

A COVID-19 SHOT IN THE ARM ... OF EMPLOYEES?

With the rollout of COVID-19 vaccines [hopefully] gaining momentum, employers need to consider a multitude of issues as they decide on the appropriate response, if any, which is in order. There are a number of legal areas which come into play, such as privacy law, commercial contract liability mitigation/allocation, employment law, and Health Insurance Portability and Accountability Act (HIPAA) obligations.

While our guidance continues to evolve based upon medical and legislative developments, this note provides suggestions to employers based upon what we know today. **The following is based only upon US law**; if/when other countries are relevant to you, please let us know and we will obtain relevant guidance.

We look forward to working with each of you to develop and modify a strategy best suited for your circumstances.

May I require employees to be vaccinated?

Yes, probably, subject to exceptions based on a disability (e.g. asthma) or religion, which we detailed for you in December 2020 ([Preparing for Exceptions To Your Business's COVID-19 Vaccine Program](#)). You should also expect some objections from those philosophically opposed, those who do not presently have access to the vaccine, and those who just don't want to be bothered. Courts have not yet ruled on the issue of COVID-19 vaccines, although they have **authorized mandatory testing** in other contexts. Therefore, though we do not know for sure, given the public policy considerations, safety, and the Equal Employment Opportunity Commission's (EEOC) position, we would expect most courts to allow such a requirement. If you impose such a requirement, you should anticipate legal challenges, which may include workers' compensation claims, if/when someone has (or claims) an adverse reaction. You should certainly wait until the vaccines become generally available before imposing such a requirement. There is no current legal requirement for employers to insist upon such vaccines.

If I have such a requirement, may I terminate someone who refuses without a medical or religion-based justification?

Presently, it appears that you may do so, but you should expect a legal challenge. There may also be new legislation or regulation to the contrary.

If I have such a requirement, may I terminate someone who refuses based on a medical or religion-based justification?

Maybe, according to the EEOC. The Americans with Disabilities Act (ADA) allows an employer to exclude a person from the workplace if the person poses a “direct threat” to the health and safety of others if the unvaccinated person cannot be accommodated. For example, an employer may be able to accommodate such an employee by having them work remotely. Similarly, and as discussed in detail in our [December 15 alert](#), once an employer is on notice that an employee’s sincerely held religious belief, practice, or observance prevents the employee from receiving the vaccination, the employer must provide a reasonable accommodation for the religious belief, practice, or observance unless it would pose an undue hardship under Title VII of the Civil Rights Act.

May I require it only for specific jobs where people are in close proximity?

Presently unclear, but probably not advisable. Doing so invites claims regarding prohibited discrimination – e.g., race, religion, gender, etc. If you do so, there must be a very clear rationale, implemented consistently, as to why the specified jobs involve higher risk of infection.

Must I provide the vaccinations on site?

No. If you do, please see below, for contractual considerations. You also need to check your state and local laws and ordinances as to who – nurse, medical assistant, etc. – may administer shots. You should also check with your insurance advisor.

May I encourage employees to get vaccinated, with extra time off, bonuses, swag, etc.?

Yes and several companies are already doing so, but if you do, *first*, you should make clear that they should consult with their own physicians regarding suitability for each of them and that the decision and related risk is theirs alone. Written consent and acknowledgment of risk per below example is necessary. You should not need to consider payment for the vaccine itself, as it is free to all Americans. *Second*, consider the quality of the swag so that you don’t inadvertently violate the ADA. The EEOC’s recently issued proposed regulations regarding wellness programs must be taken into account—<https://www.eeoc.gov/regulations/wellness-rulemaking>—as a COVID-19 vaccine program may very well be considered a wellness program due to questions about medical history. The proposed regulations state that employers generally may offer no more than “de minimis incentives,” like a (very) small gift card or water bottle, to encourage employees to take part in the wellness program.

Handbooks and other communications should be kept purely factual and avoid ‘editorial commentary’ regarding the safety and/or desirability of the vaccine.

Must I provide paid time off for off-site vaccination?

This will be covered by the laws of each state, but you should assume that this is in order. If the vaccine is required by the employer, such payment is also required.

What if I have a third party come to our facility to vaccinate those who want it? Am I in the clear?

No. The third party's actions will likely be deemed to be yours, if something goes wrong. Your contract with the third party must cover items such as the following:

- Obtaining express written consent and acknowledgement of risk;
- Avoidance of opinions as to the efficacy or safety of the vaccine;
- Use of qualified personnel and unadulterated supplies;
- Indemnification for employee or other third party claims associated with vaccine administration;
- Maintenance of appropriate liability insurance; and
- Proper handling and security of individuals' information in accordance with applicable privacy law and HIPAA.

What should I do with information indicating who was and wasn't vaccinated?

You should treat it the same way you treat other employee medical information. While the information is not, in many (and perhaps) most cases, covered under HIPAA regulations, it may be subject to other state and federal privacy and employment laws or regulations, including the American with Disabilities Act, and thus should be secured accordingly. It should not be disclosed to anyone – customers, other employees, insurance carriers, government health authorities or otherwise – without express, written employee consent. Contemplated disclosure should be incorporated into any request for consent to the vaccine itself and should be discussed with counsel when establishing a vaccine policy or program. Set forth below is some language used by the State of Florida for this and related purposes:

- On behalf of myself, my heirs and personal representatives, I hereby release and hold harmless the State of Florida, the Florida Department of Health (DOH), and their staff, agents, successors, divisions, affiliates, subsidiaries, officers, directors, contractors and employees from any and all liabilities or claims whether known or unknown arising out of, in connection with, or in any way related to the administration of the vaccine listed above.
- I acknowledge that: (a) I understand the purposes/benefits of Florida SHOTS, Florida's immunization registry and (b) DOH will include my personal immunization information in Florida SHOTS and my personal immunization information will be shared with the Centers for Disease Control (CDC) or other federal agencies.
- ...
- I acknowledge receipt of the Notice of Privacy Rights.

What if customers insist that I send them only vaccinated technicians and other personnel?

Unclear at this time and should not be an issue until vaccines are more widely available. That said, privacy considerations presently dictate not sending such people absent their express, written consent which would involve augmentation of above language. Otherwise, their presence may be deemed an implicit disclosure of their vaccine.

If you are considering actions discussed above, please discuss with your FisherBroyles lead to assist in formulating the appropriate steps for your organization.

For additional information, please contact any of the following: Radha Bachman at radha.bachman@fisherbroyles.com, Kimberly Booher at kimberly.booher@fisherbroyles.com, Amy Epstein Gluck amy.epsteingluck@fisherbroyles.com, Martin Robins at martin.robins@fisherbroyles.com with any questions or more specific situations.

About FisherBroyles, LLP

Founded in 2002, FisherBroyles, LLP is the first and world's largest distributed law firm partnership. The Next Generation Law Firm® has grown to hundreds of partners in 23 offices globally. The FisherBroyles' efficient and cost-effective Law Firm 2.0® model leverages talent and technology instead of unnecessary overhead that does not add value to our clients, all without sacrificing BigLaw quality. Visit our website at www.fisherbroyles.com to learn more about our firm's unique approach and how we can best meet your legal needs.

These materials have been prepared for informational purposes only, are not legal advice, and under rules applicable to the professional conduct of attorneys in various jurisdictions may be considered advertising materials. This information is not intended to create an attorney-client or similar relationship. Whether you need legal services and which lawyer you select are important decisions that should not be based on these materials alone.

© 2020 FisherBroyles LLP