



Fox Rothschild LLP  
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# COVID-19 VACCINATIONS: EMPLOYER DO'S AND DON'TS

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# Vaccine Mandates

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Are they Legal?

YES

But . . .



# Employer Vaccine Mandates: Considerations

- EEOC Guidance
- OSHA Guidance



- Compliance with Federal, State, and Local Laws
- ADA
- Title VII
- GINA



# Keep Careful Watch on State & Local Laws

## \*Status Changes Daily\*

### Legislation Prohibiting/Limiting Mandatory Vaccination Policies

- Arkansas (state agencies)
- Montana
- New Hampshire (must prove direct threat)
- Tennessee (governmental entities, including schools)
- Utah (governmental entities, except public health or medical settings)

### Pending Legislation to Prohibit Mandatory Vaccination Policies

Alaska, Arizona, Delaware, Georgia, Hawaii, Idaho, Illinois, Iowa, Kansas, Maine, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Vermont, Washington, Wisconsin



# Keep Careful Watch on State & Local Laws

## \*Status Changes Daily\*

### Examples of Executive Orders, Laws and/or Regulations Requiring Mandatory Vaccination of Certain Employees of Private Employers, Including Health Care Workers

- California (by 8/23/21)
- New Jersey (by 9/7/21)
- New York (by 9/27/21)
- Philadelphia (by 10/15/21)
- Washington (by 10/18/21)



# What Has History Taught Us?

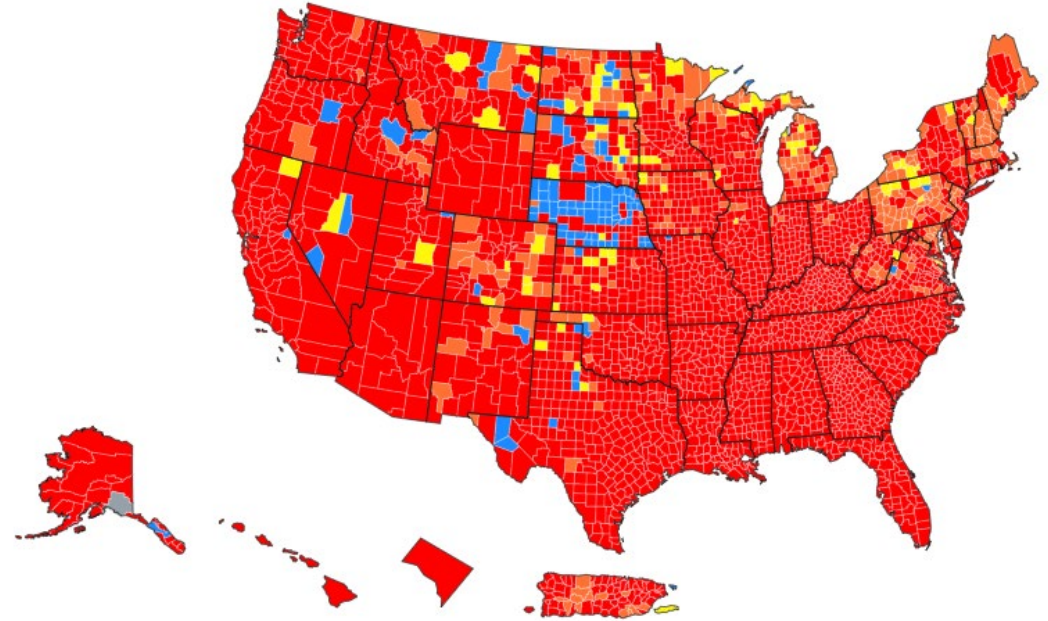
- Pandemic Preparedness in the Workplace and the ADA: 2009
- Guidance from H1N1 Pandemic
- EEOC –Employers could not compel employees to take flu vaccine unless they allowed for medical and religious accommodations.
- OSHA –Employers could mandate the vaccination.
  - Exception: whistleblower type provision for employee who refused due to reasonable belief she had a medical condition creating real danger of serious illness or death.



