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YOUR BEST SHOT:

**How to Promote a Healthy
Workplace with the Covid-19
Vaccine**

A wider lens on workplace law

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EEOC GUIDANCE ON MANDATORY COVID-19 VACCINATIONS

A wider lens on workplace law

What is the EEOC?

- The EEOC enforces federal workplace anti-discrimination laws, including:
 - Americans with Disabilities Act (ADA) and the Rehabilitation Act
 - Title VII of the Civil Rights Act
 - Age Discrimination in Employment Act (ADEA)
 - Genetic Information Nondiscrimination Act
- In California, the Department of Fair Employment and Housing (DFEH) enforces the state's versions of these anti-discrimination laws – the Fair Employment and Housing Act (FEHA)



Can an Employer Require a COVID-19 Vaccination?

- Kind of....
 - The EEOC guidance states, “if a vaccine is administered to an employee by an employer for protection against contracting COVID-19, the employer is not seeking information about an individual’s impairments or current health status and, therefore, it is not a medical examination.”



Can an Employer Require a COVID-19 Vaccination?

- But....
 - Pre-screening medical questions that are recommended by the CDC may be considered a “disability-related inquiry” or “medical examination, which may implicate the ADA.
 - Employers cannot ask disability-related questions or force an employee to undergo a medical examination unless the employer can show inquiry or examination is “job-related and consistent with business necessity.”



Can an Employer Require a COVID-19 Vaccination?

- How does an employer show “job-related and consistent with business necessity?”
 - Must demonstrate, with 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.”
 - Direct threat – Four Factors:
 - The duration of the risk;
 - The nature and severity of the potential harm
 - The likelihood that the potential harm will occur
 - The imminence of the potential harm.



Can an Employer Require a COVID-19 Vaccination?

- If my company can demonstrate job-relatedness and business necessity, and my employee refuses to get vaccinated, I can fire them, right?
- **NO!**
- “If there is a direct threat that cannot be reduced to an acceptable level, the employer can exclude the employee from physically entering the workplace, but this does not mean the employer may automatically terminate the worker.”
- “Employers will need to determine if any other rights apply under the EEO laws or other federal, state, and local authorities.”



Can an Employer Require a COVID-19 Vaccination?

- How can I avoid implicating the ADA?
- Two Options:
 - An employer can offer the vaccination on a completely voluntary basis.
 - This means that not only does the employee voluntarily agree to get the vaccine, the employee must also voluntarily agree to answer the pre-screening questions.
 - The employee receives the vaccination from a third-party that is not contracted with the employer, such as the employee's healthcare provider or at a pharmacy.
 - But, may still run into issues with the ADA if the employee cannot get vaccinated for medical reasons.



Can an Employer Require a COVID-19 Vaccination?

- Are there any laws besides the ADA that employers should consider?
 - **YES!**
- Title VII of the Civil Rights Act
 - Sincerely held religious belief or practice
 - “Once an employer is on notice that an employee’s sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act.”
 - “Undue hardship” is more than inconvenience, or *de minimis* cost or burden.
 - Must consider accommodating the employee.
- Discrimination based on sex/pregnancy? Maybe!



Can an Employer Require a COVID-19 Vaccination?

- What about GINA?
 - No, but be cautious of the pre-screening questions.
 - “if administration of the vaccine requires prescreening questions that ask about genetic information, the inquiries seeking genetic information, such as family members’ medical histories, may violate GINA. “



Can an Employer Require a COVID-19 Vaccination?

- What about unionized workers?
 - Implementing a new mandatory vaccination policy may violate the collective bargaining agreement and constitute a unfair labor practice.
 - Provide advanced notice and be prepared to negotiate with the union.



Can an Employer Require a COVID-19 Vaccination?

- Can the employer ask the employee to provide proof of vaccination?
 - Yes, but avoid asking an employee why they did or did not get vaccinated.
- Employers should caution employees not to provide any medical information with the proof of vaccination.



Can an Employer Require a COVID-19 Vaccination?

- Can the employer ban the employee from the workplace for refusing to get vaccinated?
 - Yes, but that does not mean the employer can automatically terminate the employee's employment.
 - Employers must consider whether the employee can be accommodated, including remote work or a leave of absence.





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STRATEGIES FOR INCENTIVIZING VACCINATIONS

A wider lens on workplace law

Should an Employer Implement an Incentive Program?

- Pros:
 - Encourages employees to get vaccinated.
 - Promotes a healthy and safe work environment.
- Cons:
 - Incentive programs may violate several workplace laws, including the ADA, Title VII of the Civil Rights Act, HIPAA, privacy, or wage and hour laws
 - There has been no guidance from the EEOC, the DOL, or similar agencies regarding the lawfulness of incentive programs



What Types of Incentive Programs are Employers Considering?

- Education
- Monetary or similar incentive
 - A *de minimis* incentive, such as a gift card of \$25 or less, or water bottle, key chain, or flash drive.
 - Does not put undue pressure on an employee to participate
 - However, even *de minimis* incentive programs can implicate the ADA, Title VII, HIPAA, and even tax laws!



What Types of Incentive Programs are Employers Considering?

- PTO

- However, cannot mandate that the employee get vaccinated in order to get the paid time off, or mandate how the employee spends their time.
- Also, must be provided to all workers, even those workers whose disability or religious belief may prohibit them from getting vaccinated.



What Types of Incentive Programs are Employers Considering?

- Wellness Programs
 - Providing incentives for getting vaccinated may be viewed as a “wellness program,” which triggers other requirements.





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PRIVACY CONCERNS

A wider lens on workplace law

HIPAA

Health Insurance Portability and Accountability Act (HIPAA)

- The HIPAA Privacy Rule regulates how covered entities use and disclose certain individually identifiable health information, called protected health information (“PHI”)



HIPAA

- Covered entities include:
 - (1) health plans
 - (2) healthcare clearinghouses
 - (3) healthcare providers
- Most employers are *not* covered entities



Workplace Wellness Programs

- Programs offered as part of a group health plan for employees are governed by HIPAA
- PHI obtained through the program must be protected
- Vaccination programs also may be covered by HIPAA's non-discrimination rules



Americans with Disabilities Act (ADA)

- ADA requires employers to keep all medical information about employees confidential, even if the information is not related to a disability
- Information about an employee's symptoms of COVID-19 or diagnosis must be kept confidential
- Vaccination status?



Disclosures to Public Health Authorities

- HIPAA and ADA permit employers to disclose confidential medical information to public health authorities, or as otherwise required by law
- California's AB 685 requires employers provide notice:
 - (1) Within *one business day* of potential exposure to COVID-19
 - (2) Within *48 hours* of an outbreak



Data Security

- California Consumer Privacy Act (“CCPA”) classifies health information as “personal information” for data breach notification laws
- Vaccination status?



May Employers Require Proof of Vaccination?

- YES!
- The EEOC and DFEH have issued guidance stating that asking for proof of vaccination status is *not* a disability-related inquiry.
- BUT...Employers should warn employees not to disclose any medical information in providing “proof” of their vaccination status.
- Employers also should ensure they have policies and procedures in place to protect the information





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WHAT ABOUT ERISA?

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Employee Retirement Income Security Act (ERISA)

- Open question as to whether an employer's mandatory vaccination program would be governed by ERISA
 - (1) Is the purpose of a mandatory vaccination program to provide medical benefits to the employee?
 - (2) Is a single dose vaccine considered a one-time event? Two dose vaccine?





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QUESTIONS?

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