



Legal Issues and Vaccination of the Idaho Work Force

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The opinions in this presentation are mine alone and are not the opinions of the Office of the Attorney General

Voluntary or Mandatory ?

- Does the Question Matter Right Now?
 - Vaccines have FDA Emergency Use Authorization (EUA) only and there is not enough vaccine
 - Discrimination laws protect terms of employment, even if vaccinations are voluntary
 - February 2021 survey of 165 employers
 - 1 employer will make vaccinations mandatory
 - 60% will encourage employees to get vaccinated
 - Nearly 40% have no formal plans
- Will the Question Matter Later?
 - Private Employers: At-will employment allows mandatory vaccines
 - Government Employers: Employees' constitutional rights must be considered
 - *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11 (1905), and *Zucht v. King*, 260 U.S. 174 (1922)
 - What OSHA and the Idaho Legislature say will matter
 - HB 63: prohibits State and local governments from mandating vaccinations
 - HB 140: prohibits State contracting with companies that discriminate against unvaccinated persons

Can Employers Require Proof of COVID-19 Vaccination?

YES

Under the ADA:

- OK to ask for proof of vaccination
- But don't ask why an employee did not get vaccinated
 - Question may elicit information about a disability and trigger the ADA
 - ADA prohibits questions about a disability unless "job-related and consistent with business necessity"
- When asking for proof, advise employees not to provide their medical information

COVID-19 Vaccination Record Card

Please keep this record card, which includes medical information about the vaccines you have received.

Por favor, guarde esta tarjeta de registro, que incluye información médica sobre las vacunas que ha recibido.



Last Name First Name MI

Date of birth Patient number (medical record or IIS record number)

Vaccine	Product Name/Manufacturer Lot Number	Date	Healthcare Professional or Clinic Site
1 st Dose COVID-19		mm / dd / yy	
2 nd Dose COVID-19		mm / dd / yy	
Other		mm / dd / yy	
Other		mm / dd / yy	

Reminder! Return for a second dose! ¡Recordatorio! ¡Regrese para la segunda dosis!

Vaccine	Date / Fecha
COVID-19 vaccine Vacuna contra el COVID-19	mm / dd / yy
Other Otra	mm / dd / yy

Bring this vaccination record to every vaccination or medical visit. Check with your health care provider to make sure you are not missing any doses of routinely recommended vaccines.

For more information about COVID-19 and COVID-19 vaccine, visit [cdc.gov/coronavirus/2019-ncov/index.html](https://www.cdc.gov/coronavirus/2019-ncov/index.html).

You can report possible adverse reactions following COVID-19 vaccination to the Vaccine Adverse Event Reporting System (VAERS) at vaers.hhs.gov.

Lleve este registro de vacunación a cada cita médica o de vacunación. Consulte con su proveedor de atención médica para asegurarse de que no le falte ninguna dosis de las vacunas recomendadas.

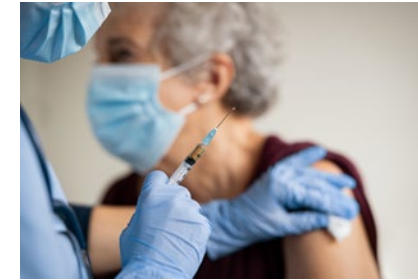
Para obtener más información sobre el COVID-19 y la vacuna contra el COVID-19, visite espanol.cdc.gov/coronavirus/2019-ncov/index.html.

Puede notificar las posibles reacciones adversas después de la vacunación contra el COVID-19 al Sistema de Notificación de Reacciones Adversas a las Vacunas (VAERS) en vaers.hhs.gov.

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How About Offering Vaccinations?



Employer-Run and Contracted Programs (e.g., on-site)

- Vaccination is not a medical examination under the ADA

But

- Pre-screening vaccination questions may be disability-related inquiries that trigger the ADA . . . unless the program is **voluntary**
 - OK for employer to decline to administer the vaccine if employee refuses to answer questions

Employee's own pharmacy or medical provider

- Vaccination is not a medical examination under the ADA
- ADA restrictions N/A to pre-screening vaccination questions by third parties who are not under contract with employer
- **No ADA issues**

If Vaccinations are Voluntary, Are Employers Subject to Any Legal Requirements?

