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COVID-19 Vaccinations & Legal Aspects

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QUESTION 1:

Do people who have had
COVID still need to get
vaccinated?

Comments:

- This is a question that you might want to consult a medical professional about.
- Reinfection is possible
- Unknowns:
 - Experts do not know how long an individual is protected from getting sick again;
 - Natural immunity varies for each individual; and
 - Early evidence suggest natural immunity might not last long.
- Natural immunity coupled with vaccine induced immunity is something experts are still trying to figure out.
- At this time, medical consensus seems to be that those previously infected should get vaccinated.

QUESTION 2:

Will we still need to wear masks after being vaccinated?

Comments:

- The answer to “need” might differ legally from medically.
- Legally – It will depend on federal and state mask requirements.
- Medically – Given the uncertainty, it is advisable to use every tool to stop the spread of the pandemic (masks, 6-foot spacing, washing your hands).
- Employer policy – Advisable to continue mask requirements until medical professionals advise otherwise.

QUESTION 3:

Can employers require employees to be vaccinated?

Comment:

- The general consensus, including EEOC, is that an employer can make such a requirement if an employee wants to work there (work-at-will/non-union situations).
- Especially true if policies are job-related and consistent with business necessity (e.g., healthcare related employment).
- An employer still has to accommodate ADA requirements.
- There are exceptions for employees with disabilities and religious beliefs that preclude them from getting vaccinated.
- At this point, the consensus still appears to favor strong encouragement, however, that might change as the vaccine is rolled out.
- In either case, an employer should have a clear written policy regarding vaccination.

Alternatives to Mandatory Vaccines

- Develop vaccine education campaigns.
- Make the vaccine as easy as possible to obtain.
- Cover any employee cost(s) associated with the vaccine.
- Provide paid time off for employees to get the vaccine and recover from any potential side effects.

QUESTION 4:

What happens if an employee chooses to not be vaccinated? (And then gets COVID?) What options does the employer have?

Comments:

- Does the employee have a disability or sincerely held religious belief?
- Would the unvaccinated employee poses a direct threat due to a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation“?
- EEOC “Direct Threat” Considerations:
 - The duration of the risk
 - The nature and severity of the actual harm
 - The likelihood that that the potential harm will occur
 - The imminence of the potential harm
- Is there a reasonable accommodation?
- Reasonable accommodation considerations:
 - The employee’s job functions
 - Whether there is an alternative job that the employee could do that would make vaccination less critical.
 - How important it is to the employer’s operations that the employee be vaccinated.
- An employer’s current COVID-19 protocol might already address the direct threat and reasonable accommodation considerations (e.g., remote working).

QUESTION 5:

If an employer requires vaccination before coming back into the office and employee has a short-term or long-term reaction what, if any liability, does employer have? Will there be liability release forms that an employer could use to help avoid this?

Comments:

- As of now it is not likely that an employer will have direct liability but this could change.
- Employees might be able to file a workers' compensation claim (WC policies change from state to state).
- Work-related illness – Needs to be reported on OSHA Form 300 (Log of Work Related Illnesses) and Form 301 (Illness and Injury Incident Report).
- OSHA Reporting Requirements: 1) Employers have 24 hours to report if an employee is hospitalized within 24 hours of the vaccination, and 2) 8 hours to report if employee dies within 30 days of a vaccination.
- Need to keep track of federal legislation for potential employer liability issues.
- Flip-side (non-required vaccination) - OSHA's "General Duty Clause" requires employers to furnish a workplace "free from recognized hazards that are causing or are likely to cause death or serious physical harm" to employees. This might already be addressed with current employer COVID-19 policies (e.g. remote working, masks, limited office occupancy).
- Liability release forms – questions of enforceability especially if employee vaccination is mandated.

QUESTION 6:

Will the answer to any of these questions be different in NH vs MA or in other states where we do business?

Comments:

- It could.
- We've already seen it with COVID-19 policies (e.g., mask and office occupancy requirements).
- That said, many of the vaccine issues involve areas of federal law (e.g., ADA, EEOC). As such, state requirements will likely be tailored to be consistent with federal requirements.

QUESTION 7:

What happens if a client requires vaccinations for site visits/resident engineering work?

Comments:

- It's really up to you.
- This will likely be a contract negotiation matter.
- We have already seen COVID-19 issues addressed in contracts (e.g. indemnity).
- If there is an owner/design-builder vaccination requirement, it is important to flow this requirement down to subconsultants through a similar provision in the subconsultant agreement.

EMPLOYEE PROOF OF VACCINATION

- Employers can require proof of COVID-19 vaccinations with some exceptions.
- Employers requiring vaccination or proof of vaccination must show that such inquiries are job related and consistent with business necessity.
- For more information, see the EEOC's guidance on COVID-19: <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>.

STATE-BY-STATE GUIDE FOR GETTING VACCINE

For a guide to vaccine accessibility for each state please see the following guide from the Wall Street Journal:

<https://www.wsj.com/articles/how-to-get-a-covid-19-vaccine-a-state-by-state-guide-11611703769>

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