

COVID-19 Update for Employers

Agenda

- For purposes of today's presentation, we will use an FAQs approach that will pose popular questions our office has received about COVID-19, followed by the relevant legal issues that drive a practical answer.
- We will leave time for attendee questions at the end of the presentation.

Can I Mandate That My Employees Get a COVID-19 Vaccination?

Practical Answer

- For most positions, yes... but only with big exceptions for religious beliefs and medical issues.
 - More information on those soon.
- We recommend that employers make vaccination voluntary rather than mandatory.
 - You will understand why as we go into more detail on this question.

ADA Limitations

- Employers can only require employees to undergo medical examinations that are job-related and consistent with business necessity.
- Administration of the vaccine itself is not a medical examination, *but the pre-vaccination questions are!*
- **Is a vaccination job-related and consistent with business necessity for every position?**

Required Exceptions:

- Must make reasonable accommodations for sincerely-held religious beliefs:
 - *Cannot pose more than a de-minimis cost.*
- Must make reasonable accommodations for employees for whom a vaccine is not medically advisable.
 - *The standard for a reasonable accommodation is much higher for the ADA.*
 - *It is relatively easy for an employee to receive a doctor's note.*

What is a Reasonable Accommodation in this Context?

- In a sense, we don't know yet.
 - *The same mitigation requirements currently apply to vaccinated and unvaccinated alike.*
- Most existing case law pertains to flu vaccines.
 - *For flu vaccines, most health care providers require unvaccinated employees to mask during flu season.*
- Masking is currently a mandated measure for everyone.
 - *Would it be a reasonable accommodation for COVID?*

Other Concern #1: Emergency Use Authorization

- Although data indicates that the Pfizer and Moderna vaccines are safe, they are under an Emergency Use Authorization:
 - They have not completed full FDA testing.
 - The RNA method used to create these vaccines is scientifically proven, but has never been used in a vaccine before.
 - For these reasons, many people are fearful of the vaccine....

Other Concern #2: Employee / Labor Relations

- Surveys indicate that 20-25% of the population refuse to vaccinate for various reasons.
 - *But survey data indicates that fear or distrust of COVID-19 vaccinations in particular is much higher*
 - ***maybe as high as 45-50% of the population.***
- If 25 – 50% of your employee population is fearful / resistant to vaccination, what will happen if you mandate the vaccine?
 - Across all industries, hiring is very difficult right now.

Our Thoughts:

- Given the required exceptions, a mandate may not capture more employees than a voluntary vaccine program coupled with employee education.
 - Employee education is key.
- To date, no firm client has mandated vaccination, and to the best of our knowledge, that is the trend nationally.

Do I Pay For a COVID-19 Vaccination?

Is There a Cost to the Vaccine Itself?

- For the majority of people, no.
- Most private health insurers will cover a visit whose primary purpose is to obtain a COVID-19 vaccination without co-pays.
- Check with your health insurance provider to confirm that all costs related to a COVID-19 vaccination will be covered.

Do I Have to Pay Employees for Time Spent Getting the Vaccine?

- Likely yes if:
 - The employer mandates vaccination;
 - The employer makes vaccination voluntary, but arranges for a provider to come to the employer's facility to administer during work hours.
- Likely no if:
 - The employer makes vaccination voluntary, and employees get vaccinated on their own time.

How Long Do I Quarantine an Employee Who Has Been Potentially Exposed to COVID-19?

Updated CDC Quarantine Options

- Pennsylvania has adopted new CDC recommendations reducing the length of quarantines for individuals who are not employed in healthcare settings:
 - Asymptomatic individuals who were exposed to COVID-19 can end quarantine on day 10 without a test;
 - Asymptomatic individuals who were exposed to COVID-19 can end quarantine after 7 days if they receive a negative result on a test from a sample taken on or after day 5 of quarantine.
- An individual should continue to monitor for symptoms until 14 days after exposure. If symptoms develop, the individual should self-isolate and contact public health authorities or the individual's physician.

Example of 7 Day Quarantine:

- Employee is exposed to virus at a party on Saturday (Day 0).
- Employee can get a sample taken for a test on or after the following Thursday (Day 5).
- Negative test result comes back Friday (Day 6).
- Employee continues to quarantine through Saturday (Day 7).
- If asymptomatic, employee can return to work as of Sunday (Day 8).

Updated Close Contact Definition:

- The current definition of “close contact” includes someone who was within 6 feet of an infected person *for a cumulative total of 15 minutes or more over a 24-hour period* from the 48 hour period immediately preceding the onset of COVID-19 symptoms through the date the individual entered isolation.
 - If asymptomatic, from the time a sample was taken that resulted in a positive test.

Difference Between Quarantine and Isolation:

- Quarantine:
 - “Quarantine” is the term used for a person who has been potentially exposed to COVID, but has not tested positive or developed symptoms.
- Isolation:
 - “Isolation” is the term used for an individual who has tested positive or developed symptoms.
 - Quarantine rules **DO NOT APPLY** to isolation.
 - <https://www.cdc.gov/coronavirus/2019-ncov/hcp/disposition-in-home-patients.html>

Travel Quarantine

- This topic has changed frequently.
- Currently:
 - Quarantine period is 10 days.
 - To avoid, must get tested with 72 hours prior to entering PA, or after entering PA (must quarantine until negative result received).
- <https://www.health.pa.gov/topics/disease/coronavirus/Pages/Travelers.aspx>

Do I Need to Give My Employee Leave From Work if They Get COVID-19?

