

SHEEHAN PHINNEY

**Can Employers Mandate the
COVID-19 Vaccine?**

with

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Agenda

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- > Path out of the Pandemic
 - > Covered employers
 - > Guidance for federal contractors
 - > ETS for large employers [not issued as of 10/22]
 - > Exemptions/Opt-Outs
 - > Testing
 - > Recordkeeping
- > Legal Issues
 - > Reasonable accommodations
- > Q&A

Introduction

- > With Delta, Delta Plus and other variants, COVID-19 infections, hospitalizations and deaths have been on the rise since late summer
- > While vaccinations among adults increased in recent months, we are still well short of national goals
- > Not wanting to return to the shut downs of last year, on September 9th President Biden announced his Path out of the Pandemic Executive Order

- > Vaccinating the unvaccinated
- > Further protecting the vaccinated
- > Keeping schools safely open
- > Increasing testing and requiring masking
- > Improving care for those with COVID-19

Full vaccination for:

- > Federal employees
- > Federal contractors
- > Health care facilities
- > Large employers
- > **Test-out options** (not federal employees or contractors)
- > **Religious and medical exemptions**

Federal Employees:

- > Fully vaccinated
- > By November 22nd
- > No testing opt outs
 - Meaning, once the deadline passes no opt out by wearing masks, social distancing or being tested weekly for the virus.

Federal contractors:

- > Fully vaccinated (with exemptions) by December 8th
- > September 24/September 30 guidance
- > Covered period for contracts over \$250,000
- > Required contract clause

Federal contractors (continued):

- > All contracts awarded on or after Nov. 14, 2021 must have the clause incorporated into the contract.
- > Any contract solicitations between Oct. 15, 2021 and Nov. 14, 2021 must include the clause.
- > Any contract awarded between Oct. 15, 2021 and Nov. 14, 2021 whose solicitation was issued prior to Oct. 15 is not required to include the clause, but agencies are encouraged to do so.

Federal contractors (continued):

- > Any contract pre-dating Oct. 15, 2021 will need to incorporate the clause if and when an option is exercised or an extension is made.
- > Should a federal agency have an urgent, mission-critical need for a contractor to have employees begin work on a covered contract or at a covered workplace before becoming fully vaccinated, the agency head may approve an exception for employees to be vaccinated within 60 days of beginning work.

Federal contractors (continued):

- > Require posting/communication
- > Full-time/part-time employees
- > Even remote workers
- > Proof of vaccination
- > Vaccine and testing record retention
- > No opt outs!

Path out of the Pandemic

Covered Healthcare Facilities:

- > Fully vaccinated (with exemptions)
- > Covers over 17 million healthcare workers
- > Hospitals, nursing homes, clinics, home healthcare agencies, etc.
- > Includes clinical and staff not directly involved in patient/client care
- > Medicare and Medicaid funding in jeopardy for noncompliance;
- > CMS rules to come

Large employers:

- > Fully vaccinated (with exemptions)
- > 100 or more employees*
- > Opt-out weekly testing
- > Proof of vaccination
- > Vaccine and testing record retention

*Waiting for ETS to determine how 100 employees are counted.

OSHA Emergency Technical Standards may answer:

- > How do you count employees?
- > How do you track vaccination and testing?
- > Who pays for testing and paid leave?
- > Do 100% remote employees need to be vaccinated or tested?
- > And more...

Legal Challenges to Path out the Pandemic

- > Numerous lawsuits brought or threatened already
- > Issues:
 - > Arizona: equal protection
 - > How to comply in states that ban mandates?
 - > Is an ETS appropriate (alleviating a “grave danger” in the workplace as opposed to addressing a public health crisis?)
 - > Imposing more paid leave on employers?

Legal Issues Related to Possible Vaccine Mandate by Employers

- > In EEOC's guidance on vaccinations it is clear that if the employee's refusal to get the vaccine is based on medical or religious reasons, **reasonable accommodations** should be considered.
- > EEOC also said that while employers could ask employees if they are vaccinated (and could ask to see proof), employers need to be careful not to elicit information about the employee's impairments or current health status if not relevant to an accommodation discussion.

