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Florida Public Human Resources Association

COVID-19 Back to Work Issues: "Vaccines, Facemasks, and Working from Home: Oh My!"

January 27, 2021

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WEISSLER ALHADEFF & SITTERSON, P.A.

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BACKGROUND

- Over 10 months into the pandemic
- FL COVID-19 Dashboard shows:
 - 1,627,603 positive cases in FL
 - 25K deaths in FL

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BACKGROUND

- 2 FDA emergency use authorized vaccines
- > 1M first dose vaccines given in FL (in the last 6 weeks)



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THREE TOPICS

1. Vaccines: Can employers mandate them? Should they?
2. Facemasks: unlikely to become obsolete.
3. Employees who want to permanently "work" from home!



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SURVEY QUESTION #1

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SURVEY QUESTION #2

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SURVEY QUESTION #3

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Vaccinations

Legal Background:

- Anti-discrimination statutes: ADA, Rehab Act, Title VII (sincerely held religious belief), and the Pregnancy Discrimination Act (“PDA”).
- Anti-retaliation statutes: employees’ good faith safety concerns. FL Whistleblower Acts.

Vaccinations

- Bargaining: Does the employer have the unilateral right under its collective bargaining contract to require mandatory vaccinations? Or is there a duty to bargain? The difference between decisional bargaining and effects bargaining.



SURVEY QUESTION #6

Vaccinations

- **Due Process:** Public employers who mandate vaccines should consider implementing a process to address employee concerns (not just under the ADA and Title VII)
 - Not very different than the interactive process.
 - Education!

SURVEY QUESTION #5

Vaccinations

Threshold question: Mandatory or voluntary (and encouraged)?

- Pros and Cons of each
- What are other employers doing?
- Not a one-size-fits-all!



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VACCINATIONS

- EEOC recent publication.
 - What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws, Technical Assistance Questions and Answers – Updated on December 16, 2020



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VACCINATIONS: MANDATED OR VOLUNTARY

Q: Is the administration of a vaccine, approved or authorized by the FDA, by the employer or a third party with whom the employer contacts to an employee a medical examination under the ADA?

A: _____

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VACCINATIONS

But what about those pre-screening vaccination questions!



And remember, the ADA requires employers to keep medical information obtained in the course of a vaccination program confidential.

VACCINATIONS



- Prescreening questions can be asked if:
 - i. The vaccination is offered to employees on a voluntary basis; or
 - ii. The employee receives the vaccine from a third party (pharmacy) that does not have a contract with the employer.

VACCINATIONS

- Back to our initial question: Should the vaccine be mandatory or should employers simply strongly encourage vaccinations?



- Not one-size-fits all
- Look at your work force: customer-facing, hospitality, healthcare, contact with vulnerable populations
- What are others doing?

VACCINATIONS

ADA – Do any of your employees have health conditions which would prevent them from getting vaccinated?



VACCINATIONS

ADA interactive discussion?

- What is required?
- Not new!



VACCINATIONS



Title VII – sincerely held religious belief.

EEOC v. Consol. Energy (4th Cir., 2017) – Employee retired rather than agree to submit to a biometric hand scanner for religious reasons.

VACCINATIONS

Question: If an employee claims religious or medical exemption from a mandatory vaccination, what documentation can/should the organization request to support the employee’s claims?

A: _____

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VACCINATIONS

Horvath v. City of Leander, Texas, 5th Cir. (January 13, 2020) – First Amendment Challenge

Plaintiff was a firefighter and an ordained Baptist minister.



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VACCINATIONS

In 2014, the fire department adopted a mandatory flu vaccine program. Plaintiff objected and received an exemption on the condition that he use personnel protection equipment as a first responder.

In 2016, the fire department required that all first responders receive vaccines to immunize them from tetanus, diphtheria, and pertussis (whooping cough).

Plaintiff again sought an exemption.

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VACCINATIONS

The city offered to reassign Plaintiff to a position that provided the same pay and benefits and did not require a vaccine.

Alternatively, Plaintiff could remain in his current position, but would have to agree to wear personal protective equipment, including a respirator, at all times while on duty and submit to testing and keep a log of his temperature.

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VACCINATIONS

Pregnancy

Vaccines only available on an emergency use authorization basis.



12/14/2020, the American College of Obstetricians and Gynecologists recommended vaccines shouldn't be withhold due to pregnancy and should be offered to anyone lactating once their place in line comes up.

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VACCINATIONS

- What about making vaccinations "voluntary" but strongly encouraging it?
- Example: Super Bowl tickets: an incentive.



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VACCINATIONS



- Can you encourage employees to get vaccinated by offering them Super Bowl tickets, like the NFL has offered to vaccinated health care workers?
- Pot for shots.
- Is the benefit taxable income to the employee?

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SURVEY QUESTION #4

VACCINATIONS

- Dollar General Corp. offered employees 4 hours “pay” to become vaccinated – equivalent to the time they would spend chasing down one of the vaccines.



VACCINATIONS

Other legal issues

- Union related issues – Is there a contract? Is bargaining required?
- Whether bargaining is required, you want the union’s support. (Just because you can, doesn’t mean you should)
- What kind of bargaining?



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VACCINATIONS

- Workers Comp. laws – What if an employee gets sick or dies?
- Can an employer fire someone who disagrees with taking the vaccine?
- Wage and hour laws: Do you owe a non-exempt employee pay for his/her time spent becoming vaccinated?

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VACCINATIONS

- What about the anti-vax movement?
- What about individuals who are scared of shots or think they should not put anything foreign in their body? Or feel the vaccines were developed too quickly!



- Expect to see more guidance and regulations.

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VACCINATIONS

- Can you ask employees if they received a vaccine?
- Can you ask why not?
- Can you require third parties/visitors to be vaccinated?



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VACCINATIONS

- Some additional suggestions:
 - Start slowly.
 - Many employers are making vaccines voluntary; others are taking a “wait and see approach”.
 - Ask questions.
 - Follow the science. And the latest developments.

VACCINATIONS

As there is some distrust of both the vaccine and the prevalence of serious COVID-19 cases, many employees are opposed to taking the vaccination. Many employers understand its employees’ concerns and feel the bar should be extremely high before taking the step of making it a job requirement.

- Is that the consensus among other employers?

VACCINATIONS

- Does your workplace really need it?
- Don’t forget your ADA/religious accommodation interactive process.
- Provide the latest information to your employees.
 - CDC COVID-19 Vaccine Information Slide Deck
 - FAQs about COVID-19 Vaccinations

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VACCINATIONS

- Stay informed: Monday, President Biden asked DOL to consider clarifying that workers have a federally guaranteed right to refuse employment that will jeopardize their health and if they do so, they will still qualify for unemployment insurance.

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OTHER COVID-19 DEVELOPMENT ISSUES

Other conflicts over coping with COVID-19 in the workplace:

1. Facemasks
2. Employees who just feel safer at home.



Don't shoot from the hip!

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**2021 CRITICAL WORKPLACE TRENDS
REPORTED YESTERDAY**

- Employers will offer COVID-19 vaccines to attract and retain top talent as a key differentiator
- They will be sued!

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QUESTIONS?



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