

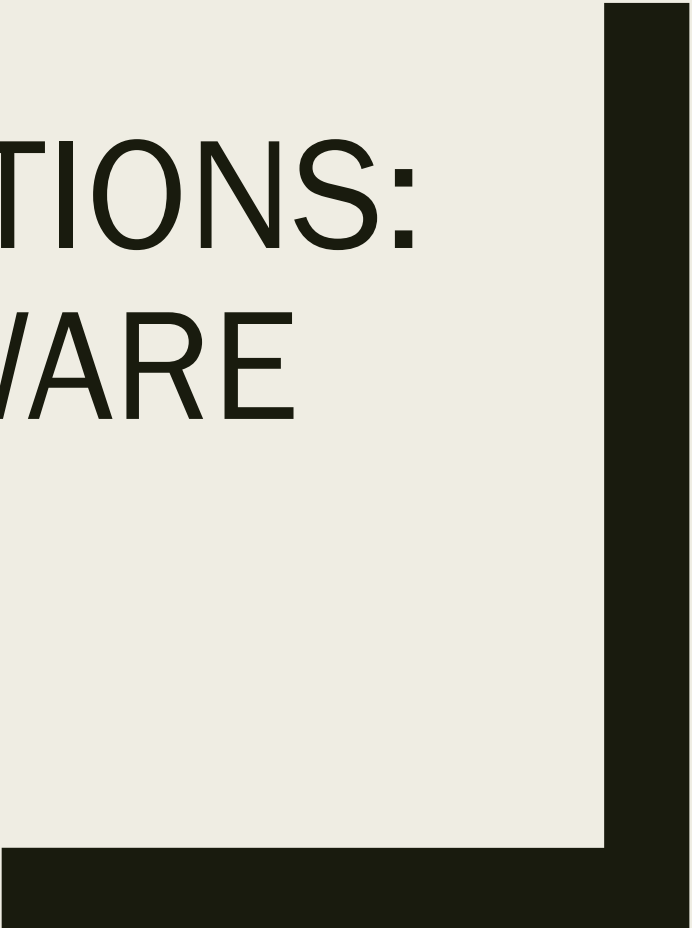


COVID-19 VACCINATIONS: EMPLOYERS BEWARE

March 10, 2021

Sim Avila

Cody Earl



Agenda

- To Vaccinate or Not - Mandatory vs. Voluntary Options
- Equal Employment Opportunity Commission Guidance
- Accommodations
- Recent Case Law
- Labor Considerations

Mandatory or Voluntary

- What we know currently – few employers are making it mandatory
- Legal obligations apply in both instances
- Private employers in Idaho – “at-will” employment allows for making it mandatory
- Government employees have constitutional rights that must be considered
- OSHA regulations should be considered - General Duty Clause [*Section 5(a)(1)*]
- Idaho State Legislature may impact this decision as well
 - *HB 63 – state and local governments cannot require vaccinations*
 - Ways & Means Committee
 - *HR 140 – prohibition on contracting with companies that discriminate against unvaccinated individuals*
 - Passed House; in Senate Commerce & Human Resources

EEOC Guidance - Does the ADA apply?

(12/16/2020)

- Disability-related inquiries and medical exams
 - *Must be job related and consistent with business necessity*
 - *Generally measuring an employee's body temperature **would be a medical examination** however EEOC has permitted temperature screening due to community spread of the global pandemic*
- Employer Required Covid-19 tests
 - *Permitted so long as job related and consistent with business necessity because employees entering workplace with Covid-19 will pose a direct threat to the health of others*
 - *Difference between Covid-19 test and test for antibodies*
- Is administration of Covid-19 vaccination to employee a medical exam?
 - **No.** *The vaccination itself is not a medical examination*

ACCOMMODATIONS



Joe the Salesman

- **TV Now** is a television sales company that decided to require all employees to receive a COVID-19 vaccination
- Joe, who has worked for **TV Now** for several years is a Native American. Because of his religious beliefs, Joe requested an exemption from **TV Now's** vaccination requirement
- **TV Now's** HR representative, Sony, received Joe's request. Sony immediately asked Joe to put his request in writing and provide proof of his religious beliefs
- Joe provided Sony with multiple handwritten pages of scripture and bible verses
- Sony did not have time to read all the bible verses and told Joe he needed to "get over it"
- Joe became very upset, demanded that he be exempt from the requirement to receive a COVID-19 vaccine and went to a customer's house to sell televisions
- **TV Now** fired Joe for failure to adhere to policy

Civil Rights Act of 1964, Title VII

- Once an employer receives notice that an employee has a sincerely held religious belief, practice or observance which prevents him/her from taking the vaccine, the employer must provide a reasonable accommodation unless it would pose an undue hardship as defined under Title VII.
 - *Undue Hardship is a lower standard under Title VII than under ADA (“more than de minimis cost” to the operation of the employer’s business).*
 - *Title VII defines “religion” to include all aspects of religion and practice, as well as belief. [42 USC § 2000e(j)]*
 - *Can request additional information from employee regarding religious tenets.*
- Most of EEOC litigation regarding employer-mandated vaccinations focuses on failure to accommodate based on religious beliefs.

Americans with Disabilities Act (“ADA”)

- Private employers **can** mandate the receipt of a Covid-19 vaccine by employees but must adhere to the ADA requirements when doing so
 - *Employees can request to be exempt from a vaccination program based on a medical condition or disability covered under the ADA*
 - *Employers must engage in the interactive process and grant these accommodations so long as they do not pose an undue hardship on the employer (i.e., significant difficulty or expense)*
- Other Considerations
 - *Medical conditions falling outside of the ADA (i.e., fear, underlying medical conditions)*
 - *Pregnancy Issues*

Considerations for Non-Employees

- Should you require vaccinations for non-employees?
 - *Contractors*
 - *Visitors*
 - *Volunteers*
- Implementation and Proof Issues
 - *One thing to ask question(s); another thing to require proof*

RECENT CASE LAW



Labor & Employment Litigation

- Since March 12, 2020 there have been 1,914 lawsuits (152 class actions) filed against employers due to alleged labor and employment violations related to the coronavirus.
 - *California* - 449
 - *New Jersey* - 228
 - *Florida* - 162
 - *New York* - 148
 - *Idaho* - 2

Chew v. Legislature of Idaho, *2021 U.S. Dist. LEXIS 7572*

- 2 members of Idaho State Legislature House of Representatives, with qualified disabilities under the ADA, sought accommodations under ADA to participate remotely.
- Immediate request for a Temporary Restraining Order was **Denied**
 - *Timeliness of complaint*
 - *Protective measures have been taken already*
 - Masks, plexiglass, seat selection, self contained workspaces
- Judge Nye
 - *“In short, Chew and Davis ask the Court to reach its hand into the business of the Idaho House of Representatives and mandate that it provide the accommodations sought.”*

Selene v. Legislature of Idaho,

2021 U.S. Dist. LEXIS 14450

- Members of public sued under Title II of ADA to participate remotely and for better in-person safety measures
- Sought a Temporary Restraining Order. **Denied**
 - *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*

LABOR CONSIDERATIONS



Employee Protections & Bargaining Issues

- Section 7 National Labor Relations Act
 - *Protected and concerted activities*
- Unionized Workforces
 - *Duty to Bargain*
 - Decisions vs. effects bargaining
 - *Collective Bargaining Agreement*
 - Management rights clause
 - Legislative mandate implications

QUESTIONS

