



COVID Update: COVID-19 and Employer Issues

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Part I – COVID-19 Updates

What has Changed?

The Pandemic Continues

- As we approach a year and a half into the COVID-19 Pandemic, life has still not returned to normal.
- Case counts, deaths, and hospitalizations began rising rapidly for the first time since the vaccine became widely available.
- In July and now August 2021, many areas are experiencing surges in COVID-19 that have surpassed the previous records.

What has Changed?

The Pandemic Continues

- The new surge in cases has been attributed in part to the “Delta” variant of COVID-19, which is believed to be significantly more contagious than the original strain. The Delta variant is believed to be responsible for the majority of cases in the US.
- Public officials are renewing their push to get people vaccinated.
- In response to the latest surge, various jurisdictions (federal, state and local) have amended their restrictions to combat the latest wave.

What has Changed?

The Pandemic Continues

- The CDC and Department of Labor/EEOC have issued additional guidance and recommendations which are used as part of this presentation.
- States have also issued new restrictions, mandates and sometimes rolled back prior rules in order to help fight the spread.
- We will therefore use this webinar to cover some of the issues that employers face.

Part II – CDC Updates

Guidance for the Fully Vaccinated

Updated Guidance Issued

- On July 27th, the CDC officially updated its guidance on masking.
- The CDC had previously stated that if you are fully vaccinated, you could participate in many of the activities that you did before the pandemic.
- But due to the rise in COVID-19 cases, they changed their guidance, which had previously stated that vaccinated people did not need to wear masks indoors.

Guidance for the Fully Vaccinated

Updated Guidance Issued

- The CDC now states that to maximize protection from the Delta variant and prevent possibly spreading it to others, wear a mask indoors in public if you are in an area of substantial or high transmission.
- Importantly, the majority of the US population lives in areas that the CDC classifies as “Substantial Risk” or “High Risk,” including every County in Florida.

Guidance for the Fully Vaccinated

Updated Guidance Issued

- You should continue to wear a mask where required by laws, rules, regulations, or local guidance.
- Wearing a mask is important regardless of the level of transmission in your area, if you have a weakened immune system or if
 - because of your age or an underlying medical condition, you are at increased risk for severe disease; or
 - if someone in your household has a weakened immune system, is at increased risk for severe disease or is unvaccinated.

Quarantine or Isolation

What is the Difference?

- You **quarantine** when you might have been exposed to the virus.
- You **isolate** when you have been infected with the virus, even if you don't have symptoms.

Quarantine

When to Quarantine?

- Quarantine if you have been in close contact (within 6 feet of someone for a cumulative total of 15 minutes or more over a 24-hour period) with someone who has COVID-19, **unless you have been fully vaccinated.**
- What to do:
 - Stay home for 14 days after your last contact with a person who has COVID-19.
 - Watch for fever (100.4°F), cough, shortness of breath, or other symptoms of COVID-19.

Quarantine

When to Quarantine?

- What to do (*continued*):
 - If possible, stay away from people you live with, especially people who are at higher risk for getting very sick from COVID-19.
 - If you have symptoms, immediately self-isolate and contact your local public health authority or healthcare provider

Quarantine

When to Quarantine?

- People who are fully vaccinated do NOT need to quarantine after contact with someone who had COVID-19 unless they have symptoms.
- However, fully vaccinated people should get tested 3-5 days after their exposure, even though they do not have symptoms, and wear a mask indoors in public for 14 days following exposure or until their test result is negative

Isolation

When to Isolate?

- Isolation is used to separate people infected with COVID-19 from those who are not infected. People who are in isolation should stay home until it's safe for them to be around others.
- What to do:
 - Monitor symptoms. If you have an emergency warning sign (including trouble breathing), seek emergency medical care immediately.

Isolation

When to Isolate?

- What to do (*continued*):
 - Stay in a separate room from other household members and use a separate bathroom, if possible.
 - Avoid contact with other members of the household and pets.
 - Don't share personal household items, like cups, towels, and utensils.
 - Wear a mask when around other people if able.

Post-Vaccination Signs & Symptoms in Employees

How to Assess?

