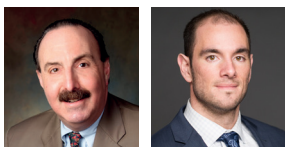


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Employment Law Insider Alert

COVID-19 and Return to Work: Recent Developments Regarding the Vaccine and Its Impact on Employers and Employees



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Key points:

The EEOC has clarified that employers can require employees to get vaccinated

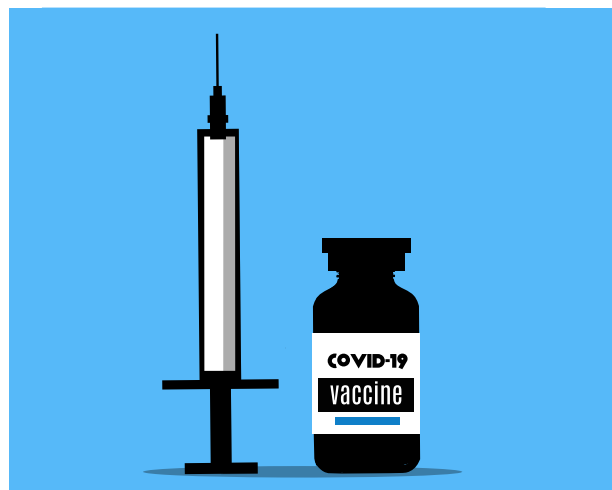
Most employers are opting to encourage rather than require vaccination

Federal tax credits are available to small and medium businesses to offer paid sick leave to employees for vaccination and recovery

While 2020 was clearly enveloped by the pandemic, 2021 marked the year of the vaccine, new beginnings, and the return of employees to the workplace. By late February 2021, the U.S. Food and Drug Administration had granted emergency use authorization for three COVID-19 vaccines in record time, marking a monumental step forward in combatting the crippling effects of the pandemic. Yet, along with the vaccine came many questions, including whether and to what extent employers could require employees to obtain the vaccine before returning to the workplace.

Employers Can Require Employees To Be Vaccinated

Initially, the Equal Employment Opportunity Commission (“EEOC”) issued guidance on this subject, suggesting employers could require employees to be vaccinated before returning to the workplace, subject to limited exceptions. However, the EEOC’s initial guidance was insufficiently clear, leaving many employers and employees with more questions.



As a result, many employers played it safe, strongly encouraging employees to be vaccinated, rather than making it a strict condition of employment, and in some cases opted to incentivize employees with cash payments or other perks. A recent survey found that 83% of employers chose not to require employees to be vaccinated.

Although these strategies have been effective, and ultimately reduce the threat of an employment dispute, recent guidance issued by the EEOC makes it clear that employers are justified in requiring employees to be vaccinated before returning to the workplace.

The EEOC Issues Updated Guidance On The Vaccine

On May 28, 2021, the EEOC issued technical assistance regarding employers' questions that arose in relation to the COVID-19 pandemic. Most notably, the EEOC clarified that Federal EEO laws do not prevent an employer from requiring employees physically entering the workplace to be vaccinated for COVID-19, as long as employers comply with the reasonable accommodation provisions of the Americans with Disabilities Act ("ADA") and Title VII of the Civil Rights Act related to religious objections. While this guidance is limited to EEO laws, and does not include guidance on other potentially applicable laws, it provides clarity to employers and employees moving forward.

The EEOC's recent guidance also clarifies a number of other issues, including: (1) EEO laws do not prevent or limit an employer from offering incentives to employees to voluntarily provide documentation or other confirmation of vaccination, so long as such information is kept confidential pursuant to the ADA; and (2) employers administering vaccines to their employees may offer incentives to employees, but such incentives cannot be coercive.

Employers Must Still Reasonably Accommodate Employees

The EEOC's recent guidance provides employers with a number of options to accommodate unvaccinated employees. Such options include providing PPE, implementing social distance measures, offering a modified work schedule, requiring frequent COVID-19 tests, and affording employees the opportunity to work from home.

