



NEBRASKA CHAPTER

**Safe at Work**  
*Breakfast Series*

# **MANDATING THE COVID-19 VACCINE: Important Considerations**

**by:**

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# Introduction to Vaccines

# Vaccine Distribution Strategy

- Initial COVID-19 vaccination to critical healthcare workforce and those at highest risk of developing complications from COVID-19
- Two doses of COVID-19 vaccine, separated by > 21 or > 28 days
- Both doses will need to be with the same product
- <http://dhhs.ne.gov/Documents/COVID-19-Vaccination-Plan.pdf>

# Vaccine Distribution Strategy

## Phase 1 B

- First responders
- Education sector
- Food/Agricultural
- Utilities Transportation

## Phase 1 C

- 65 years of age
- Vulnerable populations (disabled, homeless, etc.)
- Congregate settings (incarcerated, colleges/universities)

# Willingness to Get Vaccine

- 58% of Americans say they would get a COVID-19 vaccine
- Younger, less educated, minorities - less willing to get vaccine
- Speed of development most commonly cited reason to not vaccinate
- <https://news.gallup.com/poll/325208/americans-willing-covid-vaccine.aspx>



# **Vaccination – Mandatory or Voluntary under the EEOC, ADA and OSHA**

# Mandating the Vaccine

- With some exceptions, employers who want to mandate the vaccine may do so
- But “be careful what you wish for”
- Consider *need* to vaccinate versus *desire*
- “Carrot” versus “stick” approach?
- Passage of just a few weeks or a month may make a big difference

# New EEOC Guidance

- Technical guidance regarding the application of equal opportunity laws in light of the COVID-19 vaccine's availability
- Although the EEOC did not explicitly state that employers may mandate vaccinations, it did so implicitly by providing guidance about “mandatory” vaccination programs and how employers should respond to employees who refuse mandatory vaccination



# Title VII Considerations

- The concern here is religious discrimination
- Title VII requires employers to reasonably accommodate an employee's sincerely held religious belief, practice, or observance that prevents the employee from being vaccinated
- Reasonable accommodation is not required if it would cause the employer "undue hardship" – defined under Title VII as more than a *de minimis* cost to, or burden on, the employer

# ADA Considerations

- Administering the vaccine is not a medical examination
- Asking or requiring an employee to show proof of receipt of a COVID-19 vaccination is not a disability-related inquiry
- Employers must attempt to reasonably accommodate employees who cannot receive the COVID-19 vaccine due to the employee's qualified disability
- Unlike Title VII, to deny a requested accommodation an employer must demonstrate "undue hardship" (*i.e.*, significant difficulty or expense)

# ADA Considerations (cont.)

- A better approach is that the unvaccinated employee will pose a direct threat to the health or safety of others, and such risk cannot be reduced or eliminated by an alternative accommodation
  - EEOC’s “four-factor” individualized assessment
    - Duration of the risk
    - Severity of the potential harm
    - Likelihood that the potential harm will occur
    - Imminence of the potential harm

# OSHA Considerations

- No specific OSHA regulation applies
- Previous OSHA guidance has taken the position that employers can require vaccinations
- OSHA noted an exception based on its Section 11(c) whistleblower provision for any employee subjected to retaliation for refusing a vaccine because of a *reasonable* belief that he or she has a medical condition that creates a real danger of serious illness or death (such as serious reaction to the vaccine)

# Other Employment Law Considerations

# Wage and Hour

- Do employers have to pay employees for the time spent getting vaccinated?
  - Employers are obligated to pay an employee for time spent seeking medical attention that is required by the employer and occurs during work hours
- Do employers have to reimburse employees for costs associated with the vaccine?
  - FLSA requires employers to cover work-related expenses if cost would drop employee below the minimum wage

# National Labor Relations Act

- Mandatory Subject of Bargaining?
  - Duty to bargain over a vaccine requirement, and the effects of such a requirement
- “Section 7” Rights
  - Right to engage in “concerted activity” for the purpose of “mutual aid and protection”

# Workers' Compensation

- If vaccine mandatory...
  - Likely compensable time
- If vaccine completely optional...
  - Arguably not compensable
- If vaccine “strongly encouraged”...
  - Fact dependent



# State Laws

- Two General Categories
  - Laws requiring employers to mandate vaccine
  - Laws prohibiting mandatory vaccinations

# FMLA

- Would a side effect of the vaccine be considered a “serious health condition” for purposes of FMLA?
  - Unlikely, unless the side effects are serious enough to meet the FMLA’s definition
  - Bonus: Telemedicine considered an “in-person visit”

# Questions?

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