- Some typical post-vaccination signs and symptoms could be from COVID-19 vaccination, infection with the virus that causes COVID-19, or another infection (e.g., Influenza).
- Examples could be ANY general symptoms (e.g. fever - 100°F/ 37.8°C or higher - fatigue, headache, chills, and body aches.)

Post-Vaccination Signs & Symptoms in Employees

Suggested Approach

- Employees with typical post-vaccination symptoms who meet the following criteria may be considered for return to work without testing for COVID-19:
 - Feel well enough and are willing to work, and
 - Do NOT have fever, and
 - Do NOT have other signs and symptoms of COVID-19 (incl. cough, shortness of breath, sore throat, or change in smell/taste.)
- If symptoms do not improve in 2 days, employees should be excluded from work and COVID-19 testing should be considered.

Post-Vaccination Signs & Symptoms in Employees

Suggested Approach

- Signs and Symptoms Not Typical after COVID-19 Vaccination:
 - ANY signs consistent with COVID-19
 - cough
 - shortness of breath
 - runny nose
 - sore throat
 - loss of taste or smell

Post-Vaccination Signs & Symptoms in Employees

Suggested Approach

- For Employees with not typical post-vaccination symptoms:
 - Exclude from work pending evaluation by a healthcare provider for potential causes. Criteria for return-to-work depend on the suspected or confirmed diagnosis.
 - Employees with confirmed or suspected COVID-19 should isolate at home, follow CDC-recommended steps, and not return-to-work until they meet criteria to discontinue home isolation, (or return to work, if healthcare personnel) in consultation with healthcare providers.
 - Unvaccinated workplace contacts should be notified and advised to quarantine and self-monitor for symptoms.

Part III – Vaccinations & Return to Work

Vaccine Requirements

Can employers require that employees who physically enter the workplace be vaccinated for COVID-19?

- The Simple answer is Yes, with caveats. Federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, **subject to the reasonable accommodation provisions of Title VII and the ADA and other EEO considerations discussed below.**
- Florida follows federal law.

Vaccine Requirements

Important to Consider

- In some circumstances, Title VII and the ADA require an employer to provide reasonable accommodations for employees who, because of a disability or a sincerely held religious belief, practice, or observance, do not get vaccinated for COVID-19, unless providing an accommodation would pose an undue hardship on the operation of the employer's business.
- The analysis for undue hardship depends on whether the accommodation is for a disability (including pregnancy-related conditions that constitute a disability) or for religion.

Vaccine Requirements

Important to Consider

- Employers that have a vaccine requirement may need to respond to allegations that the requirement has a disparate impact on employees based on their race, color, religion, sex, or national origin under Title VII (or age under the Age Discrimination in Employment Act (40+)).
- It would also be unlawful to apply a vaccination requirement to employees in a way that treats employees differently based on disability, race, color, religion, sex (including pregnancy, sexual orientation and gender identity), national origin, age, or genetic information, unless there is a legitimate non-discriminatory reason.

Florida Ban on “Vaccines Passports”

Important to Consider

- On April 2, Governor DeSantis signed Executive Order 21-81 prohibiting so-called “vaccine passports,” meaning requiring an official document to certify that an individual has been vaccinated.
- The law says that “business entities,” cannot require that “patrons or customers” provide documentation certifying that they received the COVID-19 vaccine or certifying that they have recovered from the virus to enter or receive a service from the business. **The law does not prohibit private employers from requiring that their employees show proof of vaccination.**

ADA Analysis

May an employer require COVID-19 vaccinations for all employees entering the workplace, even though it knows that some employees may not get a vaccine because of a disability?

- Yes, provided certain requirements are met. Under the ADA, an employer may require an individual with a disability to meet a qualification standard applied to all employees, such as a safety-related standard requiring COVID-19 vaccination, if the standard is job-related and consistent with business necessity.

ADA Analysis

Direct Threat

- If an employee cannot meet the standard because of a disability, the employer may not require compliance unless it can demonstrate that the individual would pose a “direct threat” to the health or safety of the employee or others in the workplace.
- A “direct threat” is a “significant risk of substantial harm” that cannot be eliminated or reduced by reasonable accommodation. This determination can be broken down into two steps:
 - determining if there is a direct threat and, if there is,
 - assessing whether a reasonable accommodation would reduce or eliminate the threat.

