

EMPLOYMENT LAW LEGAL ALERT

COVID-19 VACCINATIONS FROM AN EMPLOYER'S PERSPECTIVE

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There is not much that has remained constant over the past year. In fact, it might be fair to say that the only thing that has remained consistent is the everchanging landscape of the COVID-19 pandemic. Now that we are navigating vaccine rollout, there is much for employers to consider, including employee mandates, exposure and liability, legal claims and more.

As the list of matters to be mindful of grows and shifts, we have compiled for employers a guide of current considerations regarding employees and the COVID-19 vaccine.

#1 – Must an employer mandate the COVID-19 vaccine?

- Neither federal law nor Michigan law mandate vaccines for any group of people.
- The primary authority, thus far, on mandatory vaccination requirements for employees is the December 16, 2020 Guidance by the EEOC.
- The EEOC Guidance provides that employers can mandate vaccines for their employees as long as they comply with the provisions of the ADA and an employee's religious freedoms as guaranteed by Title VII of the Civil Rights Act.
- Under the ADA, an employer must evaluate whether to accommodate an employee who cannot receive a vaccine due to a medical or disability-related condition. If the answer is yes, the employer must attempt to make reasonable accommodations, such as remote working, (absent undue hardship) before excluding the employee from the workplace. Further, the EEOC Guidance also clarified that the administration of a COVID-19 vaccine is not a "medical examination" under the ADA.
- Title VII dictates that an employee who cannot receive the vaccine due to a sincerely held religious belief, practice, or observance must be reasonably accommodated unless it would impose an undue hardship on the employer.
- Employers should also confirm that no genetic information is being acquired through pre-screening questions or while obtaining proof of vaccination.
- Further, pregnant employees who cannot take the vaccine due to a pregnancy-related medical condition may also be entitled to reasonable accommodations.
- One consideration is whether vaccines that have been authorized for use under Emergency Use Authorization (EUA) can be mandated by employers since they have not received full FDA approval.
- The statutory authority under which EUA vaccines are authorized requires recipients to be informed of such vaccines, the choice to accept or refuse the administration of the product, and the consequences of a refusal. This has been read by some legal and medical scholars to mean that mandatory programs for EUA vaccines are not allowable. However, others – pointing to the language of the statute and the role of the Secretary as well as the EEOC Guidance – have argued that EUA vaccines can be mandatorily implemented when the EEOC

Guidance is followed.

#2 – Employers have the option of incentivizing employees to receive the vaccine

- Employers can choose to incentivize vaccines with additional compensation, bonuses, vacation or other PTO.
- Employers must be mindful of the requirements of ERISA, group health plans and HIPAA wellness program regulations when considering incentives. Employers should provide alternative ways to earn those incentives by employees who do not receive a vaccine.
Example: attending a training program.
- Employers should also follow certain best practices such as creating and implementing a written policy, tailoring the vaccination program, creating a process for providing reasonable accommodations to employees and being mindful of state and federal laws regarding employee leave and layoffs.

#3 – Is an employer subject to legal exposure for claims based on COVID-19 compliance?

- Michigan has passed some laws that provide employers immunity from liability for COVID-19 related claims as long as they are in compliance with COVID-19 related government directives.
- The COVID-19 Response and Reopening Liability Assurance Act (MCL §691.1451) provides immunity from liability from COVID-19 tort claims to employers who act in compliance with all COVID-19 related government directives including federal and state laws, executive orders, and agency orders. An isolated, de minimis deviation from strict compliance does not remove this immunity. Worker's compensation actions are not affected.
- The Michigan Occupational Safety and Health Act (or MIOSHA) was amended (MCL § 408.1085) to provide immunity from liability under that Act for an employee's exposure to COVID-19 who, again, is operating in compliance with all COVID-19 related government directives including federal and state laws, executive orders, and agency orders. An isolated, de minimis deviation from strict compliance does not remove the immunity.
- There is also a Michigan statutory provision (MCL § 419.401) that protects employees from retaliation, discharge, or discipline if the employee is in compliance with COVID-19 directives contained in the law or if the employee reports health violations.
- Each of the updated provisions apply retroactively to any claims that accrue after March 1, 2020.
- Employers could face several COVID-19 related claims including:
 - o Workplace safety claims such as failure to protect or follow proper safety protocols leading to COVID-19 transmission. Such claims will have to contend with standard of care and causation issues.
 - o Worker's compensation claims for injury sustained during the course and scope of their employment.
 - o OSHA and MIOSHA citations for violating the general duty to provide a workplace free from recognized hazards.
 - o Discrimination, retaliation, and harassment claims based on COVID-19 status or decisions made during the furlough or layoffs process.
 - o Disability related failure to accommodate claims based on federal and state laws.
 - o Failure to protect employee privacy and confidentiality requirements.
 - o Denial or miscalculation of sick or family leave.

#4 – Employers cannot forget to maintain confidentiality

- Employee medical information is protected by several laws including the ADA, HIPAA, and the FMLA.
- The ADA requires that medical information must be kept confidential (unless required to be disclosed to

supervisors or managers to provide necessary accommodations) and that this information must be kept separate from other personnel files.

- Employers subject to HIPAA (such as those who offer health benefits through health plans) must also abide by privacy protection obligations and keep “protected health information” (PHI) confidential.
- COVID-19 testing results must be treated like confidential medical information and the same safeguards must be applied.
- Employers can notify those who have had close contact (i.e., exposure) with the employee without identifying the employee’s name or any other information that might identify them.
- Employers should also be cognizant of OSHA recordkeeping obligations.
- The EEOC Guidance has stated that requiring employees to provide vaccination information is not a disability-related inquiry under the ADA.
- Employers must warn employees not to provide medical information when providing proof of vaccinations.
- Employers must treat vaccinations records as medical information and keep the vaccination records in separate, confidential files similar to other employee medical information.

The Bottomline: Make policies and follow them! Seek legal guidance to confirm you are following the most updated guidelines and requirements.

This summary is general in nature and should not be construed as legal advice or as creating an attorney-client relationship. Consultation with legal counsel is recommended for specific situations.



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