



COVID-19 Vaccines and the Workplace: Expectations and Next Steps

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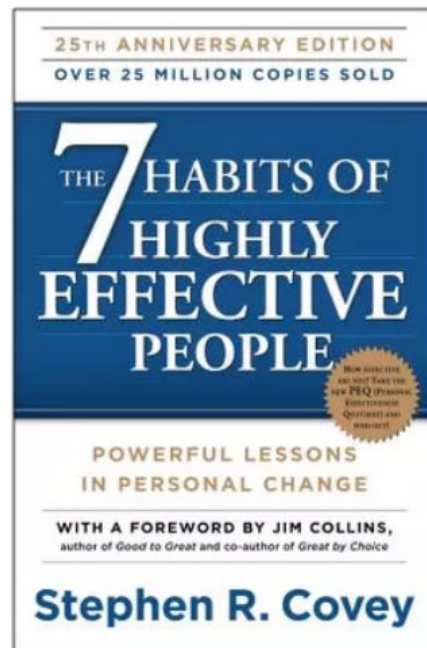
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Agenda

- The Big Picture
- To mandate or not mandate? That is the Question.
- Employee Refusals
- Other Employment Law Considerations
- Other Practical Considerations

The Big Picture

- Maintain “P/PC Balance”



To Mandate Or Not Mandate? That Is The Question.

- Yes, an employer can mandate its employees be vaccinated but . . . the legal realities are not that simple.
- FDA's approval – Emergency Use Authorization
- Ethical Considerations
- ADA Considerations

ADA Considerations

- A vaccination itself is NOT a medical examination under the ADA.
- But the prescreening questions for this vaccine most likely are because they are likely to elicit information about a disability
- If an employer administers vaccines to its employees, those pre-screening questions must be “**job related and consistent with business necessity.**”

ADA Considerations

- If an **employer requires** its employees to receive a vaccine it administers (or that a contractor administers on its behalf), the **pre-screening questions must be “job-related and consistent with business necessity.”**
- As such, **if an employee refuses** to answer the pre-screening questions (and, therefore, does not get the vaccine), **an employer cannot take an adverse employment action against the employee unless** it can demonstrate that the employee now poses a **direct threat** to him or herself or others.


ADA Considerations

- If an employer offers the vaccine to its employees on a **voluntary** basis, the decision to answer the **pre-screening questions also must be voluntary**.
- In this scenario, if any employee **refuses to answer** the pre-screening questions, the employer **may not retaliate against, intimidate, or threaten that employee for that refusal**.

ADA Considerations

- If an employee receives an employer-required vaccine from a third party, not contracted with the employer, the “job-related and consistent with business necessity” restrictions do not apply.
- While an employer can require documentation that the employee has received the vaccine, if other information is contained on the vaccination record, that information should be redacted before the employee provides the proof to the employer. All information about an employee’s vaccination status must be kept confidential.

Covid Vaccination Record Card

COVID-19 Vaccination Record Card 

Please keep this record card, which shows the vaccines you have received. For travel, you may also require this to receive a vaccine for another country.

Last Name: _____ First Name: _____ Middle Name: _____ Sex: _____ Age: _____ Date of Birth: _____

Vaccine	Product Name/Manufacturer	Date	Health-care Professional or Clinic Site
1 st Dose COVID-19	Pfizer ELI-LILLY	1/30/21	Eastfield
2 nd Dose COVID-19			
Other			
Other			

ADA Considerations

- An employer asking for proof of vaccination is not a medical examination.
- However, if the employer learns the employee did not receive the vaccine, further inquiries by the employer as to “why” may be a disability-related inquiry subject to the ADA’s “job-related and consistent with business necessity” standard.

EMPLOYEE REFUSALS



Disability Accommodations

- An employee may refuse the vaccine due to a disability.
- Employer needs to engage in interactive process.
- Isn't an unvaccinated employee a "direct threat"?
 - What if they've already had the virus?
- Can we make an accommodation?
 - Would the accommodation present an undue hardship?
 - Remember, we've been masking, socially distancing, hand washing for months now

Religious Accommodations

Covid: Vatican says coronavirus vaccines 'morally acceptable'

🕒 22 December 2020

🔗 Coronavirus pandemic



Religious Accommodations

- If an employee refuses to receive a vaccine because of a **sincerely held religious belief**, the employer must provide a **reasonable accommodation** unless it would pose an **undue hardship** under Title VII.
- Under Title VII, an “undue hardship” is **having more than a de minimis cost or burden** on the employer.
- An employer should assume the employee’s request for a religious accommodation is based on a sincerely held religious belief unless the employer has an objective basis for questioning either the religious nature of the belief or the sincerity of the employee. In that case, the employer would be justified in requesting supporting information.

