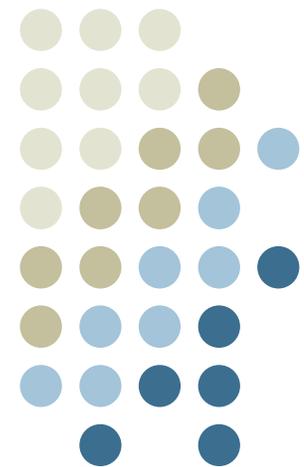


To Mandate Vaccines or Not: What Employers Need to Understand

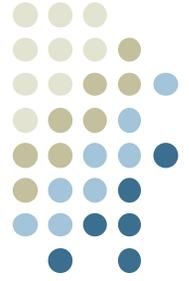
February 11, 2021

Presenter:
Julie Proscia - Partner

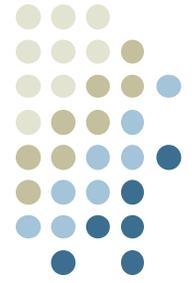
COVID -19 RESOURCE CENTER: www.saLAWus.com
www.laborandemploymentlawupdate.com



Initial Thoughts...



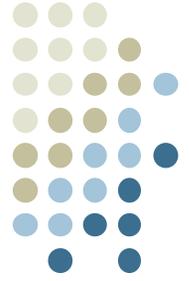
- 2020 has placed more focus on health care in the workplace and what employers can or should do to protect the health and safety of employees, clients and vendors. 2021 will continue this emphasis.
- The release of COVID-19 vaccines raise the question of whether employers can require employees to receive that -- or any -- vaccine and the implications for employers of imposing such a requirement.
- This presentation will provide some guidance for businesses looking ahead to the time when the COVID-19 vaccine is widely available.
- Deciding whether to mandate the COVID-19 vaccine will depend upon the nature of the business, federal guidance and potential impact on the workforce.



We Will Discuss And Cover:

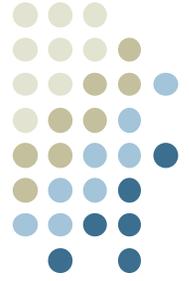
- Status of the COVID-19 vaccine.
- Current limitations on the ability to mandate vaccines in the workplace.
- The manner in which current law has been applied to the pandemic.
- Implications of current guidance on the COVID-19 vaccine.
- The pros and cons of mandating vs. strongly encouraging vaccines.
- Changes to COVID-19 guidance.

Current Status of the COVID-19 Vaccine



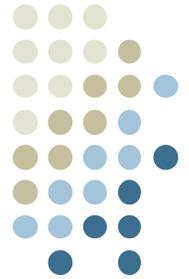
- Vaccines are being rolled out pursuant to individual state priority categories that include health care workers, age specific brackets, essential businesses etc.
- On his first day in office the Biden Administration pledged 100 million vaccines in the first 100 days.

EEOC Guidance COVID-19 Vaccines



In order for an employer to require the COVID-19 vaccine, it must show that an unvaccinated employee would pose a direct threat due to 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.”

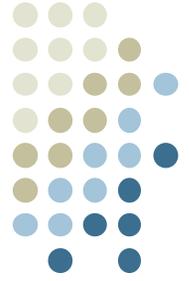
EEOC Guidance COVID-19 Vaccines



Employers should conduct an individualized assessment of four factors in determining whether a direct threat exists:

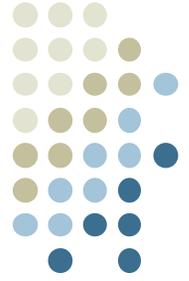
- the nature and severity of the potential harm;
- the likelihood that the potential harm will occur;
- the imminence of the potential harm; and
- the duration of the risk.

EEOC Guidance COVID-19 Vaccines



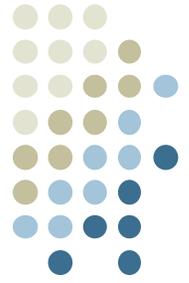
An employer must provide reasonable accommodations to a vaccine requirement for employees who seek accommodation based on disability or a sincerely held religious belief, practice, or observance.

The ADA and Vaccines



The administration of a COVID-19 vaccine to an employee by an employer (or by a third party with whom the employer contracts to administer a vaccine) is **NOT** a “medical examination” for purposes of the Americans with Disabilities Act (ADA) this is a break from past interpretations in which the Americans with Disabilities Act (ADA) considered a vaccine a medical exam.

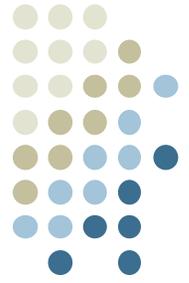
Pre-employment



Pre-screening questions associated with administering the vaccine may implicate the ADA's prohibition on disability-related inquiries if the employer requires the vaccine and answering the questions is mandatory.

