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What Employers Need To Know About COVID-19 Vaccines

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Presented by EPIC and Fisher Phillips

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Overview

This is the first in a two part COVID-19 Vaccine Webinar Series

- Employer Survey Results
- Preliminary comments
- Legal considerations
- Policy considerations
- Practical considerations and logistics
- Helpful resources



MARKET PULSE SURVEY

Market Pulse Survey Results

EPIC Conducted a Survey with 350 Employer Respondents

Key Survey Findings:

- 9% will mandate a vaccine; 53% will encourage through education and 12% will provide cash or other incentives to employees to get vaccinated
- Only 25% of employers have modified their PTO due to COVID leaves although 2/3 are accommodating work from home
- 72% of employers are only paying for medically required testing



PRELIMINARY COMMENTS

Preliminary Comments

- With us today is D. Albert (Bert) Brannen of Fisher Phillips to discuss the legal implications to employers.
- Comments today are based on current guidance.
- The Biden Administration has made this their top priority and the situation is fluid. There will be changes.
- Employers are studying their response.
- Vaccine distribution is being controlled by the federal government and the states.
- Decisions are fact-specific.
- Always consider state and local law.
- FDA has approved vaccines under Emergency Use Authorizations (EUA).



LEGAL CONSIDERATIONS

Legal Considerations

- OSHA
- ADA
- Title VII
- NLRA
- State and local laws
- Other legal authorities

- No specific standard on vaccinations (yet)
- General Duty clause requires employers to maintain a workplace free of recognized hazards
- Expect OSHA to review all applicable policies and practices, not simply whether vaccinations are required or encouraged
- **BREAKING NEWS:** New Executive Order requires OSHA to consider issuing temporary standards concerning COVID-19
 - Standard should issued by March 15
 - Would be effective immediately

ADA

- Prohibits discrimination
- Requires “reasonable accommodation”
- Limits an employer’s rights to inquire or conduct medical exams
- Must be job related, consistent with business necessity
- Medical condition must pose a significant risk of substantial harm
- Reliable, objective information must support employer’s concern
- Protects privacy of each employee’s medical information

ADA Screening vs Vaccinations

- Tests must be job-related and consistent with business necessity
- Current practices permitted due to severity of the pandemic
- COVID-19 poses a significant risk of substantial harm
- Temperature-checking is less intrusive or risky than vaccine

Title VII

- Employers may not discriminate against individuals based on certain protected characteristics—including religion, sex, pregnancy
- Employers have a duty to reasonably accommodate religious beliefs
- Employers have a duty to accommodate pregnancy, childbirth and related conditions
- Employers may require documentation

EEOC Guidance on Pandemics

- Pandemic Preparedness in the Workplace and the Americans with Disabilities Act
 - issued 2009
 - updated March 21, 2020 in response to COVID-19 pandemic
- Response to Question No. 13, regarding whether employers covered by the ADA and Title VII may require flu shots:

Generally, ADA-covered employers should consider simply encouraging employees to get the influenza vaccine rather than requiring them to take it.

EEOC Guidance on Pandemics

- Informal Discussion Letter
 - Issued March 5, 2012
 - Covered religion and pregnancy
- Specifically stated:

“...absent undue hardship, religious accommodation could apply to an applicant or employee with a sincerely held religious belief against vaccination who sought to be excused from the requirement as an accommodation.”

EEOC Guidance (12/16/20) ADA and Vaccinations

Is asking or requiring employee to show proof of receipt of COVID-19 vaccination a disability-related inquiry?

No. Simply requesting proof of receipt is not likely to elicit disability information.

EEOC Guidance (12/16/20) ADA and Vaccinations

Is administration of an FDA-approved vaccine a “medical examination” under the ADA?

No, but answers to pre-screening questions are subject to ADA standards for medical inquiries.