ADA Analysis

Direct Threat

- To determine if an employee who is not vaccinated due to a disability poses a “direct threat” in the workplace, an employer first must make an individualized assessment of the employee’s present ability to safely perform the essential functions of the job.
- The factors that make up this assessment are:
 - (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) the imminence of the potential harm.

ADA Analysis

Direct Threat

- The assessment of direct threat should take account of the type of work environment, such as:
 - whether they work alone or with others or work inside or outside;
 - the available ventilation;
 - the frequency and duration of direct interaction they typically will have with others;
 - the number of partially or fully vaccinated individuals already in the workplace;
 - whether other employees are wearing masks or undergoing routine screening testing; and
 - the space available for social distancing.

ADA Analysis

Direct Threat

- If the assessment demonstrates that an employee with a disability who is not vaccinated would pose a direct threat to self or others, the employer must consider whether providing a reasonable accommodation, would reduce or eliminate that threat.
- Potential reasonable accommodations could include:
 - requiring the employee to wear a mask,
 - work a staggered shift,
 - making changes in the work environment (such as improving ventilation systems or limiting contact with other employees and non-employees),
 - permitting telework if feasible, or
 - reassigning the employee to a vacant position in a different workspace.

Title VII Analysis

Religious Beliefs

- How should an employer respond to an employee who communicates that he or she is unable to be vaccinated for COVID-19 (or provide documentation or other confirmation of vaccination) because of a sincerely held religious belief, practice, or observance?

Title VII Analysis

Religious Beliefs

- Once an employer is on notice that an employee's sincerely held religious belief, practice, or observance prevents the employee from getting a COVID-19 vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship.
- EEOC guidance explains that the definition of religion is broad and protects beliefs, practices, and observances with which the employer may be unfamiliar. Therefore, the employer should ordinarily assume that an employee's request for religious accommodation is based on a sincerely held religious belief, practice, or observance.

Title VII Analysis

Religious Beliefs

- However, if an employee requests a religious accommodation, and an employer is aware of facts that provide an objective basis for questioning either the religious nature or the sincerity of a particular belief, practice, or observance, the employer would be justified in requesting additional supporting information.

Title VII Analysis

Religious Beliefs

- Under Title VII, an employer should thoroughly consider all possible reasonable accommodations, including telework and reassignment.
- Under Title VII, courts define “undue hardship” as having more than minimal cost or burden on the employer. This is an easier standard for employers to meet than the ADA’s undue hardship standard.

Title VII Analysis

Religious Beliefs

- Considerations relevant to undue hardship can include, among other things, the proportion of employees already vaccinated against COVID-19 and the extent of employee contact with non-employees, whose vaccination status could be unknown or who may be ineligible for the vaccine.
- Ultimately, if an employee cannot be accommodated, employers should determine if any other rights apply under the EEO laws or other federal, state, and local authorities before taking adverse employment action against an unvaccinated employee.

Title VII Analysis

Pregnancy Analysis

- **Under Title VII, what should an employer do if an employee chooses not to receive a COVID-19 vaccination due to pregnancy?**

Title VII Analysis

Pregnancy Analysis

- If an employee seeks an exemption from a vaccine requirement due to pregnancy, the employer must ensure that the employee is not being discriminated against compared to other employees similar in their ability or inability to work.
- This means that a pregnant employee may be entitled to job modifications, including telework, changes to work schedules or assignments, and leave to the extent such modifications are provided for other employees who are similar in their ability or inability to work.

Reasonable Accommodations

Reasonable Accommodations

An employee who does not get vaccinated due to a disability (covered by the ADA) or a sincerely held religious belief, practice, or observance (covered by Title VII) may be entitled to a reasonable accommodation that does not pose an undue hardship on the operation of the employer's business.

For example, as a reasonable accommodation, an unvaccinated employee entering the workplace might wear a face mask, work at a social distance from coworkers or non-employees, work a modified shift, get periodic tests for COVID-19, be given the opportunity to telework, or finally, accept a reassignment.

