



Mandatory Vaccination Policies And Compliance for Labor, Employment, and Benefits

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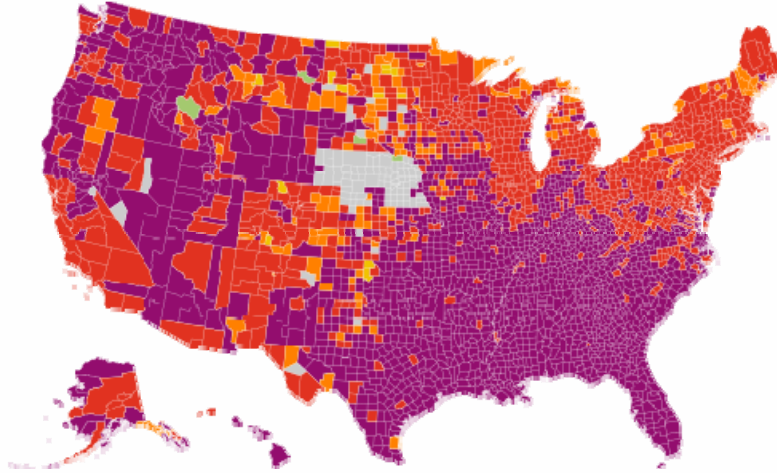
Agenda

1. COVID-19 Update: The Delta Variant
2. Mandatory Vaccine Policies At Work
3. Required Accommodations
4. What Information Can You Require Employees to Provide
5. Vaccine Incentives
6. Confidentiality of Information and Documents

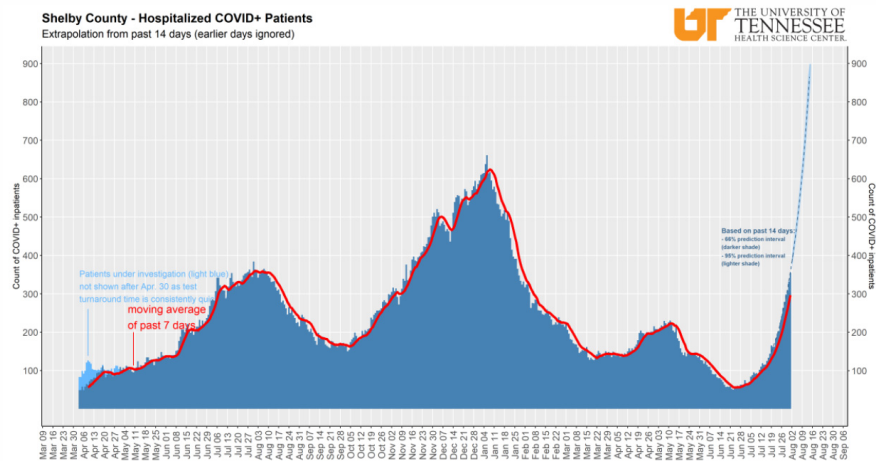
The Delta Variant

- **The Delta variant is more contagious**
 - CDC indicates it is twice as contagious as prior variations, but may not be as deadly.
- **CDC has indicated that there is increased risk of severe disease of both those vaccinated early and the unvaccinated.**
 - As of April 30, CDC data showed 10,262 breakthrough cases out of the more than 100,000,000 vaccinated people in the U.S.
 - This data underreports the number of breakthrough cases because many who contract COVID do not seek health care or may have no symptoms.
 - UK study found vaccine is very effective at preventing infection with Delta, but immunity wanes with time.

Average Daily Cases Are Increasing Dramatically



Hospitalizations Are Surging

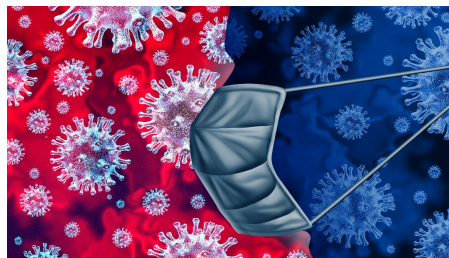


Data on Breakthrough Cases

- CDC has not been tracking.
- Some states have been tracking breakthrough COVID cases that result in hospitalization or death.
- Breakthrough cases leading to hospitalization or death have accounted for only a small percentage of overall cases.