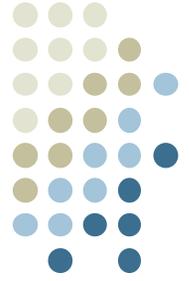
- Asking or requiring an employee to show proof of receipt of a COVID-19 vaccination is NOT a disability-related inquiry.

Pre-employment



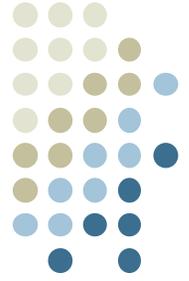
If the employer administers the vaccine, it must show that pre-screening questions are “job-related and consistent with business necessity.” This is not a concern if the vaccine and answering the questions are voluntary.

Current Employees



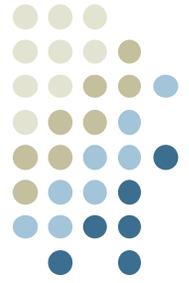
- For current employees, vaccinations must be job-related, consistent with business necessity, and no more intrusive than necessary, consistent with the four questions.

Alternatives to Mandates



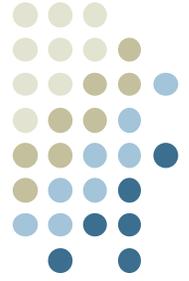
- Employers can take steps to encourage employees to receive vaccines short of job-contingent mandates by making them easy and affordable to get:
 - Allow paid time off to go get vaccines, or
 - Offer vaccines at the workplace to reduce any inconvenience
 - Educational programs and campaigns
 - Small incentives (gift cards)

Vaccines and Health Care Workers



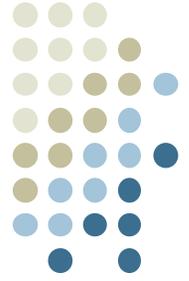
- Courts have repeatedly upheld a health care employer's right to require certain employees to receive certain vaccinations:
 - Those who work directly with patients (e.g. nurse, doctor, or patient care assistant) or
 - Those who handle materials that could spread infection (e.g. lab technician).
 - CDC recommends vaccinations for hepatitis B, flu, measles, mumps, rubella, chickenpox, tetanus, diphtheria, pertussis, and meningococcal diseases.

Current Exemptions from Mandatory Vaccines



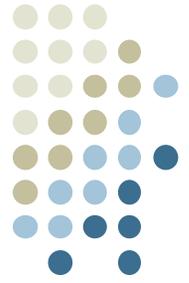
- Healthcare employers must consider exemptions for employees who cannot receive vaccines for reasons related to disability, pregnancy, or religion.
- Employers should analyze each request for exemption on a case-by-case basis, including reviewing the employee's job position and the employee's particular religious belief or medical documentation.

Exemption Due to Religious Beliefs



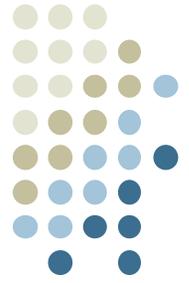
- Determine if the employee sincerely holds the religious belief.
 - The belief cannot be social, political, or personal.
 - The belief may be newly adopted, inconsistently observed, not part of a formal religious practice, or different from the common tenets of the individual's religion (veganism may be a religion if an employee refuses a vaccine containing animal products).

Exemption Due to Disability



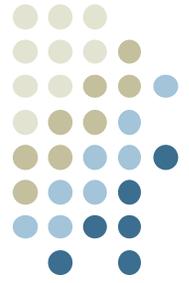
- Ask for medical documentation corroborating the disability.
- Examples of disabilities that may preclude employees from receiving certain vaccinations include life-threatening allergies, diseases that compromise the employee's immune system, or a severe and well-documented anxiety associated with the side effects of receiving vaccines.

Basis for Denying Exemption



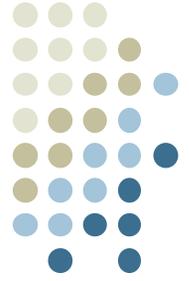
- Once an employer determines that an employee may qualify for an exemption, the employer must determine whether allowing the employee an exemption creates a burden.
 - Undue burden for disability based exemptions: The exemption would create a direct threat to the employee, his/her coworkers, or the organization's patients.
 - De minimis burden for religious exemption.

Making the Final Decision



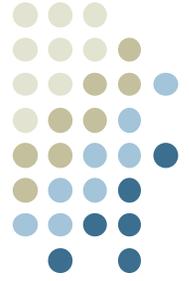
- If exempting the employee will create an undue/de minimis burden, may require the vaccine as a condition of further employment.
- Decision should be documented with a clear explanation as to why the vaccine is job-related, no more intrusive than necessary and consistent with business necessity.
- Ensure that exemption consideration and decision process is consistent.

