

ALERTS

COVID-19 Updates

March 9, 2021

Guidance, both at the federal and state levels, has provided insight with respect to mandatory vaccination programs and has significantly expanded employees' protections with respect to COVID-19. The U.S. Equal Employment Opportunity Commission ("EEOC") published guidance on COVID-19 vaccines in December 2020, which is still currently in effect. The Occupational Safety and Health Administration ("OSHA"), acting pursuant to President Biden's directive, posted COVID-19 guidance for employers entitled "Protecting Workers: Guidance on Mitigating and Preventing the Spread of COVID-19 in the Workplace." The Centers for Disease Control and Prevention ("CDC") also released guidance on workplace testing and guidance on recommendations for vaccinated individuals. The New York State Department of Labor ("NYS DOL") issued guidance that broadens paid leave for employees who must quarantine or isolate as a result of COVID-19 ("NY COVID-19 Sick Leave").

EEOC & CDC Guidance/Mandatory Vaccinations

Employers are considering whether COVID-19 vaccinations may be made a mandatory condition of employment. The EEOC issued guidance on Dec. 16, 2020 which sheds light on this topic and sets forth important considerations for employers.

The EEOC guidance clarifies that vaccines are not "medical examinations" for the purposes of the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12112(d)(1). Notably, however, the guidance provides that pre-screening questions for a COVID-19 vaccination, as

recommended by the CDC to ensure there is no medical reason that would prevent an employee from receiving the vaccination, *are* medical examinations since they are likely to elicit information about a disability. Under the ADA, employers may not administer medical examinations, and thus may not ask such pre-screening questions, unless the inquiries are “job-related and consistent with business necessity.” 42 U.S.C. § 12112(d)(4)(A).

The guidance, however, describes two ways in which disability-related screening may be accomplished without the need to satisfy such a standard: (1) make the vaccine program voluntary — therefore, answering pre-screening questions would be on a voluntary basis and would not implicate the ADA (42 U.S.C. § 12112(d)(4)(B)); or (2) have the employee receive the vaccination from a third party with which the employer is **not** contracting (e.g., pharmacy or health care provider) before returning to work. Simply requiring an employee to show proof of receipt of a COVID-19 vaccination, without more, would not be considered a medical examination according to the guidance. However, asking subsequent questions, such as *why* the employee did not receive the vaccination, would likely elicit information about a disability and therefore be considered a medical examination.

The EEOC guidance also discusses how to approach a situation where an employee indicates they are unable to receive the COVID-19 vaccination due to a disability. Before an employer may exclude such employee from the workplace, it must assess whether the 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.” *See also* 42 U.S.C. § 12111(3). This analysis includes an individualized assessment regarding (1) the existence of the direct threat, (2) the duration of the risk, (3) the nature and severity of the potential harm, (4) the likelihood that the potential harm will occur and (5) the imminence of the potential harm. Note that even if such a direct threat exists, the employer may only exclude an employee if there is no way to provide a reasonable accommodation, absent undue hardship, “that would eliminate or reduce this risk so the unvaccinated employee does not pose a direct threat.” Moreover, the employer must determine if any other rights apply under any equal employment opportunity laws or other applicable federal, state or local authorities before terminating such employee. Similar to medical exemptions under the ADA, the employee may also be eligible to receive an accommodation for their sincerely held

religious practice or belief, which is protected under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).

Since December 2020, various COVID-19 vaccinations have been granted emergency use authorization (“EUA”) by the U.S. Drug and Food Administration (“FDA”). This EUA mechanism facilitates the availability of countermeasures, like vaccines, during public health emergencies. Under the EUA, the FDA has not yet compiled and reviewed all evidence and clinical data it would otherwise examine before fully approving a drug for public use. However, the FDA has assured the public that the vaccine has met the necessary scientific standards to qualify for EUA and that “its known and potential benefits clearly outweigh its known and potential risks.”

As COVID-19 vaccines continue to become more widely available, employers are considering whether to require employees to be vaccinated in order to enter the workplace. On its face, subject to the considerations noted here, such a policy is lawful under federal law at present. However, mandating a vaccine that only has EUA creates heightened risks for employers. Notably, the Federal Food, Drug, and Cosmetics Act, which authorizes the FDA to grant EUA for vaccinations, also requires that the Secretary of Health and Human Services “ensure that individuals to whom the product is administered are informed ... of the option to accept or refuse administration of the product.” 21 U.S.C. § 360bbb-3(e)(1)(A)(ii)(III). The EEOC guidance does not discuss this issue. It does, however, indicate that employers should remain vigilant and proceed with caution when either employers, themselves, are providing the vaccinations, or when employees request certain exemptions from the vaccination policy on the basis of a disability or sincerely held religious belief.

Simply because an employer may require its employees to be vaccinated for COVID-19, does not mean it *should*. Upon implementing such a policy, employers will need to address various concerns of employees who may refuse to be vaccinated, either for legally substantiated reasons (as noted above), or simply because they are uncomfortable. Moreover, other questions remain open about potential risks and liabilities employers potentially could face. Therefore, as an alternative to implementing a mandatory vaccination policy, employers should consider whether simply encouraging or strongly recommending employees be vaccinated is a viable and/or preferable option.