Legal Issues Related to Possible Vaccine Mandate by Employers (continued)

- > EEOC's guidance has stated that employees who refuse the vaccine may be relieved from duty, transferred, or required to work remotely but employers cannot retaliate against employee for refusing vaccine.
- > In union environments, mandating vaccination would be the subject of collective bargaining.
- > Vaccination records and related inquiries and accommodations should be treated as confidential records.

Wait, so can we terminate an unvaccinated employee?

Legal Issues Related to Vaccination

EEOC says vaccinations are not “medical examinations” under the Americans with Disabilities Act (“the ADA”) but the vaccination must still be:

- > Job-related
- > Consistent with “business necessity” or justified by a “direct threat”
- > No broader or more intrusive than necessary

Reasonable Accommodations Should be Considered

When applicable (e.g. employee refuses the vaccine), employers must consider reasonable accommodation requirements under Title VII of the Civil Rights Act (religious accommodation) or under the ADA (medical or disability accommodation).

Religious Exemption

Title VII obligation to reasonably accommodate an employee's sincerely held religious belief:

- > Sincerely held *religious* belief is necessary
- > Sincerely held *non-religious* opposition to vaccine is insufficient
- > Employee must tell employer that sincerely held religious belief conflicts with job requirement (i.e. the vaccine requirement)
- > How much information can be requested?

Religious Exemption

Employer is obligated under Title VII to reasonably accommodate an employee's sincerely held religious belief unless doing so would result in undue hardship to the employer.

- > Undue hardship for religious accommodation purposes is more than a minimal burden on the operation of the business
- > Easier standard for the employer to meet than under the ADA

Disability/Medical Exemption

- > Employee requests reasonable accommodation to avoid vaccine based on “disability”
- > Disability: recognized physical or mental impairment
- > Employer’s duty to engage in interactive process with employee about possible reasonable accommodations
- > Not a reasonable accommodation if “undue hardship” or no vaccination represents direct threat to unvaccinated in workplace

So what does it mean if the unvaccinated employee represents a “Direct Threat”?

- > EEOC “Direct Threat” Analysis:
 - > Conduct an “individualized assessment” of four factors in determining whether a direct threat exists: (1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) and the imminence of the potential harm.

- > EEOC “Direct Threat” Analysis:
 - If employer determines that an unvaccinated worker poses a direct threat, the EEOC says that employer cannot then exclude that employee from the workplace unless “there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce this risk so that the unvaccinated employee does not pose a direct threat”.

Other Issues to Consider

- > Consider CDC and OSHA guidelines as well as infection control policies and guidelines when making decision as to whether reasonable accommodation is possible based on circumstances of person's job.

If direct threat cannot be reduced to acceptable level, employer can prevent employee from entering workplace and, may, be able to terminate employee.

Other Workplace Considerations

***Union Issues* – Is the employer obligated to negotiate about the Policy itself or the impact of the Policy? Concepts to consider:**

- > Obligation to bargain about terms and conditions of employment
- > Management rights clause in existing CBA
- > Union relations

Other Workplace Considerations

- > HIPAA: Generally not applicable to employers; COVID-19 vaccine does not change the analysis.
 - However, employers should not look at their group health insurance claims to determine if employees are vaccinated. (That could violate HIPAA privacy rule.)
- > GINA: Title II not implicated when employer administers vaccine or requires employees to prove they have received it because it does not (a) involve use of genetic information to make employment decisions; or (b) involve the acquisition or disclosure of genetic information as that term is defined by statute.

Other Workplace Considerations: Incentives

So if not mandated can employers provide incentives for employees to get the vaccine?

The short answer is **yes**, but there may be challenges from those who received a religious or medical exemption.

Best Practices

- > Stay up-to-date with CDC, OSHA, State Health Department guidance and Executive Orders / Safer Federal Workforce Task Force
- > Create or update COVID-19 policy for your workplace to include vaccination and/or testing requirements, if applicable
- > Continue to follow recommended workplace safety policies
- > If vaccination required or encouraged be careful to avoid improper and irrelevant inquiries
- > Engage employees seeking an exemption in interactive accommodation process
- > Maintain confidential medical records
- > Be as flexible as possible
- > Be prepared to act if safety/vaccination policy violated

Stay tuned.

**We have made progress but
COVID isn't over yet!**

Questions?



THANK YOU.

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