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FAST BREAK: **RETURNING TO WORK**

Daniel Kadish
Jake Harper
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TODAY'S PRESENTER



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Returning to Work

Topics to be discussed today include



Latest guidance on vaccine mandates



Best practices on vaccine return-to-work issues, masks, and PPE



Incentive options



Liability issues/risk mitigation recommendations

No Federal Mandates . . . Yet

- Currently:
 - No federal requirement for employers to provide or offer to provide the vaccine.
 - No federal prohibition on employers mandating or recommending the vaccine.
- Caveats:
 - OSHA's General Duty Clause concerns
 - Updated guidance: employers should make vaccines available to employees
 - Multiple pending state law bills seeking to prohibit mandatory vaccination, including in health care settings

EEOC – An Employer May Mandate COVID-19 Vaccines

- Provided that reasonable accommodations (absent undue hardship) are provided under the ADA (for disabilities) and Title VII (for sincerely held religious beliefs).
 - Qualifying disabilities likely narrow.
 - May ask for proof of sincerely held religious beliefs, in some circumstances.
- Caveats:
 - Likely a mandatory subject of bargaining for unions (if permitted at all by a CBA).
 - EEOC position may not be accepted by the courts, but a growing number of states have issued guidance adopting it.
 - State laws may provide additional exceptions or broader accommodation requirements (e.g., political objectors).

Supporting a Vaccine Mandate under the ADA

- EEOC: Vaccine requirement is a permissible safety-based qualification standard under the ADA, if an unvaccinated employee poses **a direct threat** to the health and safety of others in the workplace.
 - Direct Threat: “a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.”
 - Must conduct individualized assessment and rely on current medical judgment.
 - “Direct Threat” is unlikely to exist for remote workers.
 - EEOC: An employer’s “conclusion that there is a direct threat would include a determination that an unvaccinated individual will expose others to the virus in the worksite.”
 - Assessment should be ongoing and evolve, as risk factors may change over time.
 - Assessment may change as additional data regarding whether vaccinations prevent transmission becomes available.

Mandating Vaccines – Practical Considerations

Supply & Data

- Vaccine supply is catching up to demand, and eligibility categories are broadening.
 - Nearly all individuals 16 or older are now eligible.
- Before mandating vaccines, consider waiting until there is more data regarding the effectiveness of vaccines in stopping transmission of the virus that causes COVID-19 (including variants).
- Consider waiting until there is full licensing approval from the FDA, not just an EUA.

Implementation Considerations

- If vaccines are mandated, need to provide consistent accommodations to those who cannot be vaccinated due to disability or sincerely held religious beliefs.
- If vaccines are mandated, employer may need to provide pay for time spent by employee getting vaccinated.
 - Multiple states have issued guidance on this point.
- Potential requirement to reimburse for out-of-pocket costs incurred by employee.

Mandating Vaccines – Practical Considerations

Consider the impact on employee morale

- Safety concerns (particularly with respect to vaccines approved under an EUA).
- Ideological or political objections.
- Potential for increased union-organizing efforts.
- May be possible to reach similar workforce vaccination stats by encouraging/incentivizing vaccines

Potential turnover and staffing shortages

- Must be prepared and willing to terminate (otherwise high-performing) employees who refuse vaccination.
- May impact recruiting of new employees (both positively and negatively)
- Some employees may feel so strongly in their convictions that they choose to quit.

Mandating Vaccines for Remote Workers?



EEOC has not issued guidance.

May be risky to require fully remote employees to receive a COVID-19 vaccine, as such employees would not pose a direct threat to anyone in the workplace.

Analysis may change to the extent remote employees occasionally visit the workplace or physically interact with co-workers, clients, or others in connection with their job duties.

“Direct threat” analysis will evolve as data regarding vaccines and transmission becomes available.

Accommodating Unvaccinated Employees

- Accommodations may be needed if employer mandates vaccines or provides opportunities only for vaccinated employees.
 - E.g., opening office for vaccinated employees only or requiring attendees at events to be vaccinated
- Accommodations may include remote connectivity, providing additional protective gear, isolating employee's workstation, modifying nonessential job duties, or providing temporary reassignment.
- EEOC: It is lawful to exclude an employee who cannot get vaccinated because of a disability or sincerely held religious belief if there is no available reasonable accommodation.
 - ADA: Consider undue hardship and direct threat analysis.
 - Title VII: Consider undue hardship analysis (which may include safety risks).
- If no workplace accommodations are available, consider whether the employee may be able to perform the position remotely.
- If remote work is not possible, consider available leave options under federal, state, and local laws and the employer's policies.

Voluntary Vaccines – Incentives Generally

 ***How to increase the number of employees who get vaccinated if it's not mandatory?***

- Employers have broad discretion in encouraging employees to get vaccinated.
- Incentive efforts:
 - PTO time
 - Financial incentives
 - Gift cards/swag
 - Health and wellness campaign
 - Communication from senior leadership on why they chose to get vaccinated or why believe it is important

Can Employers Ask About Vaccine Status?



