed
- Taxation of incentives/rewards

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CARES Act

- Coverage of any qualifying coronavirus preventive services
- No cost-sharing
- Coverage also required for out-of-network providers

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Consolidated Appropriations Act, 2021

Susan K. Tvrdy

Overview of Recent Stimulus Package

- \$900 billion stimulus package
- Unemployment benefits
- Direct payments
- FFCRA tax benefits (among others)
- Expanded PPP program

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Families First Coronavirus Response Act

- Leave mandates expired December 31st
- **Stimulus:** Tax credit available if employers choose to provide paid leave that would have been required by the FFCRA from January 1, 2021 through March 31, 2021

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Other Tax Benefits

- Extension of employee payroll tax deferrals
- Extension and expansion of employee retention tax credit
- Extension of tax-free employer-paid student loans

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Paycheck Protection Program

- Borrowers can take a second loan
 - Less than 300 employees
 - Reduction of 25% gross receipts
 - \$2 million cap
 - Expansion of eligible expenses

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Questions?

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