# Updated CDC Recommendations

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- July 27, 2021: CDC updated its COVID recommendations due to the prevalence of the Delta variant
- Added recommendation that fully vaccinated people wear a mask in public indoor settings in areas of substantial or high transmission
- This is most of the USA, as of August 13, 2021



# EEOC Covid-19 Guidance: May 28, 2021

- EEOC *guidance* addresses vaccine mandates in compliance with:
  - ADA's reasonable accommodation provisions
  - ADA's prohibition on certain medical inquiries
  - Title VII religious accommodation provisions
  - GINA (Genetic Information Nondiscrimination Act)



# EEOC Guidance: Vaccine Mandates Okay, But . . .

- Federal Laws do not prevent employers from requiring all employees physically entering the workplace to be vaccinated for COVID-19.
- But Employers must comply with the reasonable accommodation provisions of the ADA and Title VII of the Civil Rights Act of 1964 and other EEO considerations.
- State and local laws may place additional restrictions on employers.



# EEOC Guidance: ADA and Title VII Considerations

- ADA – Disability
  - Must show unvaccinated employee would pose a direct threat to others in the workplace that cannot be addressed by reasonable accommodation
  - If no accommodation, may exclude the employee from physically entering the workplace, but be careful to not automatically terminate the worker
  - Individualized, interactive process is mandated
- Title VII – Religion
  - Protects employees with sincerely held religious beliefs from being forced to undergo vaccination if it legitimately offends religious beliefs
  - Provide reasonable accommodations unless it would pose an undue hardship



# The Interactive Process – Best Practices

- Keep a reasonable accommodation log and monitor it regularly to ensure consistency
- Contemporaneously document all options suggested, given, requested, and the outcomes
- Don't terminate unless the interactive process has been documented and vetted
- Plan ahead! Be ready for the impending onslaught of notes/requests



# EEOC Guidance: Employers May Offer Incentives

- Federal EEOC does not prohibit employers from offering incentives to employees to voluntarily provide documentation or other confirmation of vaccination obtained from a third party (not the employer) in the community, such as a pharmacy, personal health care provider, or public clinic.
- If employers choose to obtain vaccination information from their employees, employers must keep vaccination information confidential pursuant to the ADA.



# EEOC Guidance: Incentivize, Don't Coerce

- Employers that are administering vaccines to their employees may offer incentives for employees to be vaccinated, so long as the incentives are not coercive.
- Because vaccinations require employees to answer pre-vaccination disability-related screening questions, a very large incentive could make employees feel pressured to disclose protected medical information.



# EEOC Guidance: Educate Employees

- Employers may provide employees and their family members with information to educate them about COVID-19 vaccines and raise awareness about the benefits of vaccination.
- Technical assistance highlighting federal government resources available to those seeking more information about how to get vaccinated.



# OSHA Guidance

- OSHA issued its interim final rule on June 10, 2021 outlining **requirements** for most employers in the health care setting and **guidance** for non-health care employers.
- OSHA updated its guidance on August 13, 2021 to reflect the CDC's July 27, 2021 mask and testing recommendations for fully vaccinated people.
- Unless required by federal, state, local, or other laws, rules or regulations, most employers no longer *are required* to take steps to protect their fully vaccinated workers who are not otherwise at-risk.



## OSHA Guidance, Continued

- Employers are ***encouraged*** to engage with their workforce to implement measures to protect unvaccinated or otherwise at-risk workers, including:
  - Granting paid time off for employees to get vaccinated.
  - Instructing all workers who are infected with or have symptoms of COVID-19 to stay at home.
  - Instructing unvaccinated workers who have had close contact with someone who tested positive for COVID to stay at home.
  - Implementing physical distancing for unvaccinated and otherwise at-risk workers in communal work areas.
  - Providing, at no cost, face coverings for unvaccinated and otherwise at-risk workers.
  - Educating and training workers on company COVID-19 policies in accessible formats and languages.



# OSHA Guidance, Continued

- Employers are ***encouraged*** to engage with their workforce to implement measures to protect unvaccinated or otherwise at-risk workers, including:
  - Suggesting unvaccinated customers, visitors, and guests wear face coverings.
  - Maintaining appropriate ventilation.
  - Performing routine cleaning and disinfection.
  - Recording and reporting work-related cases of COVID-19 under 29 CFR 1904.
  - Implementing protection from retaliation for workers who raise concerns about COVID-19-related hazards.
  - Following any other applicable mandatory OSHA standards.