FFCRA?

- The Paid Sick Leave Provisions of the FFCRA are no longer mandatory.
- However:
 - Employers can voluntarily comply with the provisions through 3/31/21, and continue to claim the payroll tax rebate for employees who have not already exhausted their FFCRA entitlement.
- Stay tuned – this might change in the next stimulus bill.

First 3 Reasons for FFCRA Paid Sick Leave:

1. Employee is subject to a gov't quarantine or isolation order due to COVID-19.
2. Employee is ordered to self-quarantine by health care provider due to COVID-19.
3. Employee is experiencing symptoms of COVID-19 and seeking medical diagnosis.

These three types are paid at the greater of the regular rate or minimum wage, not to exceed \$511 per day and \$5,110 in the aggregate.

Last 3 Reasons for FFCRA Paid Sick Leave:

1. Employee is caring for someone subject to a quarantine, isolation, or self-quarantine order.
2. Employee is caring for his-her child due to COVID-19-related closure of the child's school or childcare facility.
3. Employee is experiencing any other substantially similar condition specified by Federal authorities.

These three categories are paid at the greater of 2/3 the regular rate or minimum wage, not to exceed \$200 per day and \$2,000 in the aggregate.

Practical Thoughts:

- Whether you give a COVID-positive employee leave or not, they will be prohibited from reporting to work under current public health orders:
 - *Unpaid leave should be granted, with option to use PTO.*
 - *If your policies are too restrictive, you may incentivize a sick employee to conceal the illness and come to work, exposing co-workers and customers.*

Are Employees Laid Off Due to COVID-19 Still Eligible for Unemployment?

Current Federal Emergency UC Benefits:

- The Consolidated Appropriations Act (CAA) extends Emergency Pandemic UC Benefits through March 13, 2021 for individuals who have exhausted state benefits.
- CAA also provides enhanced UC benefits of \$300/week to individuals who receive at least \$1 in state benefits through March 13, 2021.
- Unemployment rights for some self-employed individuals remains in effect.

Employer Questionnaire

- To help employees who lose employment due to COVID-19, we recommend filling out the reason for separation on the Unemployment Paperwork as follows:

“Employee [laid off / had hours reduced] due to coronavirus [shutdown / loss of business]. Employer is not contesting this application for unemployment.”

An Employee Has Requested Remote Work. What Do I Do?

Current PA Department of Health Guidance:

- “Unless impossible, all businesses must conduct their operations remotely, through individual teleworking of their employees in the jurisdiction or jurisdictions in which they do business.”

Is Teleworking Impossible?

- For some positions, the answer is clearly no:
 - *Customer-facing employee in business open to public.*
 - *Employee uses specialized machinery only available in a manufacturing location.*
- For other positions, the answer is less obvious:
 - *Many positions that primarily involve computer work can be performed remotely... but factor in:*
 - *Additional job functions, and frequency of such functions;*
 - *Location of files and key information; and*
 - *Information security and HIPAA requirements (if applicable).*

If Telework Allowed

- Put a policy in place that addresses:
 - Information security requirements;
 - Continuing requirement to perform all key job functions;
 - Availability to management during regular work hours;
 - Timekeeping (if the employee is non-exempt / eligible for overtime); and
 - Any special concerns applicable to the job.

Workers Compensation Concerns

- Teleworking arrangements will not remove an organization's potential exposure to a workers compensation claim.
- If an employee is injured while working at home, what will happen with comp?
- Causation is key here.
- Individual fact based inquiry based on a totality of the circumstances approach.
- ADA discussion - Accommodations for remote work?

Other Topics

Safety Orders

- PA Department of Health Nov. 27, 2020 safety order for businesses remains in effect.
- Online at:
<https://www.health.pa.gov/topics/Documents/Diseases%20and%20Conditions/Order%20of%20the%20Secretary%20for%20Mitigation%20and%20Enforcement.pdf>
- President Biden has ordered OSHA to investigate whether an emergency COVID-19 safety standard is needed, and if so, issue a standard by March 15.

New OSHA Requirements

- OSHA issued new COVID-19 mitigation guidance on January 29, 2021.
 - <https://www.osha.gov/coronavirus/safework>
- Employers should implement a COVID-19 Prevention Program to comply with OSHA requirements, including:
 - *A hazard assessment; and*
 - *Assignment of a workplace coordinator.*

General OSHA Guidelines

- Separate and send home infected or potentially infected people from the workplace;
- Implement physical distancing in all communal work areas (includes remote work and telework);
- Install barriers where physical distancing cannot be maintained;
- Use face coverings;
- Improve ventilation;
- Use applicable PPE to protect workers from exposure;
- Provide supplies necessary for good hygiene practices; and
- Perform routine cleaning and disinfection.

Practical Thoughts:

- The new OSHA guidance is very similar to guidelines already in place from PA Department of Health.
- Important OSHA compliance concerns:
 - *Train employees on COVID-19 safety procedures;*
 - *Appropriately document workplace COVID-19 exposure.*
- Remember:
 - *Do not retaliate against employees who raise COVID-related fears or complaints.*

Questions

If you want to receive follow-up materials on this topic or future **U&A Client Alerts** on labor and employment issues, just send us an e-mail.

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