Administrator Program
Monday, November 14, 2022
10:15am-12:00pm

1a. Employment Law

Presented by:
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PC (not politically correct but Post-Covid) Employer Considerations with Emphasis on ADA
What We Will Cover

• What is the current state of COVID-19 laws and regulations affecting the workplace?
• How has COVID-19 changed employee/employer expectations?
• What policies do you need in place as an employer to address the pandemic and the changed expectations?
• The ADA and COVID-19 the same but different

What labor & other laws come into play?

• OSHA
• ADA
• Vaccinations (ADA, HIPAA, GINA, Title VII)
• Remote Work (Unemployment laws, tax laws, Workers compensation, FLSA)
• Uniform Trade Secrets Act
• Confidentiality/Contracts
General Duties Clause requires workplaces to provide a safe work environment.

OSHA WILL FOLLOW THE CDC’S WORKPLACE AND COMMUNITY LEVELS GUIDANCE

- Employees who report to work with COVID symptoms should be sent home for 5 days
- Employees should be required to self-monitor and not report to work for 5 days if testing positive
- If an employee reports to work and is found to have contracted COVID, seek consent to disclose the individual to inform other employees who have worked in close vicinity and for extended periods of time with the positive employee
- CDC says exposed individuals who are vaccinated or who tested positive for COVID within last 90 days need not stay home unless develop symptoms but those who are not should stay home for 5 days
- If you cannot obtain consent, inform employees while maintaining confidentiality

When is COVID a recordable illness:

- COVID-19 can be a recordable illness if a worker is infected as a result of performing their work-related duties. However, employers are only responsible for recording cases of COVID-19 if all of the following are true:
  1. The case is a confirmed case of COVID-19 (see CDC information on persons under investigation and presumptive positive and laboratory-confirmed cases of COVID-19);
  2. The case is work-related (as defined by 29 CFR 1904.5);
  3. The case involves one or more of the general recording criteria set forth in 29 CFR 1904.7 (e.g., medical treatment beyond first aid, days away from work).
| OSHA | Vaccine Mandate:  
|      | Would have required employers with 100 or more employees to mandate vaccination  
|      | Withdrew after Supreme Court decision on January 26, 2022 |
| OSHA | If your company decides to mandate vaccines, know this:  
|      | OSHA issued guidance on April 20, 2021  
|      | • Adverse vaccination reactions resulting from mandatory vaccination is a recordable OSHA 300 log event  
|      | • Suggested vaccination policies do not result in recordable events  
|      | • To avoid OSHA recordable events policies must not result in any adverse action or impact performance rating or advancement |
CDC Mask Guidelines and Vaccine Considerations

- CDC new guidance says fully vaccinated individuals do not need to wear masks but wear masks if there is “A Lot” of COVID
- Employers can request to see vaccination record
- Employee who is not vaccinated, but does not want to wear a mask....

Genetic Information Nondiscrimination Act
Prevents employers from: (1) using genetic information to make decisions related to the terms, conditions, and privileges of employer; and (2) acquiring genetic information except in 6 narrow circumstances; and (3) disclosing genetic information except in 6 narrow circumstances

GINA Implications of Vaccination Policies
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This is going to sound familiar.....

EEOC says administering the vaccine or requiring proof of the vaccine does not implicate GINA

B U T

Pre-screening questions seeking genetic information, family histories, etc. does

GINA defines “genetic information” to mean:

• Information about an individual’s genetic tests;
• Information about the genetic tests of a family member;
• Information about the manifestation of disease or disorder in a family member (i.e., family medical history);
• Information about requests for, or receipt of, genetic services or the participation in clinical research that includes genetic services by the an individual or a family member of the individual; and
• Genetic information about a fetus carried by an individual or family member or of an embryo legally held by an individual or family member using assisted reproductive technology.
SO, WHAT TO DO TO AVOID GINA....

1. Neither Employer, nor employer’s contracted agent should administer
2. Non-contracted third-party should administer
3. Employer should inform employees not to provide to employer any genetic information as part of the proof for the vaccine or as an excuse not to have received it
4. The warning renders the any disclosed information as inadvertent and not unlawful

TITLE VII ISSUES

- Religious objection to vaccination
- Accommodations such as PPE may interfere with religious garb
- Pregnancy
- ADEA, b/c COVID-19 effects those 65 or older disproportionately
WHY HIPAA

- An employer in possession of Protected Health Information must keep such information confidential
  - Store vaccination proof and records separately and securely
  - Do not disclose any more information than is necessary (scheduling, accommodation, etc.)

