

Alaska Employment Law Section Meeting
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Via Zoom

Presenters: Danielle Ryman, Perkins Coie LLP
Gregory Fisher, Littler Mendelson

Employment Issues related to COVID-19 Vaccinations and Testing

Introduction

This is intended as an open-forum, roundtable discussion. Questions and comments are welcome. We cannot cover all aspects related to this issue. Time constraints prohibit full exploration and discussion of all issues.

What We “Know”

- May test (take temperature and may even administer a COVID-19 test to detect presence of virus, but may not administer or rely upon an anti-body test).
- May require employees who test positive or experiencing symptoms to stay home.
- May request note from healthcare professional clearing employee to return to workplace.
- May ask employee if experiencing any symptoms (safeguard any information, maintain as a confidential medical record), but not ask about employee’s family.
- May ask about recent travel potentially presenting risks, and require quarantine period consistent with local health standards.
- May ask if an employee has been vaccinated.
- Vaccination is not a medical examination, but pre-screening questions may implicate the ADA and GINA. Treat all such information as confidential.
- May ask if an employee has been diagnosed with or tested for COVID-19.
- Asking for proof of vaccination is not a disability inquiry.

Developing Issues

May employers compel employees to get vaccinated?

- Be careful. Covid-19 vaccines have been released under Emergency Use Authorization (EUA). The FDA instructs anyone receiving a vaccine under an EUA be allowed to refuse vaccination. Note-in other contexts (fully-vetted and approved vaccinations), employers in many industries have been able to compel vaccinations.

May employers grant incentives to encourage employees to get vaccinated?

- In concept, yes. The question then becomes whether the incentives are in compliance with wellness guidelines.

Are such incentives permissible under EEOC and/or HIPAA wellness guidelines?

- Trick question: technically there are no EEOC wellness guidelines right now.
- Quick note: time constraints do not permit a thorough discussion or review of the wellness guidelines.
- Last year, federal agencies clarified COVID-19 testing and diagnosis were not subject to HIPAA's nondiscrimination rules.
- For vaccinations, no guidance has been issued yet.
- Assuming vaccinations implicate HIPAA's nondiscrimination rules, and are subject to wellness program rules, the incentives cannot be coercive and cannot unfairly exclude employees who do not consent (or participate). If the incentive is too large it can be construed as coercive. Participation in a wellness program must be voluntary. This is part of the reason why the HIPAA guidelines impose limits. Incentives cannot exceed 30% of the total cost of medical plan coverage (employee and employer contributions) (for tobacco cessation there is a 50% limit). Employees who cannot participate because of health concerns must be provided a reasonable alternative to earn the incentive.
- The EEOC guidelines are currently in flux. Proposed regulations were released in January. but not yet adopted. The new proposed regulations allow a de minimis incentive such as a water bottle or gift card of modest value.
- Any questions related to the wellness program should not implicate disability-related issues.
- Bottom line: a modest, de minimis incentive is probably fine. This probably includes allowing PTO to get vaccinated.

If employers cannot compel vaccinations, may they nevertheless require vaccination as a condition of being present in the workplace? Under what conditions?

- This is less clear, but probably "yes" if a direct threat can be shown. Under normal circumstances, it can be difficult to substantiate a direct threat. However, agencies seem receptive to relaxing strict interpretation of direct threat principles in the specific context of the COVID-19 pandemic.

If employers may require testing or vaccinations as a condition of being present in the workplace, what accommodations are recognized (religious and disability)?

- Religious and disability accommodations must be honored. For religious accommodation, the inquiry focuses on whether it is a sincerely held religious belief. For disability accommodations, the analysis is the same as per the ADA.

- The undue hardship analysis under religious discrimination claims is not as rigorous as it is under the ADA (“more than a de minimis cost”). This includes not just monetary costs but also the burden on the conduct of the employer’s business.

Are there other methods to encourage vaccinations?

- Employers may share information, provide information on when/where to get vaccinated, encourage employees to follow the CDC’s recommendation that people get vaccinated.

Other Related Issues

- According to at least one Regional Director (Cornele Overstreet, Region 28), any testing or vaccination policies implicate bargaining obligations (terms and conditions of employment).
- So-called “gag rules” or “gag policies” may run afoul of Section 7 and 8(a)(1) rights to engage in concerted activity.

Sources

“What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws,” EEOC Technical Assistance Questions and Answers (December 16, 2020)

<https://www.eeoc.gov/coronavirus>

<https://www.dol.gov/coronavirus>

<https://www.osha.gov/coronavirus/faqs>