The CDC has also released guidance regarding individuals who have been fully vaccinated against COVID-19. This guidance is useful to employers who continue to strive for a safe workplace. Notably, the CDC guidance is clear that given the limited information about the vaccines and how long such protection may actually last, vaccinated individuals must continue to follow CDC guidance to protect themselves and others. This includes wearing a mask, maintaining social distance, avoiding crowds and practicing good hygiene. However, the guidance indicates that vaccinated persons who have been exposed to a suspected or confirmed case of COVID-19 are not required to quarantine if they meet the following conditions: (1) are *fully* vaccinated (i.e., it has been at least two weeks since they completed their vaccinations, including a second dose if taking a two-dose vaccine); (2) are within three months following the receipt of the last dose; and (3) have remained asymptomatic since the COVID-19 exposure. All three of these conditions must be met in order to bypass the quarantine requirement. Nevertheless, fully vaccinated individuals who do not quarantine should still monitor for COVID-19 symptoms for 14 days following exposure. The CDC is expected to issue further guidance on this.

OSHA Guidance

The OSHA guidance encourages employers to create a COVID-19 prevention program in order to effectively reduce the spread of COVID-19 in the workplace. A COVID-19 prevention program should include:

- A COVID-19 workplace coordinator to address issues on the employer's behalf.
- Identification of potential sources of COVID-19 exposure in the workplace.
- Consideration of protections for employees at higher risk for severe illness.
- Effective communication with employees and in a language they understand.
- Education and training of employees on the employer's COVID-19 policies.
- Allowing telework, working in isolated areas or use of paid leave.

- Recording and reporting COVID-19 infections and deaths pursuant to OSHA requirements.
- Making a COVID-19 vaccine or vaccination series available to employees at no cost.
- Enforcing protective measures for all employees, regardless of whether they are vaccinated or not.

In addition to the above, the OSHA guidance largely reiterates guidance from the CDC.

While the OSHA guidance does not confer any new legal requirements upon employers regarding workplace safety, in conducting investigations, OSHA usually considers an employer's good-faith efforts to comply with health and safety standards and guidance. As a result, employers should consider the above as they design a workplace free from hazards.

CDC Guidance

The updated CDC guidance provides that workplace-based testing requires an employee's informed consent. However, the guidance does not prohibit employers from mandating COVID-19 testing as a condition of entering the workplace.

According to the CDC guidance, employers that implement COVID-19 testing programs should:

- Consider the frequency of the testing.
- Determine the consequences of employees declining the testing.
- Determine how to obtain employee consent.
- Provide employees with information regarding the purpose of the test and the type of test.
- Inform employees about how the test will be performed.
- Disclose known and potential risks of the testing.
- Inform employees about the impact of such program (e.g., whether a positive test or declining to participate may mean exclusion from the workplace).

- Implement safeguards to protect employee privacy and confidentiality.
- Provide information about the testing program in the employee's preferred language.
- Ensure the readability of the information, including limiting the use of technical terms.
- Encourage supervisors and coworkers to avoid pressuring others to participate in the testing program.
- Encourage employees to ask questions during the consent process and providing responsive answers.

NY COVID-19 Sick Leave and New NYS DOL Guidance

As discussed in previous *SRZ Alerts* here and here, the NY COVID-19 Sick Leave law requires employers to provide paid and unpaid leave to New York employees who must quarantine or isolate due to a mandatory or precautionary order issued by any governmental body related to COVID-19.

The new NYS DOL guidance provides that employees can qualify for NY COVID-19 Sick Leave for **up to three orders of quarantine or isolation**. In no circumstances can an employee receive NY COVID-19 Sick Leave for more than three orders of quarantine or isolation. To qualify for the leave for the second and third quarantine or isolations orders, the employee must either (1) return to work following a period of quarantine or isolation and subsequently receive a positive COVID-19 diagnostic test result or (2) test positive for COVID-19 after the end of the initial quarantine or isolation period. Employees must submit documentation from a medical provider or testing facility confirming the positive test.

The new NYS DOL guidance further provides that an employee subject to a quarantine or isolation order does not need to be tested before returning to work and it is not recommended to have employees tested to discontinue isolation or quarantine. If such testing is nevertheless undertaken, employees who receive a positive test result are eligible for additional NY COVID-19 Sick Leave, as noted above.

The new NYS DOL guidance also seemingly creates an obligation to provide leave to employees who may not be subject to orders of

quarantine or isolation in instances where an employer requires such employee to remain out of work due to exposure or potential exposure to COVID-19 (regardless of whether such exposure took place at work). In this instance, such employer would be required to continue to pay the employee, at the employee's regular rate of pay, until (1) the employer allows the employee to return; or (2) the employee becomes subject to an order of quarantine or isolation, at which time the employee would be eligible for NY COVID-19 Sick Leave. Since the new NYS DOL guidance appears to create additional obligations for employers that go beyond the requirements of the statute, the guidance may be subject to legal challenge.

As always, if you have specific questions about any of the state or federal guidance or how it impacts your organization, you should contact your SRZ attorney.

Authored by Mark E. Brossman, Scott A. Gold, Max Garfield, Donna K. Lazarus and Michelle M. Orge.

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Related People



**Mark
Brossman**

Partner
New York



**Scott
Gold**

Special Counsel
New York



**Max
Garfield**

Special Counsel
New York



**Donna
Lazarus**

Partner
New York



Michelle

Orge

Associate

New York

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