Proof of Vaccination

Proof of Vaccination

- If an employer requires its employees to provide proof that they have received a COVID-19 vaccination from a pharmacy or their own healthcare provider, the employer cannot mandate that the employee provide any medical information as part of the proof.
- It is not prohibited to request basic vaccination card proof which does not contain medical information (however, may not want to maintain copy of card to avoid safety record-keeping obligations).

Proof of Vaccination

Best Practices

- Employers may want to create a confidential tracking document – employee name (maybe list with an ID number), type of vaccine shot received and date of the last dose of the vaccine.
- Let employee know they do not need to provide any medical or family history information.
- Do not ask for reasons for vaccination or how they have handled the vaccine dosage including second more difficult dose.

Proof of Vaccination

Is asking/requiring an employee to show proof of receipt of a COVID-19 vaccination a disability-related inquiry?

- No. There are many reasons that may explain why an employee has not been vaccinated, which may or may not be disability-related. Simply requesting proof of receipt of a COVID-19 vaccination is not likely to elicit information about a disability and, therefore, is not a disability-related inquiry. However, subsequent employer questions can be problematic, such as asking why an individual did not receive a vaccination, as they may elicit information about a disability and would be subject to the pertinent ADA standard that they be “job-related and consistent with business necessity.”

Proof of Vaccination

What to do when an employee informs an employer that they are not getting the COVID-19 vaccine because of a disability?

- To request an accommodation, an individual does not need to mention the ADA or use the phrase “reasonable accommodation.”
- As a best practice, before instituting a mandatory vaccination policy, employers should provide managers, supervisors, and those responsible for implementing the policy with clear information about how to handle accommodation requests related to the policy.

Proof of Vaccination

What to do when an employee informs an employer that they are not getting the COVID-19 vaccine because of a disability?

- Employers and employees typically engage in a flexible, interactive process to identify workplace accommodation options that do not impose an undue hardship on the employer.
- This process may include determining whether it is necessary to obtain supporting medical documentation about the employee's disability as it relates to the job functions.

Proof of Vaccination

What to do when an employee informs an employer that they are not getting the COVID-19 vaccine because of a disability?

- The ADA requires that employers offer an available accommodation if one exists that does not pose an undue hardship, meaning a significant difficulty or expense.
- Employers are advised to consider all the options before denying an accommodation request. The proportion of employees in the workplace who already are partially or fully vaccinated against COVID-19 and the extent of employee contact with non-employees, who may be ineligible for a vaccination or whose vaccination status may be unknown, can impact the ADA undue hardship consideration.

Proof of Vaccination

What to do when an employee informs an employer that they are not getting the COVID-19 vaccine because of a disability?

- Under the ADA, it is unlawful for an employer to disclose that an employee is receiving a reasonable accommodation or to retaliate against an employee for requesting an accommodation.

Employer- Administered Vaccinations

Do the ADA's Restrictions on an Employer Making Disability-Related Inquiries or Medical Examinations of its Employees Apply to any part of the Vaccination Process?

- Yes. The ADA's restrictions apply to the screening questions that must be asked immediately prior to administering the vaccine if the vaccine is administered by the employer or its agent. An employer's agent is an individual or entity having the authority to act on behalf of, or at the direction of, the employer.

Employer- Administered Vaccinations

Do the ADA's Restrictions on an Employer Making Disability-Related Inquiries or Medical Examinations of its Employees Apply to any part of the Vaccination Process?

- The ADA generally restricts when employers may require medical examinations (procedures or tests that seek information about an individual's physical or mental impairments or health) or make disability-related inquiries (questions that are likely to elicit information about an individual's disability). The act of administering the vaccine is not a "medical examination" under the ADA because it does not seek information about the employee's physical or mental health.

Employer- Administered Vaccinations

Do the ADA's Restrictions on an Employer Making Disability-Related Inquiries or Medical Examinations of its Employees Apply to any part of the Vaccination Process?

- Because pre-vaccination screening questions are likely to elicit information about a disability, the ADA requires that they must be “job related and consistent with business necessity” when an employer or its agent administers the COVID-19 vaccine. To meet this standard, an employer would need to have a reasonable belief, based on objective evidence, that an employee who does not answer the questions and, therefore, cannot be vaccinated, will pose a direct threat to the employee's own health or safety or to the health and safety of others in the workplace.

