

Aclaimant Knowledge Network

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Aclaimant Knowledge Network

Preparing for the Vaccine Rollout

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Today's Presenters

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Getting Back to the Workplace

- Applicable legal and government agency considerations:
 - Occupational Safety and Health Act (OSHA)
 - American with Disabilities Act (ADA)
 - Title VII of the Civil Rights Act of 1964 (Title VII)
 - Pregnancy Discrimination Act
 - National Labor Relations Act (NLRA)

Getting Back to the Workplace cont.

- Centers for Disease Control and Prevention (CDC) and Equal Employment Opportunity Commissions' (EEOC) latest guidance
- State-specific health dept. guidance
- State Workers Compensation Acts (Workers Comp.)
- Fair Labor Standards Act (FLSA)
- National Labor Relations Act (NLRA)

Getting Back to the Workplace cont.

- Prerequisite knowledge for businesses :
 - Required to create and maintain a safe environment for workforce
 - Presence of COVID-19 virus poses a 'direct threat' to safety of workforce
 - Employers must take reasonable efforts to determine if 'direct threat' exists in workplace
 - Navigation of evolving legal mandates and agencies guidance

How to Open Up Safely

- What businesses can do to create and maintain a safe workplace:
 - Pre-screening of workers - what's allowed:
 - Ask if workers are experiencing COVID-19 symptoms
 - Take workers' body temperatures
 - Require workers with symptoms to stay home
 - If infected, may ask for a doctor's note certifying fitness for duty to return
 - May administer a recognized COVID-19 test for admittance to the workplace

How to Open Up Safely cont.

- May ask if worker(s) have come in contact with someone displaying symptoms or had positive test
 - Bar workers for refusal to answer employer's screening questions/body temp for entry
 - Periodic inquiry of workers who previously had symptoms or a positive test
- What businesses cannot do:
 - Cannot require an antibody test of workers
 - Cannot ask worker whether a family member has symptoms or is positive

Determine Your Type of Plan

- **Voluntary**

- Workers encouraged (not required) to get vaccine
- Employer or third-party can voluntarily offer a vaccination
- No consequences for refusal
- No employer legal requirements

- **Mandatory**

- Is required for entry into workplace
- Employer or contracted third-party can administer or only require proof of vaccine
- Need an exception process for accommodation request
 - Requests under ADA or religious accommodation under Title VII
- Administration is not a medical exam / asking for proof not a medical record

Accommodations Under ADA

- Requests for ADA accommodation **not** to receive a COVID-19 vaccine
 - Establish that employee has a covered disability under the ADA
 - Follow your established accommodation process
 - All accommodation assessments must be consistent and timely
 - Document all steps of the process

Accommodations Under ADA

If worker is accommodated:

- Determine if he/she pose a ‘direct threat’ to health and safety to self or others
- Determination should evaluate:
 - Duration of risk
 - nature and severity of potential harm
 - harm’s likelihood, and
 - imminence of harm

Accommodations cont.

- If threat exists, can it be eliminated?
 - Review each situation individually, use interactive process
 - Are there other reasonable accommodations: e.g., remote work, different vaccine solution
 - Are other employees not vaccinated; number vaccinated enough for herd immunity
 - No other alternative, is the employee entitled to leave under the law or through company policy

Religious Accommodations Under Title VII

- Religious objections to COVID-19 vaccination must be considered by employers
 - Must be sincerely-held belief
- Businesses can challenge ‘sincerely held belief’ but need objective basis:
 - Is there a religious basis for such a belief; or,
 - Does worker hold such a belief

Religious Accommodation cont.

- Businesses have duty to accommodate unless it imposes an ‘undue hardship’ (more than business inconvenience or de minimus cost)
- No obligation to accommodate ‘personal choices’ including:
 - Anti-vaccination generally
 - Belief COVID-19 does not exist
 - Questioning COVID-19 vaccine
 - Concerned about the government actions
 - Fear of needles, hospitals, or doctors

Other Legal Concerns to Consider

Workers Compensation

- Implicated if:
 - Worker illness or injury due to mandatory vaccine
 - Time spent receiving vaccine could be a covered WC cost
 - Some state laws may include mandatory vaccine not administered by employer as within scope of employment

Other Legal Concerns to Consider cont.

