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COVID-19 Vaccines: Worth the Shot?

CLE Seminar for In-House Counsel Webinar Series
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Mandating COVID-19 Vaccines

The EEOC in its December 16, 2020 Guidance, updated May 28, 2021, states that employers may mandate COVID-19 vaccinations under the EUA authorization without violating the ADA, VII and other employment laws, because COVID-19 is a direct threat.



Mandating COVID-19 Vaccines, continued

- EEOC Guidance makes clear that:
 - If vaccine is mandated, the requirement must be **job-related** and consistent with **business necessity** or due to a **direct threat**.
 - Consider whether employees perform work in-person, work with vulnerable populations, and are within close proximity to each other or the public.
 - Consider limiting to certain employees, departments or locations if vaccine should be required.
 - Consider availability of vaccine to employee populations to avoid disparate impact.

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Mandating COVID-19 Vaccines, continued



The "vaccination itself is not a medical examination" within the meaning of the ADA

Administration of the COVID-19 vaccine is not prohibited or limited by the ADA

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Mandating COVID-19 Vaccines, continued

Pre-screening vaccination questions may implicate the ADA's provision on disability-related inquiries.

- May only be asked when “job-related and consistent with business necessity.”
 - Unless offered on voluntary basis.
- To meet this standard, employer must prove that employee who refuses to answer questions and does not get a vaccine will pose “a direct threat to the health or safety of her or himself or others.”



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Mandatory Vaccine Exceptions

Employees may refuse a vaccination IF:

- They have a disability that prevents them from getting vaccinated.
- They have a sincerely held religious belief against the vaccine.

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ADA Accommodations

Employee who is prevented from being vaccinated because of a disability and who poses a direct threat must be offered a reasonable accommodation unless doing so would result in "undue hardship" (significant difficulty or expense).

- Reassignment to other job
- Remote work
- Leave under existing policy

If no accommodation is possible and employee poses a direct threat, then employee can be excluded from the workplace.



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Mandating COVID Vaccine

Direct Threat Analysis

Must be conducted before excluding unvaccinated employees from workplace.

- Duration of risk, nature and severity, likelihood and imminence of potential harm.

Even if employee poses a direct threat, he/she cannot be excluded from workplace unless there is no reasonable accommodation that would eliminate the risk.

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Requiring Proof of Vaccination

- Employers may request or require employees to provide proof of receiving a vaccine from another provider.
 - According to EEOC, this is not a disability related inquiry.
- However, employers may only ask employee why she/he did not receive vaccine if “job related and consistent with business necessity.”
 - May qualify as a medical inquiry under the ADA.



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GINA

Genetic Information Nondiscrimination Act

- Prohibits discrimination on the basis of genetic information.
- Pre-Screening Questions before administering the vaccine may implicate GINA.
 - Ex: Do you have a family history of _____?
 - Recommendations:
 - Vaccinate off-site.
 - Do not obtain any medical records.

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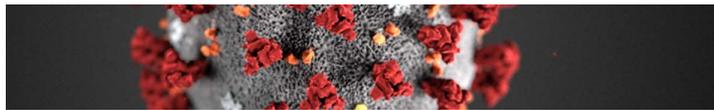
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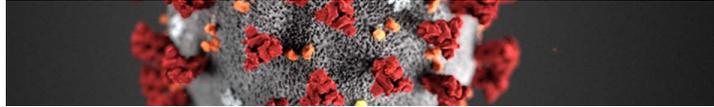
Obligations Under the OSH Act



Standards

- OSHA issued an Emergency Temporary Standard (“ETS”) for healthcare settings on June 10.
- “The standard generally applies in settings where any employee provides healthcare services or healthcare support services, even in cases where all or some employees are fully vaccinated.”
- Certain provisions do not apply to fully vaccinated workers.
 - To be exempt based on vaccination status, the employer’s COVID-19 plan must include policies and procedures to determine employees’ vaccination status.

