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COVID CONUNDRUM: EMPLOYER RIGHTS/EMPLOYEE MORALE

Like you, we had hoped that by now COVID-related issues would have waned and we all could move forward with a return to “normal.” Not so fast, apparently, as COVID variants and tensions between the pro/anti-vaccination contingents have heightened. More employers are taking charge of the COVID narrative at work, for instance by mandating employee vaccinations and/or requiring masking. The challenge for employers is to evaluate the scope of employer rights in dealing with COVID and its impact on employee morale.

The following questions and answers are intended to assist employers in determining how to address COVID policies in this new phase:

1. May I require that employees become vaccinated or else face termination?

Yes. The only exceptions are if an employee cannot be vaccinated for a disability-related reason or has a sincerely-held religious belief against becoming vaccinated.

2. If I terminate an employee for refusing to be vaccinated, will the employee become eligible for unemployment benefits?

Maybe.....which is the classic lawyer’s answer. We believe that refusal to be vaccinated should be treated as insubordination for unemployment compensation purposes and thus disqualify the (former) employee. However, it remains to be seen how this will play out in practice. Be sure that the vaccination requirement is communicated in writing, with a specific date by which it must occur and the consequences of failing/refusing to become vaccinated. That will enhance the employer’s opportunity of success in opposing an unemployment claim. Employers should also be mindful that appeals through the unemployment process provide opportunities to record sworn, transcribed testimony and that the findings of these tribunals may have preclusive effects on later litigation claims.

3. May I require some employees to become vaccinated but not others?

Yes, for example those employees who deal in person with third parties. The distinction, however, should make business sense. Employers should also evaluate the

overall morale impact of this approach: would there be less workplace tension if everyone is required to become vaccinated?

4. Does it violate HIPAA for the employer to require proof of vaccination?

No, not at all. This is analogous to a workplace drug testing requirements/report to the employer. It is an employee medical record the employer has the right to receive, but should be maintained confidentially with other medical information.

5. May the employer disclose COVID positive test results to other employees and relationship partners?

Only if there is a need for others to know, such as those who work directly with the infected employee. Even in those circumstances, it is the preferred approach not to name the employee.

6. May we require testing on-site?

Yes. It is considered working time for wage and hour compliance purposes. Furthermore, we suggest the employee sign a simple consent form, as the employee would for drug testing. If an employee refuses to consent, then as with drug testing, the refusal may be a basis for termination.

7. May an employer require those without the vaccine to wear a mask until they are vaccinated, but not require those who are vaccinated to wear a mask?

Yes, this is permissible. However, we tend to think that this is not an overall best practice, with respect to logistics, safety, and employee morale.

8. If an employee is required to take a COVID test off site, must the employer pay for the test and is time spent considered working time?

The time is considered working time for wage and hour purposes. Whether the employer is required to pay for the test depends on state law. Some states prohibit such a requirement without the employee's written consent.

9. If an employer provides cash incentives to become vaccinated, will that have to be included for calculating overtime pay?

No, we do not believe that is required. The legal analogy is if an employer provides an incentive or bonus if an employee submits to preventative medical screening—these type of health incentives do not have to be included when calculating overtime payments.

10. If employees are unionized, must the employer bargain with the union before implementing a mandatory vaccination policy?

The first step is to review the labor agreement: what language may apply to this situation? How has the employer handled medical/safety policy changes in the past? One approach which is often successful is to give the union notice of the announcement prior to distributing it to the workforce and invite the union to discuss. This usually fulfills a “bargaining” requirement by giving the union notice and it avoids blindsiding the union by announcing the policy to the workforce, who then contact the union and place the union in the position of needing to oppose the employer’s policy.

11. Is an employer required to pay for COVID-related absences and if so, is the tax credit still available?

An employer is no longer obligated to treat a COVID absence in a unique way. The employer may require employees with COVID-related absences to use PTO, sick or vacation pay, as with any other medical absence. If an employer chooses to treat COVID uniquely, it may do so and take the payroll tax credit until September 30, 2021. Apart from the tax credit, some employers are choosing to treat COVID differently for vaccinated employees who contract COVID.

If you would like additional information or have further questions, please contact us.

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