Religious Accommodations

- **BUT REMEMBER** - the definition of religion under Title VII is extremely broad and is not limited to just organized religions.



Handling Vaccine Accommodations

- Managers should be trained NOW on how to recognize and how to deal with requests for vaccine accommodations (**call HR!**)
 - Confidentiality is Important
 - No Retaliation

Other Employment Law Considerations

- OSHA
 - Whistleblower Protection
 - “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)”

Other Employment Law Considerations

- Unemployment Issues
- Liability for Adverse Reactions to Vaccine
- GINA
- Benefits
- Unionized? Partner with your Union.
- Data Privacy/Security – including State Law
- Disparate Impact?

Other Employment Law Considerations

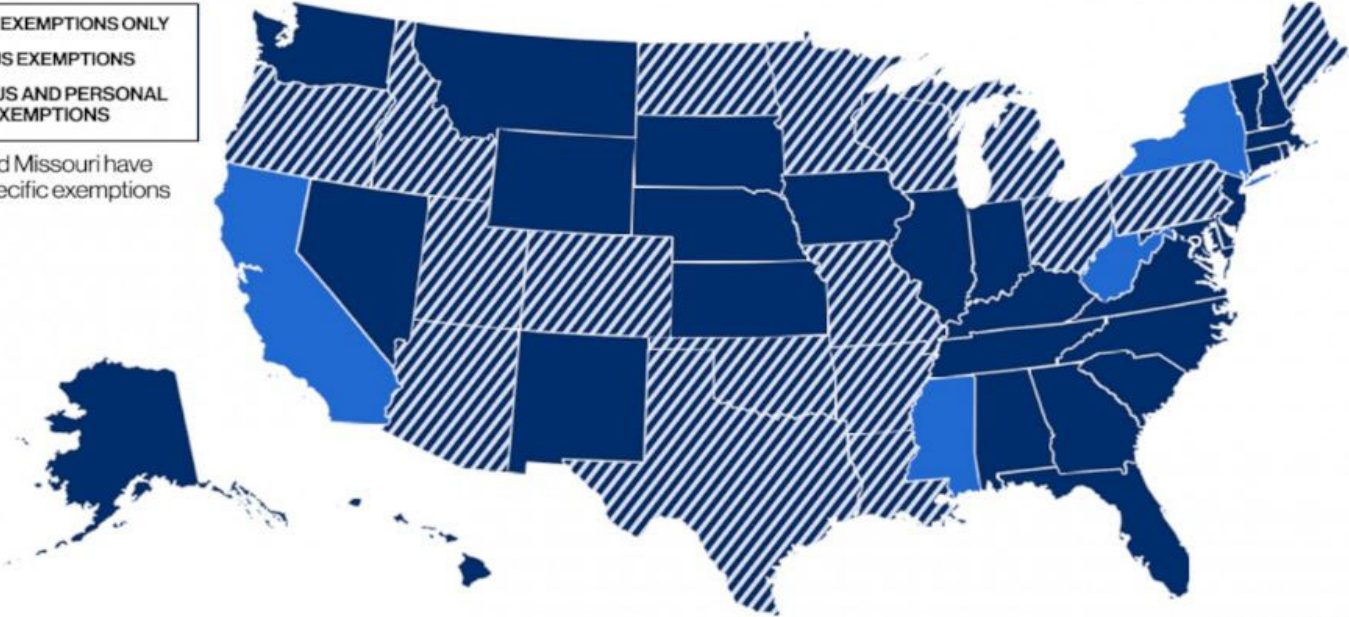
What about State Law?

VACCINATION EXEMPTIONS BY STATE

ALL 50 STATES ALLOW FOR MEDICAL EXEMPTIONS FROM VACCINES. ALL BUT THREE STATES HAVE OTHER EXEMPTIONS.

- MEDICAL EXEMPTIONS ONLY
- RELIGIOUS EXEMPTIONS
- RELIGIOUS AND PERSONAL BELIEF EXEMPTIONS

*Virginia and Missouri have certain specific exemptions



SOURCE: NATIONAL COLLEGE OF STATE LEGISLATURES, ABC NEWS, AS OF JUNE 14, 2019.



Is Vaccination Time Compensable?

- No, except...
 - 29 CFR 785.43




Should Employers Mandate Vaccination?

- Consider impact on employee morale
- Consider alternative motivation
 - Education
 - Access
 - Time off
 - What about financial incentives?



CDC HAS PUT OUT TOOLKITS



I GOT MY COVID-19 VACCINE!

You Are Essential.

Getting a COVID-19 vaccine adds one more layer of protection.

www.cdc.gov

Post-Vaccination Issues

- Time off for adverse reactions to vaccine.
- OK, my whole team is vaccinated, we can all go back to work and party like it's February 2020 again, right?

Thank you!



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Questions?