- ADA and Title VII prohibit discrimination because of [disability](#) or [religion](#)
 - In hiring, termination, **promotion**, **compensation**, **job training**, or any other **term**, **condition**, or **privilege** of employment
- ADA and Title VII may require accommodation
 - ADA: reasonable accommodation
 - Title VII: religious accommodation
- Examples
 - Company retreats
 - Internship/apprenticeship programs
 - Vaccination incentive programs

If Workplace Safety Is at Stake, What Does the ADA Require?

Example: Company is planning a mountain retreat for September 2021 with lodging in shared cabins.

* * *

- To defend a safety-based condition that screens out a person with a disability (e.g., unvaccinated employees can't attend the retreat), the employer must show:
 - The unvaccinated person poses a **direct threat** due to a significant risk of substantial harm to the health or safety of the person or others
- AND
- The direct threat cannot be eliminated or reduced to an acceptable level by a **reasonable accommodation**
 - Reasonable accommodation requires a **good faith, interactive process**

If Workplace Safety Is at Stake, What Does Title VII Require?

Example: Company is planning a mountain retreat for September 2021 with lodging in shared cabins.

* * *

- If a workplace rule screens out an unvaccinated person, the person must show
 - Refusal to vaccinate is due to a sincerely held religious belief or practice
 - *Brown v. Children's Hospital of Philadelphia*, 794 Fed.Appx. 226 (3rd Cir. 2020) (flu vaccine)
- If the unvaccinated person makes this showing, the employer must provide
 - A religious accommodation
 - *Horvath v. City of Leander*, 946 F.3d 787 (5th Cir. 2020) (TDAP vaccine)
 - Unless the accommodation poses an undue hardship
 - "Undue hardship" = more than a *de minimis* cost or burden

What Else to Watch?

- *Chew v. Legislature of the State of Idaho*, 2021 WL 112146 (D. Idaho 1/12/21)
 - Representatives sued under Title II of the ADA to appear remotely and for self-contained offices or workspaces
 - TRO Denied: Court found that accommodations in the Capitol include masks, plexiglass, priority choice of seating, and promise of self-contained workspaces
- *Selene v. Legislature of the State of Idaho*, 2021 WL 230040 (D. Idaho 1/22/21)
 - Members of the public sued under Title II of the ADA to participate remotely and for better in-person safety measures
 - TRO Denied: Court found that accommodations in the Capitol include
 - Remote participation by written comments, email, live stream with closed captioning, and Zoom
 - In Committee rooms, there are capacity limits, socially distanced seating, “recommended” masks, and air purifiers
 - Capitol has alternate day scheduling to decrease persons in the building; hand sanitizer stations; and crowd control rules
 - Ongoing assessment of public health protocols and enforcement
 - Note: Court held the Defendants participated in a good faith interactive process to remedy the Plaintiffs’ concerns





Chew v. Legislature of the State of Idaho

Plaintiffs' Exhibit 4 to Motion for Preliminary Injunction

Photo of House, January 14, 2021
(Dkt. 12-6, p. 3.)

What Else to Watch?

- First Amendment -- Free Exercise Clause

- [*Roman Catholic Diocese of Brooklyn v. Cuomo*, 141 S.Ct. 63 \(2020\)](#): Justice Gorsuch (in concurring opinion) narrows *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11 (1905)
 - "Government is not free to disregard the First Amendment in times of crisis. . . . *Jacobson* hardly supports cutting the Constitution loose during a pandemic."
 - Distinguishes strict scrutiny review for First Amendment religious rights from rational basis review for Fourteenth Amendment due process rights

- Immunities

- [Coronavirus Limited Immunity Act](#)
 - Private employers are "immune from civil liability for damages or an injury resulting from exposure of an individual to coronavirus."
 - Except for acts or omissions that constitute an intentional tort or willful or reckless misconduct
 - Idaho Code, title 6, chapter 34 -- Sunsets on 7/1/21
- [Public Readiness and Emergency Preparedness Act](#), 42 U.S.C. § 247d-6d
 - Upon declaration by HHS Secretary, provides immunity from liability (except for willful misconduct)
 - for claims of loss caused, arising out of, relating to, or resulting from administration or use of countermeasures to diseases, threats and conditions determined by the Secretary to constitute a present, or credible risk of a future public health emergency
 - to entities and individuals involved in the development, manufacture, testing, distribution, administration, and use of such countermeasures
 - Covered Countermeasure Process Fund, 42 U.S.C.A. § 247d-6e

<https://www.phe.gov/Preparedness/legal/prepact/Pages/default.aspx>

- NLRA – Concerted Activities and Collective Bargaining