# OSHA Guidance, Continued

- OSHA further recommends the following in “high risk” environments—i.e., those where there is close or prolonged contact among employees:
  - Staggering break times in high-population workplaces.
  - Staggering arrival/departure times.
  - Providing visual cues to remind people to maintain physical distance.
  - Improving ventilation.
  - Properly spacing unvaccinated or otherwise at-risk workers who are in food processing or assembly lines.
  - Suggesting masks for unvaccinated or unknown-status customers and visitors.
  - Moving electronic payment terminal/credit card readers farther away from unvaccinated or otherwise at-risk workers.
  - Moving stocking activities of unvaccinated or otherwise at-risk workers to off-peak or after hours.



# OSHA Enforcement

- OSHA has cited owners of businesses for failing to protect workers from Covid-19
  - June 15<sup>th</sup>: announced it cited an owner of an urgent care for allegedly willfully exposing employees to Covid-19.
    - Owner failed to implement safeguards after he exhibited symptoms and tested positive. Proposed fine is \$136,532.
  - August 4<sup>th</sup>: announced it cited medical facility and temporary staffing agency for failing to provide medical evaluations and fit tests for respirator use for nurses performing Covid-19 testing.
    - Proposed fine is \$273,064.



# Vaccine Administration

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## Considerations for Implementing Mandatory Vaccines:

- Administration
  - Pfizer: 2 dose vaccination (21 days)
  - Moderna: 2 dose vaccination (28 days)
- Recovery
  - CDC recommends 1-2 day recovery
  - PTO
- Business Disruption?
- Phased Implementation to offset disruption: prioritize employees with public contact
- Boosters: to be recommended within 8 months of last injection



# PTO for Vaccine Administration & Recovery

- Federal: American Rescue Plan Act of 2021 (ARPA)
  - Federal tax credits (private employers with less than 500 employees).
  - Employers voluntarily decide to provide paid sick leave or family leave for vaccine administration and recovery
- Many states and cities have enacted laws or have pending legislation to fill the gaps
- Review state and local paid sick leave requirements to determine whether and how they may apply to COVID-19, and be on the lookout for any legislative developments



# Union Employee Considerations

- Vaccine policy implementation: mandatory bargaining.
- Contractual obligations under the CBA.
  - Careful consideration of necessary language in CBA to implement.
  - If necessary language is not present, union agreement required.
- General obligation to bargain over effects of decision to implement vaccine policy/mandate.
- Provide sufficient notice to union before implementation of vaccine program.



# COVID Vaccine: Practical Considerations

- If mandating:
  - Policy with process for requesting reasonable accommodation
  - Keep vaccination records separate from general personnel files and maintain confidentiality
  - Implement consistently: Don't create disparate treatment claims



# Does HIPAA Prohibit Employers From Obtaining Proof of Vaccination?

- No.
- In general, HIPAA rules do not apply to employers or employment records.



# You Can Require Vaccines, But Should You?

## Alternatives to Mandate

- Modest Employer Incentives
  - Gift cards, cash payments, eligible for free state park passes, PTO
  - Incentives may be taxable
- Educate workforce to encourage voluntary vaccinations
- Require regular Covid-19 testing



# You Can Require Vaccines, But Should You?

## Other Considerations

- Impacts on employee morale and retention?
- Vaccines are not a substitute for creating a safe work environment
- What to do if employees refuse without citing ADA or Title VII?
  - Terminate? Suspend until vaccination proven? Other?
  - Make responsive disciplinary action clear in policies/communications to workforce and apply consistently
- Disparate Treatment Exposure



# Employees Who Refuse To Be Vaccinated

- Common reasons:
  - Fear
  - Misinformation
  - Religious reasons
  - Medical reasons



# Options To Manage Vaccine Refusal

## Reasonable Accommodations

- Working remotely or telecommuting
- Personal Protective Equipment (employer provided)
- Mandate social distance protocols
- Separate unvaccinated employees from those vaccinated
- Increased workplace sanitation



# Options To Manage Vaccine Refusal

- Daily negative Covid-19 test to work in person
- Exclude employee from work: EEOC direct threat analysis:
  - Duration of risk
  - Nature and severity of the potential harm
  - Likelihood that potential harm will occur
  - Imminence of the potential harm



**Questions?**



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