Obligations Under the OSH Act



General Duty Clause

- Section 5(a)(1) of the act requires an employer to furnish a place of employment that is free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees.
- Having a vaccinated workforce is a way of reducing the hazard presented by the SARS-CoV-2 virus.
- New OSHA guidance for non-healthcare settings, issued June 10, reflects CDC guidance (as of May 13), encourages vaccination, and focuses on “unvaccinated and otherwise at-risk workers.”

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New OSHA Guidance

Issued on June 10, 2021

“Unless otherwise required by federal, state, local, tribal, or territorial laws, rules, and regulations, most employers no longer need to take steps to protect their fully vaccinated workers who are not otherwise at-risk from COVID-19 exposure. This guidance focuses only on protecting unvaccinated or otherwise at-risk workers in their workplaces (or well-defined portions of workplaces).”

See <https://www.osha.gov/coronavirus/safework> (footnote omitted).

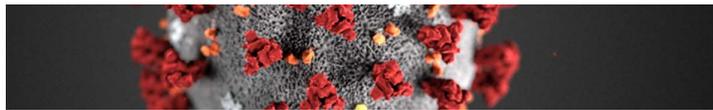
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Vaccination Policy Considerations

- OSHA's encouragement of vaccination
- Benefits of a mandatory vaccination policy
 - Establish consistent policies and protocols
 - Resolve uncertainty over steps necessary to protect unvaccinated workers
 - OSHA's concerns for "otherwise at-risk" workers
- Risks of a mandatory vaccination policy
 - See OSHA Letter of Interpretation re: H1N1 vaccinations: "an employee who refuses vaccination 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) may be protected under Section 11(c) of the Occupational Safety and Health Act of 1970 pertaining to whistle blower rights."

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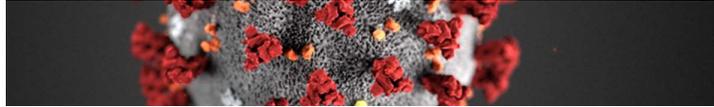
Obligations, Continued: Different Approaches



- Generally
 - Vaccinations play an important role in protecting the workforce and creating a safe environment.
- Lack of a nationwide rule from OSHA
 - There is no federal OSHA regulation about COVID vaccinations.
 - Because some states have more stringent requirements, employers should check the rules for each state, not just federal OSHA guidance.
- Approaches may differ based on context

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Obligations, Continued: Different Approaches



Examples:

- Michigan
- Oregon
- California

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Work 2.0: Vaccination Policy

- Can ERs require vaccination?
 - Should they?



- Can ERs ask about vaccination status?
 - Should they?



- Can ERs treat EEs different based on vaccination status?
 - CDC/OSHA



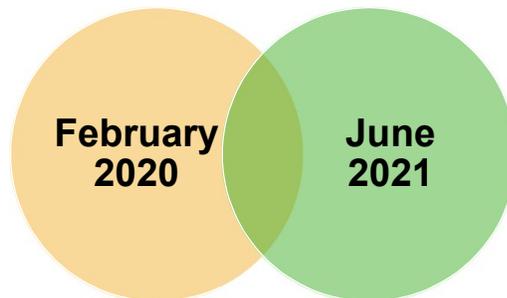
Work 2.0 Managers



- Mental health
- Familial matters
- Risk tolerance

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Work 2.0 Flex Work



Remote Work is

- Accommodations
- EE benefit
- Recruiting/retention tool

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Work 2.0 Flex Work

Ask:

Which Jobs?

- Transactional essential functions
- Relationship-based essential functions
- What *must be done* in the office? (inclement weather or traveling EEs)

Job Descriptions

- **In-office required**
- **Hybrid**
 - RTO criteria
 - Shared understanding when/under what circumstances
 - Professional standards
 - Performance metrics
- **Primary remote**
 - Location/recall
 - UI/WC/taxes
 - Equipment, security
 - Policy for expectations (professionalism, performance)
 - EOE concern?

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Work 2.0 Flex Work

Ask:

Which People?

- Preferences vs. Accommodations
- Blurred line
- Are your front lines trained to decipher accommodation requests?
- Processes to capture EE concerns?

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Work 2.0 Open Questions

- How will COVID affect business travel going forward?
- Paid Family Leave at the federal level?
- State Laws limitations on federal mitigation (surges)

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Takeaways

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