EEOC Guidance (12/16/20) ADA and Vaccinations

- If the employer requires an employee to receive the vaccination...the employer must show these disability-related inquiries are “job-related and consistent with business necessity”
- Employer must have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and does not receive a vaccination will pose a direct threat to the health or safety of his/herself and/or others

EEOC Guidance (12/16/20) ADA and Vaccinations

Two exceptions to the “job-related, consistent with business necessity” requirement:

1. If employer offers vaccination to employees on a voluntary basis, employee may refuse to answer and employer may refuse vaccine, but employer cannot retaliate against employee
2. If employee receives employer-required vaccination from third-party not contracted by employer, the “job-related, consistent with business necessity” does not apply to pre-screening medical questions

EEOC Guidance (12/16/20) ADA and Vaccinations

How does employer respond to employee who says he/she is unable to receive a COVID-19 vaccination due to a disability?

- Conduct an individualized assessment
- If a vaccination requirement screens out employee with a disability, employer must show that unvaccinated employee would pose a direct threat that cannot be eliminated or reduced by reasonable accommodation

EEOC Guidance (12/16/20) ADA and Vaccinations

What happens if employer cannot exempt or provide reasonable accommodation to employee who cannot comply with mandatory vaccine policy due to disability or sincerely-held practice or belief?

- It would be lawful for employer to exclude employee from workplace
- Leave is preferable to termination

EEOC Guidance (12/16/20) ADA and Vaccinations

Is Title II of GINA implicated when employer administers COVID-19 vaccine to employee or requires employees to provide proof they have receive a vaccination?

No. Administering vaccination or requiring proof of receiving a vaccination does not involve use of genetic information to make employment decisions.

Summary of EEOC's Position

- It *may* make a difference because the vaccines are issued under EUA
 - An employee may be exempt from mandatory vaccine based on:
 - an ADA-covered disability or other medical circumstances
- Employers must accommodate disabilities, sincerely-held religious beliefs, practices, or observances and pregnancy childbirth and related conditions
- In these cases engage in the “interactive process”
- Consider reasonable accommodations
- Document communications with employee
- Process may be as important as the final decision

- Unionized employers:
 - Are bound to follow terms of current contracts
 - Have a duty to bargain about vaccinations and related matters
 - Cannot unilaterally adopt such requirements
- All employers, unionized or not, should realize:
 - Employees have rights to engage in “Protected Concerted Activities” (PCA)
 - Employees cannot be fire or retaliate against employees for engaging in PCA

Other Legal Considerations

- State and local laws
 - May protect “anti-vaxxers”
 - May protect employees from adverse action for “lawful off-duty activities”
 - May provide a “right to privacy”
- Current policy provisions or agreements



POLICY CONSIDERATIONS

Opinions Differ

- Is the workplace ready?
 - A Gallup poll showed only about 50% would take the vaccine
 - Is the public becoming more receptive?
 - Anti-vaxxers have been around for a long time
- Dr. Beth Bell, Federal Advisory Panel on Vaccinations says vaccines authorized under the FDA's EUAs cannot be mandated
- So, do you want to be a test case by taking the strongest position?

Mandatory Flu Shots Provide A Roadmap

- Subject to some limitations, employers may require employees to get the flu vaccine
 - Tied to job duties and environment
- Some jurisdictions require flu shots for employees in certain positions, e.g., healthcare workers with patient contact
- Other jurisdictions prohibit mandatory flu shots

Adopt a Policy Regarding Vaccines

- Comply with all applicable laws
- Requirements should be based on industry/positions/job-relatedness
- Articulate the rationale
- Will vaccines be:
 - Required? Expected? Strongly recommended? Encouraged? Available?
- Reference availability of and procedure for exemptions
- Reference the “individual interactive process”
- Respect employee confidentiality rights and interests
- Include an anti-retaliation statement

Develop A Communications Plan

- Consider employees' likely response
- Respect employee attitudes and perspectives
- Educate employees about rationale and benefits
- Choose the “educator” carefully
- Take steps to maintain good employee relations
 - Critical to maintaining focus and productivity
 - Consider possible susceptibility to union organizing efforts
 - Clients, customers and public will take notice and be impacted
- Don't underestimate importance of good communications

Should You Survey Your Employees?