Pandemic Preparedness Plan Should address:

- General Statement of Employer’s policies on COVID and other pandemics
- Company’s policy with regard to PPE
- Infection and exposure requirements
- Social distancing
- Visitor protocols
- Leave policy for illness and quarantine
- Protocol for ADA accommodation and required documentation
- Remote work accommodation
- Be flexible for federal, state, and local guidelines
Ada issues with COVID-19

- Vaccinations
- PPE accommodations
- Auto-immune, increased risk employees
- Providing Accommodations
- Undue Hardship

Can an Employer force vaccinations?

Generally speaking, yes, according to EEOC
Recipients of Medicare/Medicaid funds are MANDATED to require vaccinations. Need to provide exemptions for:
1. Religious
2. Medical Reason

Texas says only if employer provides exemptions for:
1. previous infection with COVID
2. religious exemption
3. personal conscience
4. medical reason

Pay attention to other state guidelines, military, medical providers who receive Medicare/Medicaid.
The EEOC says the vaccination is not a medical examination,

BUT, AND THERE IS ALWAYS A BUT

ADA Implications of Vaccination Policies

PRE-SCREENING QUESTIONS IMPLICATE THE ADA
According to CDC, health care providers should ask certain questions before administering the vaccine to ensure there is no medical reason to prevent the person from receiving the vaccination
Proof of Vaccinations

The EEOC says requiring an employee to show proof of receipt of a COVID-19 vaccination is not a "disability related inquiry"

BUT, HERE WE GO AGAIN, ANOTHER BUT

Subsequent employer questions may elicit information about a disability and must be "job related and consistent with business necessity"

Employers should take care not to receive information as part of the proof

Example:
Why didn't you get the vaccination?

Mandatory Vaccination Policy

There are different implications for employer administered vaccinations and contracted third-party administered vaccinations v. non-contracted third-parties

WHY???
Employer/Employer agent administered vaccinations

Pre-vaccination questions are likely to elicit information about a disability.

If the employer requires an employee to receive the vaccination, administered by the employer or an agent of the employer, the employer must show that these disability-related screening inquiries are "job-related and consistent with business necessity."

To meet this standard, an employer would need to have a reasonable belief, based on 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.

Non-contracted administered vaccinations

Pre-vaccination questions are likely to elicit information about a disability.

Non-contracted third parties (hospitals, medical providers, pharmacies, etc.) do not disclose the screening answers to employees.

Therefore, the employer does not need to consider the "job-related and consistent with business necessity" requirement.
AND, THERE IS ALWAYS CONSENT

- Making the vaccination program voluntary and obtaining consent is also voluntary

Proper documentation

- Clear and concise vaccination policy
- Medical Exemption/Accommodation Request forms
- Religious Accommodation Request forms
- Paid Leave request forms
- Extended FMLA request forms
- Security of documentation
What does an employer do with an employee who is unable to receive a COVID-19 vaccination because of a disability?

This inquiry falls back on regular ADA analysis:
1. The employer must determine an unvaccinated employee poses a direct threat due to "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation."
2. Consider: the duration of the risk; nature and severity of the potential harm; likelihood potential harm will occur; and imminence of potential harm
3. Conduct an ADA accommodation dialogue (remote work, adjustments to schedule, adjustments to work area, etc.)
REMOTE WORK: Real considerations

- Who gets to work from home – is it the exception or the norm?
- What are the accessibility and hardware requirements and who pays for these?
- What will be required to track hours and attendance and avoiding unapproved overtime—FLSA
- How do you know where employees are working? Tax implications dependent on services in various states
- There are ADA issues when you evaluate solely based upon productivity.
- Will there be any physical presence required?
- Workplace safety issues – get assurances of safety precautions and hardware needs—Workers Compensation invoked when employee is injured, even at own home
- Set rules for confidential information

REMOTE WORK: How do you show an undue hardship

- Refer to your job descriptions – Does it require an in-office presence?
- Be prepared to explain a difference between work during COVID and your industry/type of work and your PC industry/type of work
- Immaterial dollar costs will not meet the burden but costs to other employees in the way of increased work, timing of work probably will
- If so, why? You will need to justify it.
- Be prepared to document effect on other workers (i.e. lack of communication issues, reassignment of tasks, cost to company)
- Set rules for confidential information
Auto-immune illnesses

Adverse vaccination reactions

FFCRA

Care for others

Workers’ compensation issues for remote work

Ergonomics (if employees have accommodations at work, make sure they have it at home; send home a guide)

Slip, trip, fall risks

Pets, children
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