- Wage and Hour / Fair Labor Standards Act (FLSA)
 - Mandatory vaccines must be paid by employer
 - Time spent receiving mandatory vaccine is 'compensable time'

- Union Concerns / National Labor Relations Act (NLRA)
 - Does the CBA address this issue
 - Duty to bargain the issue

Business Considerations

The New OSHA

The emerging OSHA landscape:

- Higher fines, imposed more frequently
- Less employer collaboration or conciliation
- Additional enforcement personnel
- Expansive data collection mandates
- Weaponized publicity & public shaming
- Increased emphasis on repeat offenders and at-risk populations
- Coordination with other government agencies
- Direct involvement of organized labor
- Liberal application of the general duty clause

The OSHA COVID-19 Timetable

President Biden has ordered the Occupational Safety and Health Administration to consider issuance of a COVID-19 Emergency Temporary Standard.

- January 29: New workplace COVID-19 “science-based” enforcement guidance issued
- By March 15: National **COVID-19 Emergency Temporary Standard** highly likely; six months maximum duration
- By September: New permanent **infectious disease standard** likely
- In the meantime: continuation of individual actions by the 22 state OSHA plans

The current California and Virginia COVID-19 standards give insight as to the possible content of a national Emergency Temporary Standard. A good snapshot of potential elements can be gained from the COVID-19 State Research Report which can be found in the Resources section of Aclaimant.com.

The January 29 Guidance

Core Elements:

- Assignment of a workplace coordinator
- Hazard assessment
- Devise multiple measures to limit spread
- Accommodate at-risk workers
- Effective communication and education
- Isolation and exclusion of those posing risk
- Telework or paid leave
- Enhanced cleaning and disinfecting
- “Guidance on screening and testing”
- Ongoing Form 300 recording/reporting
- Anti-retaliation; anonymous reporting tool
- Free vaccines

Relevant Passages:

- “The most effective COVID-19 prevention programs engage workers and their representatives in the program’s development and implementation at every step...”
- “This guidance is not a standard or regulation, and it creates no new legal obligation.”
- “The [Occupational Safety and Health] Act’s General Duty Clause...requires employers to provide their workers with a workplace free from recognized hazards that are causing or likely to cause death or serious physical harm.”

Potential Aspects of a National COVID-19 Standard

- Prompt reporting of exposure events and facilitation of contact tracing
- Daily employee check-in screening
- Facility hazard assessments with obligation to address noted issues
- Written mitigation and response plans developed with employee representation; potential mandate for union involvement
- Mandated personal protective equipment, multi-layer face coverings, physical separation, ventilation, cleaning protocol
- Training in a language well understood by the particular employee
- Return-to-work conditions for persons testing positive
- Salary/benefits continuation, to discourage premature return to work
- Anti-discrimination/retaliation provisions

The New Regulatory Landscape

- New rules will lag the triggering events, both in creation and sunseting
 - Some suns won't set
- States and localities will continue to issue additional mandates
- In some instances, new rules will be effective on day one
- Is “guidance” truly voluntary?
- Administration and application of rules can be somewhat inconsistent
- Coordination with plaintiff litigation firms will be an explicit practice
- If you can't prove you did something, the presumption may be that you didn't
- Rules will keep changing as the political climate and pandemic metrics evolve

Some Common Bases for COVID-Related Litigation

- Retaliation against complainants
- Wrongful termination
- Discrimination (beware of age discrimination in particular)
- Failure to provide reasonable accommodation
- Privacy breach
- Unpaid work time incl. screening, donning/doffing, remote work (class action potential!)
- Leaves of absence
- Violation of state/local executive orders, administrative rules, mandatory guidance
- “Take-home” infections
- Force majeure disputes: cancellations, postponements, non-refunds

Things Responsible Employers Do

- Consider all stakeholders when determining the appropriate course of action
- Accept that employees are looking to them for guidance and advice
- Seek input from a spectrum of sources; ensure in-house expertise
- Communicate the reasons for their policies and actions
- Don't treat communication as a "one and done"
- Instill broad accountability and empowerment
- Document *all* COVID-related employment actions, determinations and decisions
- Prepare to act quickly and respond to changed conditions
- Adapt to circumstances...one size doesn't fit all
- Know the laws and regulations, but do more when necessary

Some Final Advice

- Safety is the new must, not a nice-to-have.
- Trust is a prerequisite for having an engaged workforce. The pandemic puts trust relationships to the test.
- There's no risk-free path. Perfection won't exist. Information will always have gaps. Adverse events won't wait for you.
- Don't calibrate solely against current legal standards.
- Never compromise on integrity.
- Reach a state where you can always look back and say we're comfortable with what we did under the circumstances.

Questions

As a reminder, there is a button at the bottom of your screen that you can use to pose questions for the presenters.

Thank You

Thank you for attending!

For more information, go to aclaimant.com
and mcleodlegalsolutions.com

Aclaimant is the insight-driven workflow solution for safety and active risk management. We help identify and protect what's important.