

# COVID-19 Vaccination Legal Considerations

New York Alliance for Inclusion and Innovation



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# Relevant Laws

- Disability Accommodation Statutes: Americans with Disabilities Act, NYS Human Rights Law, and NYC Human Rights Law;
- National Labor Relations Act;
- OSHA;
- Wage Hour Laws: Fair Labor Standards Act and New York Labor Law.



# Can Employers Legally Mandate Vaccinations?



# Vaccinations – Mandatory or No?

- The EEOC confirmed employers may mandate COVID-19 vaccinations.
- Accommodation requirement.
- Contrary indication from OPWDD?



# Medical Inquiry and Medical Examination Requirements



# Disability-Related Inquiries & Medical Examinations

- Employers are restricted from making disability-related inquiries or requiring medical examinations unless job-related and consistent with business necessity.
- Disability-related inquiries - A "disability-related inquiry" is a question (or series of questions) likely to elicit information about a disability.
- Medical examinations - A "medical examination" is a procedure/test seeking information about an individual's physical/mental impairments or health.



# Is Receiving the Vaccine a Medical Inquiry or Examination?

- Receiving the vaccination is not directly regulated as medical inquiry or medical exam.
- Employer may require employee to provide proof of vaccination without implicating job-related/consistent with business necessity standard.
- The screening questions to get the vaccine would be governed by medical inquiries if asked by an employer or employer's representative. Special standards apply.



# Key Takeaways?

- Easier under disability laws if you require employees to provide proof of vaccination rather than overseeing vaccination process.
- If employer provides vaccinations directly or through a vendor, then the employer will need to demonstrate job-related/consistent with business necessity standard.
- All medical information/accommodation information should be kept in separate, confidential, and secured file – not in personnel file.





# Employee Objections

# Union and Collective Action

- Union: Employer may have bargaining requirements.
- Individual or group collective action may be protected.



# Safety Concerns

- OSHA General Duty requires:

Each employer shall furnish to . . . employees “employment and a place of employment ... free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees.”

- An employee with a medical condition who refuses a vaccination because of the “reasonable belief” that the shot could lead to a serious illness or death may be protected from retaliation by OSHA whistleblower laws.



# Wage and Hour Considerations

# Must Employers Pay for Vaccinations?

- If the vaccination is mandated, the employer must pay/reimburse employees for:
  - whatever costs/copays are not covered by health insurance;
  - time spent getting the vaccine if the vaccination is mandatory.
- If the vaccination is not mandated, the employer may still be required to pay for time getting the vaccine if the vaccination occurs during working hours.



# Vaccination Compliance Strategies



# Strategy Advantages

- Mandatory

- May result in better compliance with those who are not inclined to get the vaccine in the absence of a requirement.
- Most likely to achieve substantial compliance in shortest timeframe.
- Faster short-term protection for individuals served and employees.
- Stronger defense for negligence claim.

- Encouragement

- Less likely to result in resignations, walk-offs, unionization, or other employee relations challenges.



# Reframing

It's not a cost-benefit analysis.

It's a perceived cost v. perceived benefit analysis.





# The Reluctant Employee

- Perceived Cost

- I believe it is/could be unsafe.
- I lose my autonomy to make the decision for myself.
- Vaccination is inconvenient for me.

- Perceived Benefit

- There is little value to me because the benefits are short-term or COVID is not a risk to me.
- My employer isn't sufficiently incentivizing me to get it.



# Changing the Analysis

- Decreasing Costs:

- Provide information credible to the employee that vaccine is safe.
- Make vaccination easy and accessible.
- Compensate employee for time to get vaccination (even if not legally required).

- Increasing Benefit

- Appeals to mission and teamwork.
- If employee is not incentivized by personal risk, consider other motivations (e.g., likelihood of more freedom in the future).



# Messages

- Must be understandable
- Designed to be accessible to your audience
- Appeal to THEIR values



Questions?