<https://www.kff.org/policy-watch/covid-19-vaccine-breakthrough-cases-data-from-the-states/>

CDC's Back and Forth Guidance



- May 2021
 - CDC recommends that vaccinated persons do not need to wear masks when around others who are vaccinated.
- August 2021
 - CDC backtracked and again began recommending masks.

The Pandemic Is Not Over



Mandatory Vaccine Policies At Work



- The number of employers requiring vaccines has been increasing rapidly over the past 6 weeks.
- 27% of companies on the Dow Jones now require vaccination.
- Mandatory Vaccination Policies started with the largest employers.
- However, some employers are not requiring all employees to get vaccinated.

Is it Legally Permissible to Require Vaccination

- **Federal Law**
 - Generally, yes, but you have to make sure your policy accounts for many different legal obligations.
- **State Law**
 - No state law directly prohibits employers from requiring vaccination, but there is always a risk of litigation.
 - Florida and Montana:
 - Prohibition on vaccine passports

Accommodations & The Interactive Process

- ADA – employers must offer reasonable accommodations for disabilities
- Title VII – employers must offer reasonable accommodations for sincerely held religious beliefs.



How Do You Ensure You Follow the Law

Employers Needs Policies and Implementation Guidelines

- Vaccine Policy;
- Religious Accommodation Request Form;
- Disability Related Accommodation Request Form;

Considerations:

- Pushback from Employees;
- Resignations;
- Turnover;



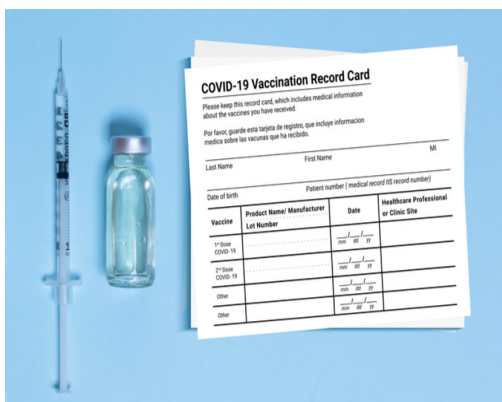
Mandatory Vaccine Policy

- The fact based rationale for adopting the mandate;
- Verifying Vaccine status:
- Required date for vaccination;
- The process employees should follow to request accommodations;
- Alternative options to vaccination (if offered)
- Implementation for new hires.

What Proof Can You Require Employees to Provide

- Can you ask an employee their vaccine status?
 - The EEOC advised that asking an employee for vaccine status is not a disability related inquiry. Hence, you can ask for this information.
 - You should not ask questions that are likely to elicit information about underlying health conditions.
- Can you ask employees for proof of vaccination?
 - You can ask employees for proof of vaccination. It is not a disability related inquiry.

Confidentiality of Vaccine Status



EEOC's position is contradictory, but its guidance says that employers must keep information confidential.

How will you maintain confidentiality?

Can you maintain confidentiality and still hold unvaccinated employees accountable for taking the necessary precautions to protect others?

Note: You can possibly use the confidentiality requirement as part of the undue burden analysis for religious accommodations.

Vaccination Incentives

The Whats, Whens, and Hows on
Workplace Incentive Programs

Workplace Vaccination Incentive Programs

- Workplace COVID vaccination incentives are permissible under the ADA (The Americans with Disabilities Act) and GINA (The Genetic Information Nondiscrimination Act)
- Risks
 - Not offering persons who have valid legal reason for accommodation the same incentive.
 - EEOC published guidance indicating a permissible de-Minimis incentive but then retracted it.
 - Raffles (Check state laws prohibiting games of chance/gambling)

Reviewing Requests for Accommodation

- ADA
 - Does the employee have a disability?
 - May need to consider using ADA questionnaire to seek additional information.
 - If the employee does have a disability that precludes taking the vaccine, does the employee pose a direct threat? (Only qualifies as a direct threat if risk cannot be reduced to acceptable levels)
- Religious Accommodation
 - How do you know if an employee has a sincerely held religious belief;
 - Undue Hardship standard for Religious is employer friendly;
 - Anything that imposes more than a minimal burden on the operation of the business.
 - Be on the look out for accommodation request letters that were purchased online by employees.
 - You still cannot automatically deny the request, but you do have options.