Can an employer ask about vaccine status?

- Yes.
 - Vaccinated individuals do not need to quarantine after exposure to COVID-19 under CDC guidance that is becoming widely adopted at the state level.
- But should not ask about individual's health status and/or reasons for not getting vaccinated.
- Treat vaccinated and unvaccinated employees the same with regard to opportunities, evaluations, promotions, etc.

Proof of Vaccination – Employees



Can an employer require its employees to show proof of vaccination?

- Yes.
- Whether a vaccine is mandatory, incentivized, or purely voluntary, employers can ask for proof of vaccination.
 - However, questions about why an employee was not vaccinated can only be asked where they are job-related and consistent with business necessity
- Vaccination documents should be treated as confidential records under the ADA.
- Employers with a mandatory vaccine requirement for new hires can refuse employment for those who have not received a vaccine.
 - But must provide accommodations to candidates for disability or religious needs.

Proof of Vaccination – Clients



Can an organization/hospital network require visitors to show proof of vaccination?

- Yes, organizations can generally prohibit unvaccinated visitors from entering their workspaces.
- Consider updating credential requirements for vendors seeking access to organization premises.
- Note ADA/Title III for people with disabilities who cannot get vaccinated.
- Consider how to respond if a partner organization requests that their contact at the organization be vaccinated.

Safety Measures after Vaccination

Can we get rid of mask standards/social distancing for vaccinated employees?

- Not so fast; state and local guidance still requires safety measures for in-person work
 - Best practice is for all employees to wear masks at all times unless they are working alone and not within 6 feet of any other individual, and to wear masks while walking through the office, in elevators, meetings, etc.
- OSHA and CDC have issued guidance stating that fully vaccinated individuals should continue to wear masks.
- Datasets are promising, but not definitive, regarding the risk of transmission for vaccinated workers.
- Potential liability if an employer relies only on vaccines to prevent the spread of COVID-19 and removes other workplace safety measures.

Vaccine Wage and Hour Concerns



Do employers need to pay for the cost of vaccines?

- Not currently. All vaccines available now are paid for by federal government, but this could change in the future as vaccines supplies/producers increase



Do employers need to pay employees for time spent getting vaccinated?

- Maybe. Multiple states have passed laws requiring employers to provide paid time off to employees to use when getting vaccinated.
- If getting vaccinated is mandatory or employees must report to a company location at a certain day/time, pay might be required.
- Whether employees are entitled to paid sick leave for COVID-19 vaccine side effects depends on an employer's leave policies and state and local laws.

Practical Guidance

- Clear communications to employees on vaccine requirements and expectations.
 - Consider union concerns (careful drafting to avoid encouraging organization efforts).
- Organization should avoid providing its own assessment of the efficacy or safety of COVID-19 vaccines in messages to employees; rely on official announcements from health authorities to minimize risk of employer liability in the event of injury.
- Provide training or dos/don'ts to managers:
 - What they can say (company encourages employees to get vaccinated).
 - What they cannot say ("Why didn't you get vaccinated?").
 - Reiterate importance of protecting confidentiality of those requesting an accommodation.
 - Avoid scheduling vaccinated employees for "better" shifts or directing clients only to work with vaccinated employees.

Join us next month!

Please join us for next month's webinar:

Fast Break-May-rathon:
Digital Health Update – What's New in 2021

Featuring

Michele Buenafe and Jake Harper

➤ Thursday, May 27, 2021 3:00 PM (EST)

Thanks and Be Well!



Daniel Kadish

New York

+1.212.309.6328

daniel.kadish@morganlewis.com

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Daniel represents and counsels employers facing employment disputes and has been a leader on Morgan Lewis' COVID-19 compliance and counseling team. He also litigates single plaintiff and complex employment matters, including class and collective actions, before US federal and state trial courts and administrative agencies. Daniel works with his clients to thoughtfully prevent and mitigate risk as well as defend wage and hour litigation, discrimination, harassment, retaliation, wrongful discharge, and breach of contract claims.

Thanks and Be Well!



Jake Harper

Washington, DC

+1.202.739.5260

jacob.harper@morganlewis.com

[Click Here for full bio](#)

Jake advises stakeholders across the healthcare industry, including hospitals, health systems, large physician group practices, practice management companies, hospices, chain pharmacies, manufacturers, and private equity clients, on an array of healthcare regulatory, transactional, and litigation matters. His practice focuses on compliance, fraud and abuse, and reimbursement matters, self-disclosures to and negotiations with OIG and CMS, internal investigations, provider mergers and acquisitions, and appeals before the PRRB, OMHA, and the Medicare Appeals Council.