- Employee attitudes are important
- Be careful what questions you ask
- Do not ask employees “why” they would not be vaccinated
- IF you survey, best to do it anonymously
- Consider how you will actually use the results if you do survey



PRACTICAL CONSIDERATIONS

Consider Logistics

- Are vaccines available?
- Have professionals administer the vaccinations
- Consider paying for vaccines and lost work time
- Offer vaccines on-site during normal work hours
- Offer vaccines on multiple dates
- Consider staggering vaccinations
- Make it easy and convenient for employees

Should You Offer Incentives to Employees?

- EEOC has NOT taken a definitive position yet
- Based on the recent proposed Regulations on Wellness programs, employers will only be able to offer *de minimis* incentives
- Typical incentives include
 - Cash bonuses or gift cards
 - Additional Sick or PTO time
 - Entry into give-aways
 - Points in the wellness program
 - Pay for taking care of a family member with COVID

Final Comments

- Anticipate issues, questions and pushback from employees
- Vaccines are important to protect the workplace and society
- Vaccines reduce strain on nation's healthcare system
- Decide on your position now
- Develop policies and communications aligned with your decision
- Don't be stingy with accommodations
- Just because an employee gets vaccinated, he/she cannot be exempted from mask requirements
- Even after a vaccination program, adhere to the best safety practices for your industry



HELPFUL RESOURCES

Helpful Resources

- [EEOC.gov](https://www.eeoc.gov)
- [CDC.gov](https://www.cdc.gov)
- [OSHA.gov](https://www.osha.gov)
- [HHS.gov](https://www.hhs.gov)
- [FDA.gov](https://www.fda.gov)

Visit Fisher Phillips Vaccine Resource Center for Employers

Fisher Phillips has a number of resources to aid employers with the upcoming COVID-19 vaccine that can also be used during flu season. We encourage you to check back often.

- COVID-19 Vaccine FAQs
- Sample policies and procedures
- Data Bank of templates and forms
- 50-state issues
- COVID-19 Vaccine and Flu insights

Visit **fisherphillips.com** for up-to-date information. To subscribe to Fisher Phillips' Alert system, scroll to the bottom, and click on **Subscribe**



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FMLA App

Visit Fisher Phillips Vaccine Resource Center for Employers

To receive a complete copy of today's 6-page Fisher Phillips Alert on COVID-19 Vaccines, email Bert Brannen at

dabrannen@fisherphillips.com



Top 7 Things You Need To Know As EEOC Says Employers May Mandate COVID-19 Vaccines

12.17.20

Employers now have clarification that they will be able mandate the COVID-19 vaccine among their workers in certain circumstances without running afoul of key federal anti-discrimination laws, according to updated guidance issued Wednesday by the Equal Employment Opportunity Commission. While there are numerous issues to consider before mandating that your employees get vaccinated, this guidance is the first official pronouncement on the subject from the employment law watchdog agency and provides an outline of various hurdles to overcome. Here are the top seven takeaways for employers from this critical development.

1. The EEOC indicates that employers can require their workers to get a COVID-19 vaccine in certain circumstances, even under the Emergency Use Authorization.

The agency's updated FAQs do not unequivocally state that "employers can require the vaccine." However, the Equal Employment Opportunity Commission (EEOC) repeatedly answers questions discussing what actions employers can take in response to various circumstances *after* an employer has mandated the vaccine. This approach plainly suggests there must be circumstances where

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EPIC COVID-19 Vaccine Webinar Series- Part 2



Join us on **February 10, 2021** for part 2 of our webinar series where our presenter will be:

Sree Chaguturu, M.D.
Chief Medical Officer of CVS Caremark and SVP of CVS Health

Part 2 will answer your medical questions about the vaccine including distribution, efficacy, other vaccines on the horizon.

Invites will be sent early next week.



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Final Questions?