Fact Specific Analysis



- The key to handling requests for exemptions is to ensure that the consideration focuses on the specific concerns of the particular employee and encompasses a back-and-forth dialogue with the employee.
- Learning more about the employee's specific concerns may lead to a solution.
 - An employee objecting to a vaccine on religious grounds because it contains animal cells may accept an alternative vaccine that does not.

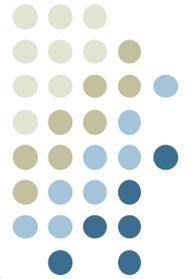
Unions/Concerted Activity



- Vaccine may be subject of mandatory bargaining.
 - Even if not, consulting with union may foster goodwill.
- If non-union employees protest COVID vaccine program (or lack of one) and employer takes adverse action, it could lead to unfair labor practice charges being filed with the NLRB.

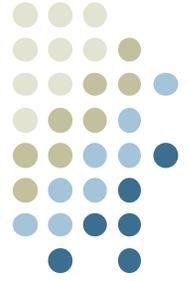
 Potential new organizing efforts.
SmithAmundsen

Workplace Considerations



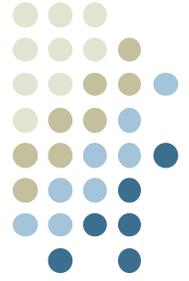
- The fact that employers may be permitted to require employees to get the vaccine does not mean they should.
- Enforcing a vaccine mandate, i.e. telling workers they have to have the vaccine or be fired, could be difficult if a large number of employees refuse to comply.
- There are many cultural and religious concerns with the vaccine as well as broad based fears.

Voluntary Program



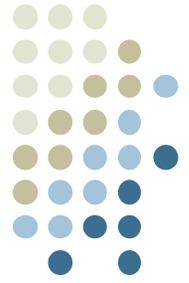
- Encourage rather than require vaccine
- Use same approach as flu vaccine:
 - Make low/no cost
 - Easily accessible
- Lead by example – publicize C-suite getting vaccine, employees of different demographics etc.

What to do While Waiting...



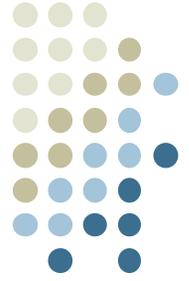
- Continue current practices
 - Temperature screenings
 - Symptom monitoring
 - Require ill employees to stay home
 - Maintain social distancing at work
 - Follow good hygiene practices
 - Masks
 - Contact tracing

Current COVID-19 Symptoms (2-14 days after exposure)



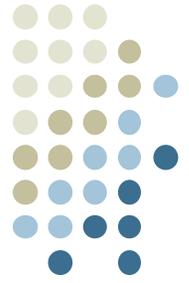
- Fever or chills
- Cough
- Shortness of breath or difficulty breathing
- Fatigue
- Muscle or body aches
- Headache
- New loss of taste or smell
- Sore throat
- Congestion or runny nose
- Nausea or vomiting
- Diarrhea

Current Definition of “Close Contact”



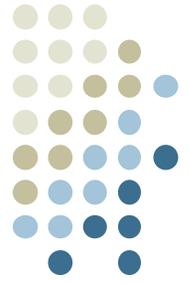
- Someone who was within 6 feet of an infected person for a cumulative total of 15 minutes or more over a 24-hour period starting from 2 days before illness onset (or, for asymptomatic patients, 2 days prior to test specimen collection) until the time the patient is isolated.
- Note: Individual exposures added together over a 24-hour period.

FFCRA Sick Leave-Voluntary for Employers after January 1, 2021



- Two weeks (up to 80 hours) of paid sick leave if employee is unable to work due to:
 - Quarantine (pursuant to Federal, State, or local government order or advice of a health care provider);
 - Experiencing COVID-19 symptoms and seeking a medical diagnosis;
 - Need to care for an individual subject to quarantine;
 - Need to care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19; and/or
 - Experiencing a substantially similar condition as specified by the Secretary of Health and Human Services.

FFCRA Sick Leave Pay



- Leave would be paid at the employee's regular rate where leave is due to the employee being quarantined and/or experiencing COVID-19 symptoms and seeking a medical diagnosis.
- Leave would be paid at two-thirds the employee's regular rate if leave is for the other listed reasons.

Questions????

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SmithAmundsen's COVID-19 webpage & blog have insight and resources:

- o <https://www.salawus.com/practices-covid19-task-force.html>
- o www.laborandemploymentlawupdate.com