



ALASKA SHRM STATE COUNCIL



WORKING THROUGH THE PANDEMIC – WHAT ABOUT VACCINE MANDATES?

PRESENTED BY
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Navigating COVID-19 Vaccine Issues

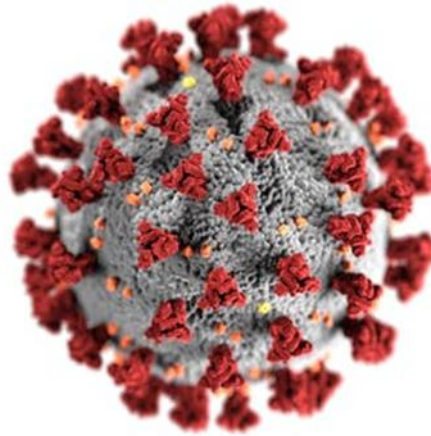


Presented to
Alaska HR SHRM
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By
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The Question



Can employers require their employees to be vaccinated against COVID-19 as a condition of employment?

The Answer

- **Generally, yes**
- But to do so properly will require development of a clear, nondiscriminatory, and legally compliant written policy or program, that balances a number of important legal protections and limitations at play



The Key Considerations

1. Employment discrimination and disability protections
2. Balancing occupational safety and health obligations
3. Labor-related limitations
4. Additional state and local law constraints
5. Wage and hour compliance
6. Worker's compensation/insurance coverage
7. Reputational and employee-relations concerns

Employment Discrimination and Disability Protections

- The Americans with Disabilities Act (ADA)
 - Basic premise: Nondiscrimination in employment includes reasonable adjustments to any barriers that would exclude those with a disability, so long as doing so doesn't pose an undue hardship to the employer.
 - Also limits “medical exams” and disability-related inquiries during employment unless employer can prove that they are “job related and consistent with business necessity.”
 - EEOC says vaccination is not “medical exam”
 - But pre-screening vaccination related questions, if administered by employer (or third party employer contracts with to administer vaccinations), must be narrowly tailored to only what is “job-related and consistent with business necessity.”

Employment Discrimination and Disability Protections



- **CAUTION!** Even if mandated, there are likely to be required exceptions and additional steps that must be taken before termination
 - ADA also requires exploration of alternatives- i.e. the “interactive process” requirement where disability conflicts with mandate
 - Title VII protections work similarly where religious exemptions at play
 - Likewise in the context of pregnancy.

Employment Discrimination and Disability Protections

- ADA also requires special privacy protections for employees personal medical information— that may be implicated in vaccine administration and screening.
- Employee medical information must be:
 - a) Kept separate from employee’s primary personnel file; and
 - b) Not shared with those that don’t have a legitimate need to know



Employment Discrimination and Disability Protections

- Current EEOC guidance says merely asking for proof of vaccination isn't a "disability-related inquiry."
- But be careful about follow up questions that can overstep and implicate ADA – e.g. "Why didn't you get the vaccine?"
- Consider also reminding employees not to provide medical information in connection with providing proof of vaccination.

Balancing Occupational Safety and Health Obligations



- OSHA's (the Act) "general duty" clause requires employers to provide a workplace free of known hazards to employees
- Airborne transmission of COVID-19 is a deadly or serious hazard, and OSHA (the Agency) has issued specific guidance around cleaning, PPE, and other protocols thus far

Balancing Occupational Safety and Health Obligations

PROCEED WITH CAUTION!

- The federal Occupational Safety and Health Act of 1970 may afford whistleblower protections to employees who refuse a vaccine based on good-faith concerns that the vaccine may pose a real danger to their health, based on a medical condition.



Labor-Related Limitations

- Employers with union-represented work forces should
 1. review their CBAs and
 2. ask whether there are any terms that may directly or indirectly address a vaccine requirement
- If a CBA term restricts an employer from imposing a vaccine requirement, then that employer would need agreement from the union to require a vaccine



Labor-Related Limitations

- An employer should notify its employees and the union that it is considering a vaccine requirement, and be prepared to bargain
- If vaccination is mandatory subject of bargaining, the employer must generally bargain to agreement or impasse
- If no agreement is reached, limited exceptions of *business necessity or emergency* might apply, but those are narrow

Labor-Related Limitations (Yes, Even Non-Union Employers)



- Labor laws protect certain “concerted activities” of non-union employees, and if employees take joint action concerning employment-vaccine policies or management practices this may trigger protections

Additional State and Local Laws Constraints



- No state-mandated vaccine requirement in Alaska at this time.

Wage and Hour Compliance



- If mandating, employers need to carefully consider wage and hours requirements, and whether they are obligated to compensate employees for:
 - the employees' time spent getting the vaccine (including a post-vaccination observation period) during normal working hours, and
 - the costs associated with the COVID-19 vaccine, if any (if not fully health-insurance funded)
- Best practice: Employers need to be very clear about whether vaccination is mandatory or voluntary to avoid disputes.

Workers' Compensation/ Insurance Coverage

- Employers should review their workers' compensation and other applicable insurance policies to confirm coverage and identify any relevant limitations
 - For example, would adverse reactions to vaccines be covered?
 - If so, would the vaccine need be administered at the employment site, during work hours, or satisfy any other requirements in order to preserve coverage?

Reputational and Employee-Relations Concerns



- Balancing concerns and options:
 - Customer preference;
 - Community expectations;
 - Potential impacts and employee-relations considerations applicable to their operations;
 - Adverse reaction(s) to a mandatory COVID-19 vaccine or employee opposition to such a mandate can easily spread on social media;
 - Discriminatory enforcement of mandate

Weighing the Alternatives



- Given a myriad of unknowns and competing considerations at play, many employers may opt to not require vaccination
- Instead, they may find it preferable to strongly encourage, and perhaps even incentivize, employees to get the COVID-19 vaccine, at least until further guidance and information is available

The Alternatives to Mandates

- To strongly encourage the vaccine, an employer can:
 - Develop and distribute accurate, reputable COVID-19 vaccine education materials;
 - Help make the COVID-19 vaccine accessible to employees;
 - Explore and promote “perks” that may be available to vaccinated employees through voluntary and carefully designed wellness programs;
 - Provide paid time off for employees to get the vaccine and recover from any potential side effects; and/or
 - Lead by example and ensure that management is vaccinated first

The Takeaway

- Regardless of which approach employers take now regarding vaccine mandates, it is important that all employers stay informed and remain equipped to quickly adjust, based on continuing and evolving guidance and data on this issue

Thank You

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This presentation is not legal advice. It is provided solely for informational and educational purposes and does not fully address the complexity of the issues or steps business must take under applicable laws.



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