Vaccinated employees are also entitled to reasonable accommodations, particularly if such individuals are at a heightened risk in the event they contract COVID-19.

In either case, employers are encouraged to handle reasonable accommodations judiciously, engaging in an open discussion with their employees so that together an employer and employee can decide the appropriate accommodation.

Texas Court Dismisses Hospital Workers' Vaccine Lawsuit

Many commentators predicted that any COVID-19 vaccine mandate imposed by employers would trigger a wide variety of legal issues and employee lawsuits. One such suit, perhaps the first of its kind, is *Jennifer Bridges, et al., v. Houston Methodist Hosp., et al.*, Defendants., No. CIVILACTIONH211774, 2021 WL 2399994 (S.D. Tex. June 12, 2021).

Houston Methodist Hospital ("Houston Methodist") announced on April 1, 2021 that it would require employees to be vaccinated by June 7, 2021 as a condition of reporting to work. Jennifer Bridges, an employee of Houston Methodist, and dozens of other employees, sued to block the vaccine requirement, arguing Houston Methodist is unlawfully forcing employees to be injected with one of the currently-available vaccines or be fired. Ms. Bridges principally argued that the currently available COVID-19 vaccines are experimental and dangerous and against public policy. Houston Methodist moved to dismiss the complaint, which the court granted on June 12, 2021. Notably, the court held Houston Methodist's policy of requiring employees to be vaccinated or be fired is not coercion. The court explained:

"[Houston Methodist] is trying to do their business of saving lives without giving them the COVID-19 virus. It is a choice made to keep staff, patients, and their families safer. Bridges can freely choose to accept or refuse a COVID-19 vaccine; however, if she refuses, she will simply need to work

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somewhere else. If a worker refuses an assignment, changed office, earlier start time, or other directive, he may be properly fired. Every employment includes limits on the worker's behavior in exchange for his remuneration. That is all part of the bargain.

Paid Time Off For Employees To Obtain The Vaccine and Employer Tax Credit

A number of states, including New York and New Jersey, have taken steps to ensure that employers provide their employees paid leave to obtain the COVID-19 vaccine. In New York, for example, Labor Law § 196-C requires an employer to provide employees paid leave up to four hours per vaccine injection. Similarly, in New Jersey, employees can use their New Jersey earned sick leave to obtain the COVID-19 vaccine, including for traveling to and from their appointment and for any recovery time necessitated by side effects.

Nationally, the American Rescue Plan signed by President Biden on March 11 provides a tax credit for small and medium sized businesses to fully offset to cost of paid leave for employees to get vaccinated or recover from any side-effects from the vaccine. The tax credit has multiple benefits for employers.

First, the tax credit will offset the cost for businesses and nonprofits with fewer than 500 employees for up to 80 hours (i.e. 10 work days) up to \$511 per day of paid sick leave offered between April 1 and September 30, 2021.

Second, the tax credit will reimburse eligible employers for providing paid leave for employees to obtain a COVID-19 vaccination and for any time employees may need to recover from that vaccination, at no cost to the employer.

It is projected that the tax credit will apply to nearly half of all private sector

employees in America, including many in New York and New Jersey.

In Sum

While the EEOC's recent guidance clarifies a number of issues, many issues remain and are sure to be the subject of litigation in the coming months. In the interim, employers may require employees to be vaccinated before returning to the workplace, but experience suggests that strongly encouraging rather than requiring employees to do so may be the most effective way to promote vaccination. As demonstrated by Houston Methodist, requiring employees to obtain the COVID-19 vaccine may result in significant dissension and discord in the workplace and potentially expose an employer to unnecessary litigation and expense. As these issues make their way through the courts, it is imperative that employers establish clear guidelines regarding the COVID-19 vaccine, including whether and to what extent said employer will require employees to be vaccinated. ▲

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