Pregnancy Accommodation

- You may also have to offer accommodations to pregnant employees;
 - Do not substitute your judgment for that of a health care provider;
 - Engage in the interactive process to determine what accommodation might be reasonable.

Examples of Possible Accommodations

- Protective gowns, masks, gloves, or other gear beyond what the employer may generally provide to its employees
- Physical barriers
- Temporary modification of work schedules to decrease contact between employees
- Reassignment
- Unpaid Leave

Regular Testing As Alternative

- Who pays for the regular testing?
- Is time going to get tested worktime or personal time?
 - The FLSA is a concern, but there are ways to place some of the burden on employees while also minimizing the risk to the employer, but these strategies must be developed and tailored to specific circumstances.



Vaccination Incentives in Employee Benefit Plans

Employee Benefit Plans - Considerations

- ERISA – requires program to be in writing and provide notice to participants
- HIPAA – applies to information obtained from a health care provider or health plan
- Patient Protection Affordable Care Act – limits amount of incentives and impact on affordability
- GINA - prohibits discrimination in insurance and employment on the basis of genetic information, such as asking about current or past health status of the employee or a family member.
- Required Coverage - Vaccines, vaccines administrative fee, and testing must be covered by a health plan without cost sharing.

Employee Benefit Plans

- Wellness programs
- Onsite Clinics
- Employee Assistance Programs

Wellness Programs

- Certain ERISA-covered health programs are subject to HIPAA's nondiscrimination rules.
- If a program is subject to those nondiscrimination rules, and an employer wants to incentivize wellness activities (such as vaccinations), then the program must comply with HIPAA's wellness program rules.
- An incentive offered by an employer to employees who take the COVID-19 vaccine is governed by the HIPAA wellness program rules and is considered a health-contingent program.

Wellness Programs

- Health-contingent programs under HIPAA must comply:
 - (1) HIPAA's limits on incentives (30% of the total cost of medical plan coverage), and
 - (2) employees who cannot receive the vaccine due to adverse health status factors must be provided a reasonable alternative method for earning the incentive.
- An employer will have wide latitude in determining the alternative method, such as a
 - a doctor's note informing the employer that the employee cannot receive the vaccine, or
 - an additional activity that the employee must complete (such as completing education or a rapid test periodically).
- If the employee completes the reasonable alternative standard, the employee must be able to earn the same incentive as an employee who was vaccinated.
- Cost of vaccines and testing should be paid for by the employer or the health plan.

Other Benefit Programs

- **Employee Assistance Program (EAP)** – Employee assistance programs can provide the testing, vaccines, and COVID-19 testing and diagnosis, if it does not charge cost-sharing and other excepted benefits requirements.
- **Onsite Medical Clinic** – Employers can provide COVID-19 vaccines, testing and even treatment through an on-site medical clinic to all employees – regardless of health plan enrollment – without the clinic have to meet all the ERISA and ACA rules for plans.

Workplace Vaccination Policies and Unionized Employers

The NLRA

- Under the NLRA, unionized employers and unions must bargain over all matters affecting “wages, hours, and other terms and conditions of employment”
- Subjects not implicating “wages, hours, and other terms and conditions of employment” are **permissive** rather than **mandatory** subjects of bargaining

Where Do Workplace Vaccination Policies Fall Under?

- The implementation of a mandatory employee vaccination policy would likely require notice and bargaining

Contract Coverage

- Implementing a mandatory vaccination program must start by reviewing its collective bargaining agreement:
- **Q1:** Did the employer reserve management rights as to the implementation of health and safety rules in the workplace?
- **Q2:** Does the CBA contain a provision on vaccinations?

Bargaining Over the Effects of a Vaccination Program

- Additional bargaining may still be required after unilateral implementation over the effects

NLRB Guidance on Duty to Bargain in Emergency Situations

- NLRB Memorandum GC-20-04 indicates that COVID-19 presents “an unprecedented situation” but does not address the duty to bargain over COVID-19-related situations

Expectations for Unionized Employers

- Unilateral implementation of a vaccine policy may not be possible for unionized employers
- Even if unilateral implementation is possible, unionized employers should communicate with the union regarding their intent to implement such a policy
- Unionized employers should consult with their labor counsel in the event they want to implement a mandatory vaccination program

THANK YOU!
Questions?



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