Employer- Administered Vaccinations

Caveats

- If the employer offers to vaccinate its employees on a voluntary basis, meaning that employees can choose whether or not to get the COVID-19 vaccine from the employer or its agent, the employer does not have to show that the pre-vaccination screening questions are job-related and consistent with business necessity. However, the employee's decision to answer the questions must be voluntary.
- The ADA prohibits taking an adverse action against an employee, including harassing the employee, for refusing to participate in a voluntary employer-administered vaccination program. An employer also must keep any medical information it obtains from any voluntary vaccination program confidential.

Fully Vaccinated Employees who Request Accommodations

What Should an Employer Do?

- A fully vaccinated employee may request and accommodation because of a continuing concern that they face a heightened risk of severe illness from a COVID-19 infection, despite being vaccinated.
- Employers who receive a reasonable accommodation request from an employee should process the request in accordance with applicable ADA standards.
- When an employee asks for a reasonable accommodation, the employer should engage in an interactive process to determine if there is a disability-related need for reasonable accommodation. This process typically includes seeking information from the employee's health care provider with the employee's consent explaining why an accommodation is needed.

Fully Vaccinated Employees who Request Accommodations

What Should an Employer Do?

- For example, some individuals who are immunocompromised might still need reasonable accommodations because their conditions may mean that the vaccines may not offer them the same measure of protection as other vaccinated individuals. If there is a disability-related need for accommodation, an employer must explore potential reasonable accommodations that may be provided absent undue hardship.

Employer Incentives

Can Employers Offer Incentives Under ADA?

- Yes. Requesting documentation or other confirmation showing that an employee received a COVID-19 vaccination in the community is not a disability-related inquiry covered by the ADA. Therefore, an employer may offer an incentive to employees to voluntarily provide documentation or other confirmation of a vaccination received in the community. As noted elsewhere, the employer is required to keep vaccination information confidential pursuant to the ADA.

Employer Incentives

Can Employers Offer Incentives for Vaccines Administered by the Employer Under ADA?

- Yes, if any incentive (which includes both rewards and penalties) is not so substantial as to be 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.
- However, this incentive limitation does not apply if an employer offers an incentive to employees to voluntarily provide documentation or other confirmation that they received a COVID-19 vaccination on their own from a third-party provider that is not their employer or an agent of their employer.

Employer Incentives

Can Employers Offer Incentives for Vaccines Administered by the Employer Under GINA?

- Yes. Under GINA, as long as an employer does not acquire genetic information while administering the vaccines, employers may offer incentives to employees for getting vaccinated. Because the pre-vaccination medical screening questions for the three COVID-19 vaccines now available do not inquire about genetic information, employers may offer incentives to their employees for getting vaccinated.

Employer Incentives

Can Employers Offer Incentives for Vaccines Administered by the Employer to the Employee's Family Members Under GINA?

- No. Under GINA's Title II health and genetic services provision, an employer may not offer any incentives to an employee in exchange for a family member's receipt of a vaccination from an employer or its agent. Providing such an incentive to an employee because a family member was vaccinated by the employer or its agent would require the vaccinator to ask the family member the pre-vaccination medical screening questions, which include medical questions about the family member. Asking these medical questions would lead to the employer's receipt of genetic information in the form of family medical history of *the employee*.

Employer Incentives

Can Employers Offer to Administer Vaccines to the Employee's Family Members Without Incentives Under GINA?

- Yes. GINA permits an employer to offer vaccinations to an employee's family members if it takes certain steps to comply with GINA. Employers must not require employees to have their family members get vaccinated and must not penalize employees if their family members decide not to get vaccinated.
- Employers must also ensure that all medical information obtained from family members during the screening process is only used for the purpose of providing the vaccination, is kept confidential, and is not provided to any managers, supervisors, or others who make employment decisions for the employees.
- In addition, employers need to ensure that they obtain prior, knowing, voluntary, and written authorization from the family member before the family member is asked any questions about his or her medical conditions. If these requirements are met, GINA permits the collection of genetic information.

Part IV – Q & A



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**Thank you
&
Stay Safe!**